21-8027

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Case No._____

DEREK J. DEGROOT,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

ON PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT II.

Derek J. DeGroot #664542
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Stanley, WI 54768
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QUESTIONS PRESENTED FOR REVIEW

1. Does the Sixth Amendment require a trial court to conduct a competency colloquy, pursuant to this Court's holding in *Faretta v. California*, where a defendant makes a mid-trial demand to represent himself (alleging a conflict with counsel), and if so, is the trial court required to conduct the colloquy and allow that defendant to proceed *pro se* if it determines he is competent?

> The Wisconsin Court of Appeals announced a rule that a *Faretta*-based competency colloquy isn't mandatory where a defendant makes an unequivocal request to proceed *pro se* mid-trial. A decision from this Court will clarify both the need for secured autonomy and conflict-free counsel, and clarify whether or not a state is permitted to force unwanted counsel onto a defendant in the middle of trial; a situation likely to reoccur. The Fourth and Eleventh Circuit join the Wisconsin Court of Appeals' rationale, and also hold that untimeliness of a *pro se* request can serve as a stand-alone reason to deny self-representation, but this Court hasn't announced such an exception to its holding in *Faretta*.

2. Was the Petitioner denied his Sixth Amendment right to effective assistance of counsel, and does the Constitution require an appellate court to apply the cumulative error analysis to ineffective assistance of counsel claims pursuant to the principles of this Court's holding in *Kyles v. Whitley*, and *Chambers v. Mississippi?*

> The Wisconsin Court of Appeals did not weigh the totality of counsel's deficiencies in making its determination on prejudice. The Ninth Circuit suggests cumulative error analysis is one of 'kind' and must be presented as such. The Eighth Circuit appears to reject cumulative-error analysis when claims are mixed. A decision from this Court will clarify when a court must address, and apply cumulative-error analysis.

3. Was the Petitioner deprived of his Sixth and Fourteenth Amendment rights to a fair trial where the defense was taken by surprise by the evidence offered, and if so, pursuant to this Court's holding in *Oregon v. Kennedy,* does the Double Jeopardy Clause of the Fifth Amendment bar retrial where a multitude of prosecutorial misconduct was undertaken to goad the defense into asking for a mistrial, and where the judge prevented juror review of admitted exculpatory police reports subsequent to an expression of a fear of dismissal?

> A decision from this Court will clarify when variance in allegations becomes fatal where a surprise mid-trial allegation carries a mandatory minimum punishment, where the broader statute under which a defendant was charged does not. A decision from this Court will also clarify at what level judicial and prosecutorial misconduct will bar retrial.

LIST OF PARTIES AND RELATED CASES

All of the parties involved appear in the caption.

The case below directly relates to this case to the extent that: 1) the trial court judge was the same in both cases; 2) an objectively biased juror was impaneled in both cases; 3) the defendant requested the double jeopardy clause be invoked to bar retrial in both cases.

Oswald v. Bertrand, 374 F.3d 475 (7th Circuit 2004); *See also Oswald v. Bertrand*, 2005 WL 1058887 (E.D. Wisconsin 2003).

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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

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is found at *State v. Degroot*, 967 N.W.2d 308 (Table), 2021 WL 4564777, 2021 WI App 82 (unpub).

The opinion of the state trial court appears at Appendix B to the petition.

The opinion of the Wisconsin Supreme Court appears at Appendix C to the petition.

JURISDICTION

The date on which the highest state court decided to deny discretionary review was on March 16th, 2022. A copy of that decision appears at Appendix C.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

US. CONST. AMENDMENT V.

The right to not "be subject for the same offence to be twice put in jeopardy of life or limb. . . ."

US. CONST. AMENDMENT VI.

The right to "an impartial jury of the State and district wherein the crime shall have been committed. . . ."

The right "to be informed of the nature and cause of the accusation. . . ."

The right "to have the Assistance of Counsel for his defence."

US. CONST. AMENDMENT XIV.

The right to be free from the deprivation of "liberty. . .without due process of law. . . ."

The right to be free from the deprivation of "equal protection of the laws."

WIS.STAT. § 939.616

PROCEDURAL HISTORY OF THE CASE

On 12/22/14, DeGroot was arrested for allegations of child enticement, 2nd degree sexual assault of a child, possession of drug paraphernalia. (14CF1531:1)[1]. The Suburban Critical Incident Team and the Muskego Police Department had executed a search warrant at DeGroot's residence located at S73 W16024 Linda Ct., Muskego, WI 53150, and seized all electronics, and recording devices including DVDs to conduct a forensic analysis on. . . the results of which were never turned over (R:138:5-6). DeGroot was represented by Attorney Mark Kershek and bound over for trial on these charges on 12/23/14. (14CF1531:124). On 07/18/15, while DeGroot was on bail pending the trial in 14CF1531, he was charged with allegations of 1st degree sexual assault, which preceded the allegations in 14CF1531, and also additional charges of felony bail jumping for allegations of drinking alcohol. (R:1). DeGroot was appointed Attorney Eryn Menden as new counsel. Both 14CF1531 and 15CF909 were consolidated and tried together beginning on Halloween in 2017.

On 10/30/2017, the day before trial, DeGroot's counsel made a conflicting decision usurping his objective to speak with the prosecutor. (R:144:15). The morning of the first day of trial, DeGroot was questioned by the judge why he was at the prosecutor's office without counsel. DeGroot and counsel informed the trial court judge that a meeting had been scheduled but she had called it off. Trial proceeded. (R:143:1-20). The morning of the second day of trial, DeGroot demanded that Attorney Eryn Menden be completely removed from his defense so he could proceed *pro se* without any delay in the proceedings. The trial court denied DeGroot's request based on DeGroot's definition of hearsay and its perception that DeGroot would be unable to acquire the technical legal knowledge of a lawyer in a matter of minutes. (R:144:1-25). Trial continued and DeGroot was found guilty and sentenced to a total initial confinement of 20 years in prison followed by 20 years of extended supervision, with a consecutive 15 year probation sentence. (R:151). DeGroot signed his Notice of Right to Seek Postconviction Relief, and it was filed shortly after. (R:80). postconviction counsel was delaying DeGroot's appeal and as a result, DeGroot elected to proceed *pro se* on appeal. (R:92; 93; 96; 117). DeGroot filed a *pro se* motion on 12/26/19 and brief in support. (R:114; 115). The lower court entered an order denying motion for postconviction relief on 12/26/19, without a hearing, stating the motion and

[1] All references to the record (R:) are for 15CF909, unless otherwise noted.

brief did not state a legal basis on which to grant relief. (R:118). DeGroot appealed to the Wisconsin Court of Appeals, raising the same issues, and the Court of Appeals denied relief on 10/06/21. DeGroot petitioned the Wisconsin Supreme Court for review raising the same grounds, and it denied review on March 16th, 2022. DeGroot now petitions the U.S. Supreme Court for a writ of certiorari.

FACTS OF THE CASE

The initial sexual assault charges in 14CF1531 were the result of a contradictory report written by a Muskego Police Officer named Michael Petz who was dispatched to DeGroot's residence on 11/22/14 due to an unrelated incident involving a caller's complaint of a disorderly conduct. The city police were tactically deployed to DeGroot's home due to allegations that the caller heard the word "gun." Once on scene, the Muskego Police arrested both DeGroot, and a minor named K.S. who was with him. Officer Petz took K.S. into custody and transported him to the police station. In his report regarding the disorderly incident, Officer Petz wrote that K.S. informed him that DeGroot was meeting K.S. for sex. . . but immediately following this statement, he also wrote that K.S. had informed him DeGroot had not enticed K.S. into any sexual or other illegal activity. (R:115:App). The second page of Petz's report alleges that after K.S. and his mother arrived home the night of disorderly incident on 11/22/14, K.S.'s mother had asked to see his phone, and in response to his mother's request, K.S. threw his cell phone against the wall, disabling the phone. (Id.). But the criminal complaint that was later filed, and Detective Westphal's report in connection therewith, do not reflect the story as told by Officer Petz . . . those reports indicate that the disabling of the phone took place at the police station, not at K.S.'s mother's house, and that it was actually Detective Westphal who asked to see K.S.'s phone, not K.S.'s mother. (14CF1531:1:1-4) The 'people' and 'places' in the story have changed. Detective Westphal also reported that K.S. had given him a written statement to a sexual assault after he confronted K.S. with incriminating messages he had obtained from a forensic download from the phone. (R:147:4-12; R:142:8). But the written statement of the sexual assault does not exist. . . and Westphal's claim about confronting K.S. with incriminating messages from the phone download is refuted by the forensic report which indicated no readable contents of the phone download were able to be confirmed by the analyst (R:97). The eventual disclosure of a phone

download did not contain incriminating messages between K.S. and DeGroot, and the messages were 'truncated.' (R:143:13-17; 14CF1531:25).

Moreover, K.S. had testified that he had never even met Detective Westphal. (14CF1531:144:62) . . . further undermining the reliability of anything Detective Westphal had reported. K.S.'s mother had testified that Officer Petz had actually taken the phone home with him the night of 11/22/14 (14CF1531:144:124); a fact never disclosed to the defense. If this is true, it proves that Officer Petz's report relative to the phone, was fabricated, and his trial testimony was perjurous. Petz testified that he did not take the phone, contrary to K.S.'s mother's testimony. (14CF1531:144:112-116). The testimony of K.S. would also be proven perjurous as he too testified to breaking the phone at his mother's house. This of course could not have occurred if in fact Officer Petz had taken it the night of 11/22/14. (14CF1531:144:74).

The extrinsic evidence of last time-stamped messages in the phone proves the phone was functional on 12/05/14; after the time it was alleged to have been broken on 11/22/14. (R:56 Exhibit #50). This suggests that K.S.'s mother's testimony that Officer Petz had taken and used K.S.'s phone on (11/22/14) was actually true. The functionality of K.S.'s phone, and its possession and use by Officer Petz, is *Brady* evidence that was never disclosed to the defense prior to trial, and could have been used to demonstrate to the jury that the prosecution witnesses had lied about the status, contents, and whereabouts of K.S.'s phone. If this information was presented to the jury, they would have seen a propensity of the prosecution witnesses to lie and had reasonable doubt about the sexual assault allegations against DeGroot. There's a reasonable probability that some, if not all of the jurors, would have concluded that this impeaching phone evidence suggests that the complainants were compelled to go along with a story fabricated by Muskego Police Department. Numerous objections were made by counsel about the origins, authenticity, and ever-changing content of these alleged messages linked to K.S.'s phone, but the State was permitted to evade the exculpatory disclosure requirement of *Brady*, and use the data as a primary weapon against DeGroot at trial. (R:142:9-13; 143:13). Information regarding electronic devices used by police officers during the course of an investigation were demanded to be disclosed by the defense. (R:36).

The subsequent sexual assault charges in 15CF909 came approximately 8 months after DeGroot was charged in 14CF1531, but the allegations in 15CF909 precede the charging date in

14CF1531. Prosecution witnesses, N.S. and J.P., two individuals who were involved in civil disputes with DeGroot, had been immediately notified by Muskego Police of his arrest in 14CF1531 (R:144:117), but it wasn't until shortly before DeGroot went to trial in that case, that N.S. and J.P conveniently decided to accuse DeGroot of sexually assaulting J.P.'s son A.L. On 07/18/15, Officer Christopher Bloom of the Waukesha police department was informed by Dispatch that DeGroot was at Waukesha Springs Park at 600 North Hartwell and wanted for the new charges by the Muskego Police Department. DeGroot was arrested, and Felony Bail Jumping was recommended in addition to the two new sexual assaults charges. DeGroot, represented by his new Attorney, Eryn Menden, was bound over for trial for 2 counts of 1st Degree Sexual Assault, and Felony Bail Jumping. (R:1; R:130).

At trial, A.L, N.S., and J.P unleashed surprise allegations against DeGroot claiming that chemistry beakers were found in their home, and that DeGroot had made A.L. drink liquid sedating drugs out of a beaker to facilitate repeated anal intercourse. (R:144:88-91,115) These allegations were not previously disclosed, and DeGroot's counsel later informed the trial court of the nondisclosure. (R:151:23). Trial counsel sought to impeach the surprise allegations of complainant A.L., his mother J.P., and her ex-girlfriend N.S., by showing the jury that the original police report, relative to the sexual assault allegation, did not contain any information about liquid drugs or beakers. (R:145:35-36). Counsel's strategy was to demonstrate that the allegation had continued to change because it wasn't true. The trial court admitted this police report as evidence, but later prevented the jury from seeing it during deliberations. (R:145:35-36; 146:12; 149:62; 143:118). The trial court's arbitrary decision to exclude the report came subsequent to the judge's expressed fear of dismissal if the court were to instruct the jury on the substantial elements of the offense and reiterate the presumption of innocence. (R:143:118) In closing arguments, the prosecutor undermined the jurors confidence as fact-finders—calling them inexperienced. He also blended the stories together, misstated the evidence, and suggested the jury consider pictures of trash, and a toilet found in complainant A.L.'s backyard, when reaching their verdict. (R:149:16-39). The jury asked the court to explain what the difference was between the two counts for 15CF909, and was directed by the judge to make their own determination. (R:65;66;67). The jury ultimately found DeGroot guilty of all charges. J.P and N.S. were instructed by the trial court to bring receipt evidence of A.L.'s psychologist bills, costs

alleged to have been incurred as a result of this controversy, but they were unable to produce the evidence at the restitution hearing and DeGroot's restitution was set to zero.

REASONS FOR GRANTING THE PETITION

I. DEGROOT WAS DENIED HIS CONSTITUTIONAL RIGHT TO CONDUCT HIS OWN DEFENSE AND WAS FORCED TO BE REPRESENTED BY COUNSEL WITH WHOM HE HAD CONFLICT AND DID NOT WANT. REVIEW BY THIS COURT WILL CLARIFY WHETHER OR NOT A STATE COURT CAN BYPASS AN INQUIRY INTO A DEFENDANT'S COMPETENCY, AND FORCE UNWANTED COUNSEL ONTO A DEFENDANT, IF THE DEFENDANT'S PRO SE REQUEST OCCURS MID-TRIAL.

The Wisconsin Court of Appeals "has decided an important question of federal law that has not been, but should be, settled by this Court, [and] has decided an important federal question in a way that conflicts with relevant decisions of this Court." U.S. Sup .Ct. Rule 10, 28 U.S.C.A. (c). Certiorari review will settle any disputes over whether or not a state or federal court can avoid conducting a *Faretta* colloquy, and force unwanted counsel onto a defendant if the defendant makes an unequivocal demand to conduct his own defense after the start of his trial has begun. There are two circuits that join the Wisconsin Court of Appeals' rationale.[2] The record here does not contain any evidence that DeGroot would have used his right to self-representation "for deliberate disruption" of his trial. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), at FN 46. The trial courts already have the option of appointing stand-by counsel after granting a defendant's demand for self-representation, and if the defendants engage in misconduct, the court may terminate self-representation. *See McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984), at 950. There is no justifiable reason for a court to avoid making a competency determination so that it may arbitrarily deny an otherwise competent defendant's unequivocal demand to represent himself, regardless of how untimely or rash that defendant's request was. "Only in rare cases will a trial judge view a defendant's choice to represent himself as anything other than foolish or rash." *Imani v. Pollard,* 826 F.3d 939 (7th Cir. 2016), at 945. By creating an exception to the mandatory competency colloquy, the Wisconsin Court of Appeals refined "a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced." *Marshall v. Rodgers*, 569 U.S. 58, 133 S.Ct. 1446, 185 L.Ed.2d 540 (2013), at 64.

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[2] U.S. v. Young, 287 F.3d 1352 (11th Cir. 2002); U.S. v. Lawrence, 605 F.2d 1321 (4th Cir. 1979)

PRINCIPLES OF REVIEW

The right to represent one's self in a criminal trial is guaranteed by the Sixth Amendment while "any individual right to self-representation on appeal based on autonomy principles must be grounded in the Due Process Clause." *Martinez v. Court of Appeal of California, Fourth Appellate Dist.*, 528 U.S. 152, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000), at 153. Two conditions must be met before a defendant may proceed *pro se* in his criminal trial. First, " The defendant must "voluntarily and intelligently elect to conduct his own defense. . . ." *Id.*, 161-162 (*internal quotes and source omitted*). Second, the trial court must conduct an inquiry into "the defendant's competence to *waive the right*." *Indiana v. Edwards*, 554 U.S. 164, 128 S.Ct. 2379 (2008), at 173 (*internal quotes and source omitted*). "[T]he competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself." *Godinez v. Moran*, 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993), at 2687; *See also Westbrook v. Arizona*, 384 U.S. 150, 86 S.Ct. 1320, 16 L.Ed.2d 429 (1966). Both the unequivocal waiver, and the inquiry into the defendant's competence, must appear in the record. *Patterson v. Illinois*, 487 U.S. 285, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988), at 2395. The Constitution prohibits the state from forcing unwanted counsel against counsel onto a defendant who wishes to conduct his own defense. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). "[F]orcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." *Id.*, at 2532. "*Faretta* rights are adequately vindicated in proceedings outside the presence of the jury. . . ." *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984), at 179 (emphasis added)

A. A defendant's late *pro se* request does not absolve a trial court of its duty to conduct a proper *Faretta* colloquy, and to allow a competent defendant to conduct his own defense.

On his second day of trial, outside of the presence of the jury, DeGroot made an unequivocal demand to the trial court "to supersede his lawyers altogether and conduct the trial himself.[]" *Faretta*, *supra* 816, and was denied. The trial court conducted an inquiry (rejected by this Court) as to DeGroot's understanding of "the intricacies of the hearsay rule" *Id.*, 836. It ultimately denied DeGroot's *pro se* demand because of its perception of DeGroot's lack of knowledge of "what the law is, what the procedures are, what is objected, [what] is not allowed. . . ." reasoning that DeGroot wouldn't be able to learn that knowledge in a "matter of minutes."

(R:144:22-24). In a desperate attempt to prevent the trial court's denial of DeGroot's *pro se* demand because of his lacking technical knowledge, he responded to the trial court's statements by indicating that he believed he could acquire the technical knowledge of an attorney in about 30 days, but because he had "a pretty solid mind," he wanted to continue to the trial without counsel. The trial court stated that may be so, but claimed it was well within its authority to force counsel to continue representing DeGroot.

The Wisconsin Court of Appeals affirmed the trial court's denial, but it made up its own reasons to justify the decision. *State v. Degroot*, 967 N.W.2d 308 (Table), ¶12, 2021 WL 4564777, 2021 WI App 82 (unpub) ("[W]e look for reasons to sustain a circuit court's discretionary decision."). Acknowledging, but ignoring this Court's holding in *Faretta*, the Wisconsin Court of Appeals concluded that a *Faretta* colloquy wasn't required because DeGroot's request was "untimely." *Ibid.*; *See also State v. Klessig*, 211 Wis.2d 194, ¶23, 564 N.W.2d 716 (1997) (Wisconsin Supreme Court opinion congruous to *Faretta* holding that a proper competency colloquy "must appear in the record"). Even if the trial court had raised the reason that the Wisconsin Court of Appeals relied on, the conclusion that "untimeliness" of a *pro se* request will excuse a court from conducting a mandatory *Faretta* colloquy, without more, is insufficient. A court does "not merely consider the time of the initial request in determining whether there is an unequivocal desire to represent himself." *U.S. v. Campbell,* 659 F.3d 607 (7th Cir. 2011) *(vacated on other grounds*, 568 U.S. 802, 2012 WL 2028440, 184 L.Ed.2d 1) (*citing Mckaskle*, *supra*). The Fourth and Eleventh Circuit join the Wisconsin Court of Appeals' rationale without any consideration to the constitutional right to a defendant's right to conflict-free counsel. *See U.S. v. Young*, 287 F.3d 1352 (11th Cir. 2002); *U.S. v. Lawrence*, 605 F.2d 1321 (4th Cir. 1979). The Fourth Circuit did however acknowledge, "the [*Faretta*] Court was not called upon to resolve this question. . . ." *Id.*, at 1324. Still, this Court has held that once a defendant makes an unequivocal demand to proceed *pro se*, the trial court's inquiry must focus on the defendant's "competence to waive the right, not the competence to represent himself." *Godinez v. Moran*, 509 U.S. 389 at 2687; this Court did not include an exception to that rule. In DeGroot's case, the trial court explicitly relied on his lack of technical legal knowledge, and his inability to acquire that knowledge in a matter of minutes, as its basis to deny him his right to self-representation. (R:144:23-24) "[T]here is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents." *Harrington v. Richter*, 562

U.S. 86, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011), at 102. The Wisconsin Court of Appeals' decision that a trial court need not conduct an inquiry into a defendant's competence to conduct his own defense, whenever the defendant's request for self-representation is untimely, warrants certiorari review by this Court; especially given that two federal circuits have joined this rationale. *Supra.*

DeGroot's *pro se* request was a result of a conflict between him and his attorney. (R:144:6-20). This conflict was so severe, counsel had actually "steer[ed] the ship the other way[]" when she distanced DeGroot from scheduled pretrial discussions with the prosecutor. *McCoy v. Louisiana*, 138 S.Ct. 1500, 200 L.Ed.2d 821 (2018), at 1509; *See also Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), at 373-374 ("[T]he negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel."). Degroot's assertions that his counsel was wasn't following his objective, her trial performance was poor, and that she was "working with the system" made no difference to the trial court. (R:144:6-20). It still chose to force unwanted counsel onto DeGroot. This Court has held that "prejudice is presumed when counsel. . . breaches the duty of loyalty, perhaps the most basic of counsel's duties." *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), at 2069 (*citations omitted*). Moreover, "[t]o force a lawyer on a defendant can only lead him to believe that the law contrives against him." *Faretta*, *supra*, at 834. "[T]he right of self-representation would be virtually impossible to invoke if dissatisfaction with counsel meant equivocation since most requests to proceed *pro se* are premised on precisely those grounds." *Freeman v. Pierce*, 878 F.3d 580, at 588-589 (7th Cir. 2017) (*citations omitted*). The record reads:

> DEGROOT: Your Honor, **actually I'm relieving Attorney Menden of her duties to represent me. I will be representing myself for this process now.**
>
> JUDGE DREYFUS: Well, not necessarily.
>
> DEGROOT: Um, what? Um, what is that?
>
> JUDGE DREYFUS: Because at this point, I have the ability to control whether or not that occurs.
>
> DEGROOT: Okay. Well, **there's a big conflict between us.**
>
> JUDGE DREYFUS: We're in the Middle of trial
>
> DEGROOT: Yeah, I know.

JUDGE DREYFUS: ...Well, Mr. DeGroot at least **there's nothing here at this point that indicates otherwise in a position to be able to try the case** . . .

...

DEGROOT: Yes, Your Honor. I understand. Um, so basically **there's been a massive conflict** between like -- It's[SIC] just not doing things. She's not providing the defense I need...She's doing a terrible job . . . **She is working with the system, not with me.** She's not defending me properly.

JUDGE DREYFUS: I understand, Mr. Degroot. And I -- understanding those kind of issues do arise that there isn't -- that conflict can and does arise between the attorney and their client. Generally we allow the attorney to make that -- the determination...

...

JUDGE DREYFUS: Mr. Degroot, and essentially, if Mr. Thurston's offer made and whatever reason it was -- Agreement didn't get reached. That resolves that issue. But getting back to my question, **what's your[SIC] say?**

DEGROOT: **What's hearsay?**

....

JUDGE DREYFUS: ...And at least, at this point, I'm not getting that sufficient understanding in terms of -- what the law is, what the procedures are, what is objected, is not allowed for. And certainly, that's not going to happen in a matter of a few minutes in order for that to occur.

DEGROOT: ...[I] am not as well versed in law, but I do have a pretty solid mind, Your honor and I just --

JUDGE DREYFUS: And all of that may be, but at least, at this point, the -- And it is well within my authority. I'm going to deny your request to terminate Ms. Menden as your attorney at this point in time. She is going to continue to need to proceed and continue in order to represent you.

(R:144:4-24)

"Where a constitutional right to counsel exists . . . there is a correlative right to representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981), at 271 (*citing Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1709, 64 L.Ed.2d 333 (1980)). Here, DeGroot asserted a conflict that clearly illustrated to the court that counsel was not being loyal to DeGroot but instead, was acting as an advocate for the State. (R:144:5). *See Strickland, supra*, at 2069. "An actual conflict occurs when, during the course of the representation, the attorney's and the defendant's interest diverge with respect to a material factual or legal issue or to a course of action." *U.S. v. Edelmann*, 458 F.3d 791 (8th Cir. 2006), at 807 (*internal quotations omitted, quoting U.S. v. Levy*, 25 F.3d 146, 155 (2d Cir.1994)). Prejudice is presumed in these circumstances. *Id.* Not only did the trial court force counsel onto DeGroot with whom he had conflict, it gave an unreasonable justification to deny DeGroot his Sixth Amendment right to proceed *pro se* by speculating on how well DeGroot could represent

himself. (R:144:24) "[T]he trial court is to look not to the quality of his representation, but rather to the quality of his decision." *Bribiesca v. Galaza*, 215 F.3d 1015 (9th Cir. 2000), at 1020 (emphasis added, *abrogated on other grounds*). The trial court was required to conduct a proper competency colloquy upon DeGroot's unequivocal demand to represent himself. A criminal defendant may not be tried, plead guilty, or waive counsel unless he is found competent. *Godinez v. Moran*, 509 U.S. 389 at 401. "[T]he Sixth Amendment's guarantee of a right to the assistance of counsel, is 'the right of the accused personally to manage and conduct his own defense in a criminal case.'" *Faretta v. California*, 422 U.S. 806 at 817. A defendant's alternative option to representation by counsel is self-representation. "[F]or it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself[]" *Id.*, 816 (*citations omitted*). A waiver of certain constitutional rights must be "[a] voluntary and intelligent choice among the alternative courses of action open to the defendant." *Parke v. Raley*, 506 U.S. 20, 113 S.Ct. 517, 121 L.Ed.2d 391 (1992) (*quote source omitted*), at 29. A criminal defendant who waives his right to counsel and chooses the alternative course to proceed *pro se* is "[e]ntitled to hearing or inquiry into issue of his competence to waive his constitutional right to assistance of counsel and... conduct his own defense . . . ." *Westbrook v. Arizona*, 384 U.S. 150. Reversible error occurs when a trial judge fails to create a record affirmatively showing that a defendant's waiver of counsel, or other constitutional rights, is "knowingly and voluntary." *Parke v. Raley*, 506 U.S. 20, at 29 (*citing Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)). A trial court judge is required to make a defendant who demands to proceed *pro se* "[a]ware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Faretta*, *supra*, at 835 (citations omitted). A defendant who is "literate, competent, and understanding" must be allowed to represent himself. *Ibid.* Here, the trial court's decision to deny DeGroot his Sixth Amendment right to proceed *pro se* because he has not "[m]astered the intricacies of the hearsay rule. . . ." is contrary to *Faretta*. *Tatum v. Foster*, 847 F.3d 459 (7th Cir. 2017), at 465.

Even if the trial court had discretion to deny DeGroot's mid-trial demand to represent himself, "[t]hat discretion is not unbridled. It is improper for the court to deny the defendant the right to serve as his own attorney solely because of a perceived lack of legal dexterity." *U.S. v. Noah*, 130 F.3d 490 (1st Cir. 1997) (*cited by U.S. v. Kosmel*, 272 F.3d 501, (7th Cir. 2001)). "[T]he right to self-representation—to make one's own defense personally—is thus necessarily

implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." *Faretta, supra*, at 819. To deny the criminally accused the right to discharge his counsel in the middle of trial so he unable to "make his own defense personally" "[i]s to imprison a man in his privileges and call it the Constitution" *Id.*, at 815 (*quote source omitted*). For "[e]ven when the trial judge suspects that the defendant's contentions are disingenuous, and motives impure, a thorough and searching inquiry is required...a trial judge cannot be permitted to go forward when a defendant does not fully appreciate the impact of his actions on his fundamental constitutional rights." *McMahon v. Fulcomer*, 821 F.2d 934 (3rd Cir. 1987) (*quote source and citations omitted*). '[T]he *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury...." *McKaskle, supra*, at 169."

In *U.S. v. Singleton*, the Fourth Circuit upheld a lower court's allowance of a defendant's "mid-trial request to fire counsel, made while a government witness was on the stand awaiting cross examination" because the lower court had conducted the proper colloquy. 107 F.3d 1091 (4th Cir. 1997), at 1098. In *Daniels v. Woodford*, the Ninth Circuit held that timeliness does not withstand a conflict, even "[o]n the eve of trial...." 428 F.3d 1181 (9th Cir. 2005). In *Moore v. Haviland*, the Sixth Circuit held that a defendant was entitled to "*Faretta*-based inquiry" after he demanded to proceed *pro se* on his 5th day of trial. 531 F.3d 393 (6th Cir. 2008), at 402-403. Likewise, in *U.S. v. Peppers*, the Third Circuit held that if a criminal defendant demands to proceed *pro se* during trial, a court must either grant a continuance for the appoint of new counsel if it finds good cause, or "[m]ust inform the defendant that he can either proceed with current counsel, or represent himself." 302 F.3d 120 (3rd Cir. 2002) at 132 (*citations omitted*). Although a trial court may "not obliged to accept every defendant's invocation of the right to self-representation... the court must determine the nature of the waiver, as well as its clear and unequivocal election." *U.S. v. Betancourt-Arretuche*, 933 F.2d 89 (1st Cir. 1991) (*quote source and citations omitted*). Events that came subsequent to an improper inquiry into competency or an arbitrary denial of a defendant's right to represent himself, are irrelevant and "reflect[] a fundamental misunderstanding of the nature of the right guaranteed by *Faretta.*" *Raulerson v. Wainwright*, 469 U.S. 966, 83 L.Ed.2d 302 (1984) (JUSTICE MARSHALL dissenting from the denial of certiorari.). A defendant is "not required, in order to avoid waiver, to add anything to the straightforward request that he had already made plain in writing." *Batchelor v. Cain*, 682

F.3d 400 (5th Cir. 2012), at 412. "The trial court's failure to conduct the required *Faretta* colloquy is an indication only of the trial court's error. That the appropriate colloquy did not occur cannot be construed as an indication of vacillation." *Ibid.* Even a defendant's absence from his trial, subsequent to the denial of his *pro se* request, does not constitute a waiver or forfeiture of the previously asserted right. *Buhl v. Cooksey*, 233 F.3d 783 (3d Cir. 2000), at 804; such a denial likely lead the defendant "to believe that the law contrives against him." *Ibid.* (*quoting Faretta, supra*).

The consensus of the courts is that a *Faretta*-based colloquy must appear in the record when a defendant requests to proceed *pro se*, even mid-trial. The Wisconsin trial court committed a structural-error when it engaged in an inquiry into DeGroot's technical legal knowledge as a substitute for a *Faretta* colloquy. The Wisconsin Court of Appeals created a legal exception to the *Faretta* rule that this Court has not announced, and it has been joined by the Fourth and Eleventh Circuit. For the above reasons, this Court should grant certiorari review and reverse the decision of the Wisconsin courts, and cure the circuit split.

II. DEGROOT WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL. THE WISCONSIN COURTS DID NOT WEIGH THOSE DEFICIENCIES IN THEIR TOTALITY IN DETERMINING PREJUDICE. THIS COURT SHOULD CLARIFY THAT CUMULATIVE DEFICIENCIES OF COUNSEL MUST BE WEIGHED IN THEIR TOTALITY IN ORDER TO DETERMINE PREJUDICE AND FIND THAT DEGROOT WAS DENIED EFFECTIVE ASSISTANCE.

The Eighth Circuit does not appear to recognize the full extent of this Court's opinion on cumulative error review. *Girtman v. Lockhart*, 942 F.2d 468 (8th Cir. 1991), at 475 ("In a case involving both ineffective assistance claims and other claims, we recently held that "cumulative error does not call for habeas relief, as each habeas claim must stand or fall on its own") (*quote source omitted*). And The Ninth Circuit suggests that cumulative error must be 'fairly presented' to satisfy exhaustion, implying cumulative error is one of 'kind' like *Strickland* and *Cronic*. *Wooten v. Kirkland*, 540 F.3d 1019 (9th Cir. 2008); *See also Bell v. Cone,* 535 U.S. 685, 122 S.Ct. 1843 (2002), at 697 (*"*[T]his difference is not of degree but of kind. . . . ."). Review by this Court will clear up the confusion on whether cumulative error analysis is one of 'kind' or one of 'degree' and whether courts are mandated to apply it.

PRINCIPLES OF REVIEW

This Court has "recognize[d] that a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge." *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), at 645. It has accepted the rationale of the cumulative impact of errors in frustrating a defendant's "efforts to develop an exculpatory defense." *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), at FN 3.

A. The Wisconsin Court of Appeals used a standard of review rejected by the U.S. Supreme Court in determining prejudice when it should have weighed each deficiency in its totality.

The Wisconsin Court of Appeals erred when it assessed each point of alleged deficient performance of counsel for prejudice individually, rather than in its totality. (WI-COA-Decision ¶16) and placed an unreasonable burden on DeGroot by requiring him to establish that the "final result of the proceeding would have been different."See *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838 (1993) "[A] defendant need not show that "counsel's deficient conduct more likely than not altered the outcome in the case." *Thill v. Richardson*, 996 F.3d 469 (7th Cir. 2021) (*citations omitted*), at 477. The Wisconsin Court of Appeals used the "would have been different" analysis that focused solely on the outcome. It stated:

> "[DeGroot] does not explain **why the outcome of trial would have been different** if counsel had successfully objected to the testimony at issue and during the prosecutor's closing argument."
>
> (WI-COA-Decision, ¶23) (emphasis added)

"[A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Lockhart v. Fretwell, supra*. Wisconsin also "rejects an outcome-determinative standard" and the standard to show prejudice is less than the preponderance of the evidence standard. *State v. Pitsch*, 124 Wis.2d 628 (1985), at 642. "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect" *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574 (1986). The "fairness of adversary proceedings" is the primary focus of the constitutional inquiry into the right to effective assistance. *Lockhart, supra*, at 842; *See also Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988 (1986), at 998. "Absent some effect of challenged

conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *U.S v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984), at 657. "Sheer outcome determination isn't sufficient to make out a claim under the Sixth Amendment. *Lockhart, supra,* at 843. When the State's case depends exclusively on witness testimony and there is no physical evidence, counsel's failure to impeach a witness establishes prejudice. DeGroot's appellate brief clearly articulates counsel's failure to impeach the witnesses with available exculpatory information had prejudiced him. (Def. Br. 17-21). The Court of Appeals used the "outcome determinative" standard in more than one part of its decision denying DeGroot relief. (WI-COA-decision ¶25). It should be presumed DeGroot told counsel about the witnesses, as DeGroot had argued it as a *pro se* litigant and the most basic investigation into the case would have revealed the name of the witness. Moreover, the Wisconsin Court of Appeals erred in faulting DeGroot for counsel's failure to investigate the witness, or explain what the substantial extent of "their testimony would be." *See Mosley v. Atchison*, 689 F.3d 838 (7th Cir. 2012). Portions of the record demonstrate that examination of Sarah Flayter was part of counsel's strategy.

> ATTORNEY MENDEN: Now, **when you talked to Sara about this**, you talked about sleeping over at Derek's house right?
>
> K.S.: Yes
>
> ATTORNEY MENDEN: And you said that you slept in a room in a basement
>
> K.S.: Yes
>
> ATTORNEY MENDEN: And that you locked the door to the room.
>
> K.S. Yes
>
> ATTORNEY MENDEN: But we looked at those pictures, and there weren't any doors.
>
> K.S.: Yes
>
> ATTORNEY MENDEN: And **you also never told Sara** that you woke up to Derek doing something to you in the basement of that room, right?
>
> (14CF1531:144:100)
>
> ...
>
> ATTORNEY MENDEN: **Also when you talked to Sara, you said didn't really know what happened** with Derek because you were sleeping.
>
> A.L. : Yes
>
> ATTORNEY MENDEN: Right? And then she asked you if it would be better to write down things that happened with Derek, and so you did that, right?

A.L. : I can't remember right now.

ATTORNEY MENDEN: Do you remember writing down most of the time when I was asleep, I really don't know what happened. Do you remember that?

A.L.: I was asleep or I didn't remember.

(R:144:101-102)

ATTORNEY MENDEN: That was based on how testimony was going yesterday, as well as the fact that **expected the State to call Miss Flaeter[Sara]** or he introduced her-- the CARE CENTER interviewer -- yesterday. **So I apologize for that over assessment.**

(R:146:5)

As for the witness Craig Schroeder, any reasonable attorney is going to investigate and interview an individual whom was present with DeGroot when he first met the complainant K.S.. This witness one of the favorable witnesses in question, was able to observe DeGroot around the complainant during work activities. This axiomatically would have negated any potential prejudice the jurors may have had about why DeGroot was around a minor to begin with. (Def. Br. 25). The failure of counsel to investigate such a witness cannot be presumed "strategic decision." *Montgomery v. Petersen*, 846 F.2d 407 (7th Cir. 1988), at 412. DeGroot's case was based solely on witness credibility, and counsel's failure to provide him any type of a viable and meaningful defense does not meet the standard of a prevailing norm. *See Strickland*, 466 U.S. 668. DeGroot properly presented his claims to the appellate court (Def.Br. 16-26). "Some investigation" by counsel does not confer effective assistance to a defendant. *See Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527 (2003). Had counsel investigated and then presented the testimony of Craig Schroeder, it would have had substantially removed any bias the jury had that DeGroot set out with a motive to commit these sexually based offenses. And if the jurors would have had assurance that DeGroot's intentions were normal and pure, then they might not have been so quick to give credit to the complainants' testimony in the absence of any physical evidence; especially if counsel had presented to them the fatal inconsistencies in testimony and evidence outlined below.

The Wisconsin Court of Appeals unreasonably applied federal law when it focused on the outcome and burdened DeGroot to make a showing that the omissions of counsel "would have led the jury to believe that Degroot was not guilty of the charges. . . ." (See WI-COA decision - ¶25). It erred in burdening DeGroot to supply the substantial witness testimony that counsel was required to obtain. *See Mosley v. Atchison, supra*, at 848.

B. DeGroot had alleged material facts, if true, would entitle him to relief.

DeGroot had submitted clear and convincing information to both the trial court and the court of appeals, alleging "sufficient material facts that, if true, would entitle the defendant to relief." *State v. Allen*, 274 Wis.2d 568, ¶9, 682 N.W.2d 433, (2004). But even if not, "[a] highly detailed factual basis ... or a precise account of how that conduct [was] prejudic[al] . . . ." is not required for *pro se* litigants to have adequately presented their claims. *Ward v. Jenkins*, 613 F.3d 692 (7th Cir. 2010) DeGroot had alleged that false evidence (phone messages), and perjured testimony in connection therewith, were used against him during trial. (Def.Br. 17-20) (14CF1531:144:124---R:56; 147; 142:8) (R:97; 14CF1531:1:1-4) The defense was impeded by the State's withholding of exculpatory information regarding the origins of communications alleged to have been between DeGroot and complainant K.S.. (R:143:13-17; 14CF1531:25). The motion in limine requested disclosure of this information (preserving the objection) to the authenticity of these communications. (R:143:13-17; 14CF1531:25) Instead of ruling on the communications admissibility, the trial court deferred its determination to the prosecutor. (R:142:13). In examining the record, this Court will see that the prosecutor 'played dumb' about the messages, and later introduced an additional 78 pages of undisclosed messages during trial. "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, 124 S.Ct. 1256 (2004), at 696. The record reads:

> ATTORNEY MENDEN...**It's really not clear if they [Facebook communications] were given to them -- it's by email so was either by the victim or the victim's father.** The problem I have with that and allowing any of those Facebook messages or those purported Facebook messages, but there is no authentication of that. There is no -- it is certainly possible -- actually have an example here -- to get a warrant from Facebook, to specify a specific time. And when they produce those records, they are self-authenticating because they include all of the data...
>
> THURSTON: So I'm not really sure what counsel is referring to, when she talks about Facebook messages, Facebook posts...So I don't know if she's talking about some other message, but the messages on Facebook messenger are really what I intend to get, so I can tell your honor **it's about a hundred 50 of them.[SIC]**
>
> ATTORNEY MENDEN: **The hundred 50 pages are --were not download from the phone.** There are from K.S.'s phone and then downloaded. There are some in the -- downloaded Facebook messages on there as well, and that's not what I'm talking about. I'm talking about the a hundred 50 pages that were emailed. K.S. is the quote by the officer. Like I said, it's not clear if they came from K.S. or his father, but **that's not the same as getting Facebook messages from the phone.**

(R:142:5-9)

ATTORNEY MENDEN: ...It's not in the correct format for that [Facebook communications] to be properly admitted, and there's too much speculation about who was doing it and it some cases what they were even saying or trying to say because it is not coming from Facebook, and it doesn't have all the information in it. So I continue to object to any of those coming in. The other issue was on the phone download and that specific section of text messages there were -- **truncated is the best word that I have for it**...I think should be excluded because we're just guessing what the rest of those letters, words, whatever else was there.

(143:14-15) (emphasis added)

PROSECUTOR THURSTON: Okay, I'm going to show you what's marked exhibit 21. That's just what the sticker says okay. **Pages 1 through 233 are all part of this sticker number 21, is that right?**

(14CF1531:144:65)

Thurston introduced an additional 78 pages of communications that were never disclosed to the defense. The page count went from 155 to 233 of messages over Attorney Menden's objections to the admissibility of the first 155. (Id.; R:142:9; 14CF1531:144:65; Def.Br.28-32) The material facts offered by DeGroot to support his contentions that the phone communications and testimony were false, appear to have been conceded by the appellate court, but that it wouldn't have mattered. (WI-COA-Decision ¶¶ 19,20). The Wisconsin Court of Appeals disregarded the false evidence and relied on "K.S.'s own testimony about the assaults" as determinative of DeGroot's guilt. (WI-COA-Decision ¶ 20) DeGroot does not understand the Wisconsin appellate court's reasoning as K.S. himself testified that he broke the phone (14CF1531:144:74). His testimony was contradicted by his mother's testimony who admitted officer Petz took the phone home (as opposed to it being broken by K.S. (R:144:124)), and also by the extrinsic evidence of the phone's timestamp. (R:56 Exhibit #50). The timestamp of the last messages proves the phone was functional during the time it was alleged to have been broken by K.S. but counsel did not point out these inconsistencies to the jury at trial. (Def.Br.18-20,36-40). "When even a single conviction is obtained through perjurious or deceptive means, the entire foundation of our system of justice is weakened." *Hayes v. Brown*, 399 F.3d 972 (9th Cir.2005), at 988. The Wisconsin Court of Appeals reasoning is an unreasonable application of U.S. Supreme court precedent because "[f]alse testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence." *Napue v. Ill.*, 360 U.S. 264, 79

S.Ct. 1173 (1959), at 269 (*citations omitted*). The Wisconsin Court of Appeals' reliance on "K.S.'s own testimony about the assaults" as determinative of DeGroot's guilt, in the face of both extrinsic evidence and testimony to the contrary, is unreasonable. (WI-COA-Decision ¶20). The jury was not presented with this inconsistency, and "[a] credibility determination will be overturned ... if credited testimony is internally inconsistent, implausible, or contradicted by extrinsic evidence." *U.S. v. Contreras*, 820 F.3d 255 (7th Cir. 2016), at 263 (emphasis added). Counsel could have possibly discovered this information pretrial. (Def.Br.17-20). She could have impeached the witnesses' credibility with the extrinsic evidence of the functionality of the phone and it would have demonstrated to the jury the propensity of the prosecution witnesses to lie. If the complainant and other prosecution witnesses were willing to lie about the phone and its contents, then the jury would be less likely to believe anything the complainants had said; specifically their sexual assault allegations.

> PROSECUTOR THURSTON: They take the Defendant, Derek Degroot, back to the police station in the City of Muskego and they write him a ticket for disorderly conduct. And they say you're -- They bring this 13-year-old boy who has no relation, no connection, this is no parental figure. No -- You know, nobody at this Linda Court address -- into a separate room. And they're trying to talk to him. And in the process one of the City of Muskego police officers calls his mom. His mom - Again, this boy's name is [K.S.] He was about 13 years old. About a half, 50 percent less, right? You got a 26-year-old Derek Degroot and 13-year-old. They call -- [K.S.] is one of the two vulnerable boys who are left out of the pack so to speak. You'll hear about how [K.S.]'s parents were divorced, how [K.S.] was bouncing between a home, between two different homes. **And you're going to hear about how they called [K.S.]'s mom that night to come pick him up [at Muskego Police Station]. Ladies and gentlemen, the evidence will be uncontroverted, undisputed how when mom arrives around midnight that night-- . . .Now moments later mom comes in -- [K.S.] is in the side room, a separate room.** They're trying to talk to [K.S.] about what was going on, what has been going on for the last few months with this Degroot character. [K.S.] at that point is not really ready to disclose much. He's not -- In fact he gets angry enough that he throws his phone that you'll later learn he's been using to communicate with the Defendant on. **Throws his phone across the room, and it shatters the phone.**
>
> (14CF1531:144:6-7)

> CRIMINAL COMPLAINT: "...**Detective Westphal asked to see the juvenile's cell phone. K.S. then threw a cell phone across the room [at police dept]** which cracked the face of the cell phone. Detective Westphal received consent from both parents of the juvenile to seize and examine the cell phone which the Muskego Police Department was able to do."
>
> (14CF1531:1:1-4)

PROSECUTOR THURSTON: Was there ever a situation where he got angry with his phone?

J.H.: He -- Yeah.

PROSECUTOR THURSTON: I want you to tell the jury about that.

J.H.: **He threw it across the room.**

PROSECUTOR THURSTON: Where did that happen?

J.H.: **At my house**

(14CF1531:144:126-127; *See also* R:115:App-CONTINUATION REPORT BY OFFICER PETZ #14-021907 PAGE 2/2)

PROSECUTOR THURSTON: **Why didn't you [PETZ] take this phone that night** [11/22/14] and download it if you recall? And of course, **we're playing a little monday quarterback"**

(14CF1531:144:115)

PROSECUTOR THURSTON: Okay. Did you ever remember talking with an officer by the name of Petz, P-E-T-Z, about information that might be on [K.S.]'s phone?

J.H.: Yes.

PROSECUTOR THURSTON: Tell me about that conversation if you can recall

J.H: He **[PETZ] just wanted his [K.S.] phone if he could bring it home. I remember like a couple days after, we went and picked it up**, and we dropped it off to the police department.

(14CF1531:144:124)

The above transcripts and reports undisputedly illustrate that the material facts of the story do not align. The 'WHO' and 'WHERE,' regarding the status and possession of the phone in question, are different in each version. As counsel had noted pretrial:

ATTORNEY MENDEN ". . . [F]acebook by nature can be used in many different places by many different people with different logins. **It can be created fictitiously**. . . ."

(R:143:13-17).

This explains how K.S. appears to be the person using his fully functional phone in Exhibit 50 on 12/05/14 (two weeks after it was alleged to have been disabled (R:56)) and also how police were able to have access to K.S.'s Facebook account to create a visual template of Facebook with fictitious dialogue because Petz had taken the phone home with him on 11/22/24.

(14CF1531:144:124). K.S. first testified truthfully that he remembered seeing the messages, and explicitly stated that they were not sent between him and DeGroot . . . but the prosecutor, not liking his response, suggested to K.S. that he did not remember those specific messages because of the time.

> PROSECUTOR THURSTON: [K.S.], do you remember him sending you a message like that?
>
> K.S. : **I remember message but they were[n't] sent by me and him.**
>
> PROSECUTOR THURSTON: You remember sharing a bunch of messages back and forth right?
>
> K.S.: Yes
>
> PROSECUTOR THURSTON: When you say you don't remember anything of these messages, is that because you haven't spent a lot of time thinking about them the last 3 years?
>
> (14CF1531:144:67-68)

The story about the phone being broken is completely false, thus why the transcripts above show that there are two entirely separate locations in the different versions of the story about the phone, (K.S.'s mother's house / Muskego Police station) as well as two entirely different people asking to see the phone (Detective Westphal / K.S.'s mother). The breaking of the phone was a lie so the police could deceive the defense and jury about the authenticity of who was sending and receiving the Facebook messages in order to support their sexual assault allegations through fictitious dialogue. (See R: 143:13-17). "Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." *Strickland, supra*, at 686 (*citations omitted*). This entire story was the result of a disorderly conduct incident that occurred on DeGroot's property. Had counsel pointed out and directed the jury to consider the inconsistency of the testimony about the functionality of the phone from Petz, K.S., and K.S.'s mother, and most importantly, the extrinsic evidence of the phone's timestamp proving it was functional after the date the prosecution witnesses had claimed to been disabled, then it is more likely than not, that the jury wouldn't have believed the authenticity of Facebook messages, and had serious questions as to whether K.S. and A.L. had been compelled to go along with a false storyline invented by the Muskego Police and prosecution.[3] The jury may have discredited all of the

[3] A substantial amount of electronic storage devices were seized in the RAID of DeGroot's house, yet no inculpatory information supporting the State's theory that DeGroot had an interest in children, enticed children, or committed a sexual assault, was produced as a result of the seizure of those storage devices. (R:138:5-6)

officers and complainants' testimony. The record suggests the prosecution was aware of the false evidence and explains why they refused to turn over the exculpatory data and interfered with the defense. (R:142:5-9). "[I]n cases of outright denial of counsel, of affirmative government interference in the representation process, or of inherently prejudicial conflicts of interest . . . no special showing of prejudice need be made." *Strickland, supra*, at 682; *See also Banks v. Dretke*, 540 U.S. 668, at 696. Still, DeGroot's counsel had a duty to prove the Facebook message evidence and testimony against him was false. Had she (1) shown the jury that the timestamps of the phone download illustrate that the phone was functional on 12/05/14 (contrary to reports and witness testimony that it was disabled on 11/22/14); and (2) pointed out that K.S.'s mother first testified that Officer Petz took the phone home (contrary to both Petz's and K.S.'s testimony), then at least some jurors may have had reasonable doubt about the allegations, and the jury as a whole would not have arrived at a unanimous guilty verdict. *Strickland, supra*, at 2069. (14CF1531:144:74, 112-116, 124; R:56)

C. The central issue to DeGroot's case was witness credibility and therefore his counsel's deficient performance had prejudiced him.

When credibility is the central issue of a sexual assault case, no reasonable attorney under prevailing norms is going to: (1) fail to use a peremptory strike on mandatory reporter of sexual abuse from the jury pool who sat on the panel.[4] "[T]he issue for implied bias is whether an average person in the position of the juror in controversy would be prejudiced." *U.S. v. Torres*, 128 F.3d 38 (2nd Cir. 1997), at 45. "[I]mplied bias in cases where the juror in question has had some personal experience that is similar or identical to the fact pattern at issue in the trial. . . ." *U.S. v. Gonzalez*, 214 F.3d 1109 (9th Cir. 2000), at 1111. "The bias or prejudice of even a single juror is enough to violate that guarantee." *Ibid. See also Mach v. Stewart*, 137 F.3d 630 (9th Cir. 1997). (the statements of a single juror may be perceived to be expert-like and taint the jury pool.) No reasonable attorney under prevailing norms is going to (2) fail to guarantee an examination of prosecution witness Sarah Flaytor, a witness vital to her strategy.[5] The defense can be impaired where the prosecutor surprises the defense by not calling an expected witness just as much as where a prosecutor surprises the defense with a witness not on their list. *See Smith v. Estelle*, 602 F.2d 694 (5th Cir. 1979), at 698. An attorney has a duty to investigate and

[4] R:143:87
[5] R:146:5

call witnesses that are crucial to the defense. *See Toliver v. Pollard*, 688 F.3d 853 (7th Cir. 2012). No reasonable attorney under prevailing norms is going to (3) fail to present a lay witness (Craig Schroeder) who would establish a normal work oriented relationship between DeGroot and complainant K.S to eliminate any prejudgment (prejudice) as to why DeGroot was around complainant K.S. to begin with; (4) fail to present evidence of previous civil court disputes regarding child custody and divorce settlements in which DeGroot had aided the father's counsel, as a motive for complainant A.L., N.S., and J.P. to lie[6]; (5) fail to investigate or present an expert witness to testify on the negativing effect of Methadone on sexual drive that DeGroot was taking during the time of the complainants' allegations. An attorney's decision not to investigate or use "objective medical evidence" pointing to impotency, which would have bolstered the defense, amounts to ineffective assistance. *Foster v. Lockhart*, 9 F.3d 722 (8th Cir. 1973), at 726. "[C]ounsel could not have made an informed tactical decision that the risk that the doctors might equivocate on the stand outweighed 'what potential benefit might come from [their testimony].'" *Holsomback v. White*, 133 F.3d 1382 (11th Cir. 1998), at 1388; *See also Gersten v. Senkowski*, 426 F.3d 588 (2nd Cir. 2005) (same); *Rogers v. Israel*, 746 F.2d 1288 (7th Cir. 1984), at 1292 (same). The jurors were likely to have serious questions and reasonable doubt as to the sexual assault allegations if they would have known that DeGroot's sexual drive and function was severely impaired by Methadone. No reasonable attorney under prevailing norms is going to (6) fail to investigate and present to the jury the timestamps of the phone messages in dispute to impeach the authenticity of the messages and credibility of the witnesses who claimed the phone was disabled prior to the date of its continued functionality.[7] "[T]he record establishes that counsel had reason to know, from an objective standpoint, that a possible defense ... [was] available." *Sullivan v. Fairman*, 819 F.2d 1382 (7th Cir. 1987), at 1389 (*quote source omitted*). No reasonable attorney is going to (7) fail to object to the witness vouching of N.S. for A.L.[8] (which violated the law as established by Wisconsin in *State v. Haseltine*, 120 Wis.2d 92, 352 N.W.2d 673 (Ct. App. 1984) as well as federal law in *Earls v. McCaughtry*, 379 F.3d 489 (7th Cir. 2004) (*citing Strickland* and acknowledging *Haseltine*). When there is no independent physical evidence of a sexual assault, failure of counsel to object when one witness testifies to the veracity of another witness, is deficient performance and prejudices the accused. *Ibid.*; (8)

[6] R:144:110
[7] R:56
[8] R:144:120

fail to object to the undisclosed testimony of a beaker and uncharged burglary; (9) fail to object the impermissible, unethical, and egregious closing arguments of the prosecutor[9]; (10) fail to object to the final jury instructions which took the burden of proof off of the State to prove its so surprise allegations of repeated sexual intercourse through use of liquid drugs in a beaker, by including that allegation within the broader charge of sexual contact.[10]

A reasonable attorney under prevailing norms would also have objected to the prosecutor's closing arguments. In closing, the prosecutor blended the stories together (R:149:36-39), reduced the jurors confidence in their ability to analyze the evidence presented, and suggested jury consider factors (trash) other than the evidence when reaching their verdict.

> PROSECUTOR THURSTON: but I think the evidence suggests or the evidence seems to be that in fact Derek Degroot not only started taking care of the kids, but started moving his stuff in, such that when [K.L.] was finally in Huber and finally in jail, in August, Defendant had all his stuff there, right? **Stuff all over, trash in the backyard. Remember we heard about a toilet in the backyard? All kinds of trash and stuff all over the house. His personal belongings in [A.L.]'s room. House was in shambles. Trash everywhere.**
>
> (R:149:16)

The prosecutor also manipulated and misstated the presented evidence, *see Darden v. Wainwright*, 477 U.S. 168, 106 S. Ct. 2464 (1986), at 157-158, claiming that K.S. testified to a sexual assault incident in Wal-Mart parking lot . . . when in fact, the record shows K.S stated, "I don't recall." when he was asked about a "Wal-Mart incident."

> PROSECUTOR THURSTON: **Do you recall whether or not you ever told anybody that at that Walmart parking lot**, he claimed he put his mouth on your penis.
>
> K.S: **I don't recall.**
>
> PROSECUTOR THURSTON: You don't recall saying that?
>
> K.S: **I don't recall.**
>
> (14CF1531:144:51-52)
>
> PROSECUTOR THURSTON: **[K.S.] said after the Wal-Mart incident**, he woke up in this crazy car that's blacked out with construction paper, that the Defendant was bragging how he'd sucked his penis and how uncomfortable it made [K.S.].
>
> (R:149:38)

[9] R:149:16-50
[10] R:146:20-30

Here, DeGroot's counsel failed to prepare a viable defense, investigate, and object . . . specifically to the prosecution's closing. And given the severity of the prosecutorial misconduct, counsel should also have moved for a mistrial with a bar to where such misconduct can be described as goading for a mistrial request. And if not for that reason, certainly for the reason that the judge presiding over DeGroot's trial took it upon himself to remove exculpatory evidence from jury review[11] in an apparent attempt to avoid an acquittal, after he previously expressed his concern that the charges would be dismissed.

> JUDGE DREYFUS: **My concern though**, is that we provide essentially elements of those offenses and we need to do so with regard to all 6 of them which as a result of this one, **more of the charges are -- simply are dismissed, and at the close the -- of the State's case . . .**
>
> (R:143:118)
>
> ATTORNEY MENDEN: **And she didn't mention anything to you about a beaker, did she**?
>
> DETECTIVE SHERIDAN: I don't know. I'd have to look at my report...
>
> ATTORNEY MENDEN: ...And so does that look like your report from the day of, um, July 9 of 2015?
>
> DETECTIVE SHERIDAN: Yes
>
> ATTORNEY MENDEN: Is that a fair and accurate copy of that report?
>
> DETECTIVE SHERIDAN: I would believe so.
>
> ATTORNEY MENDEN: I'd move that into evidence...
>
> JUDGE DREYFUS: I will -- **It will be received. Ultimately, we may readdress this at some point, but it will be received.**
>
> (R:145:35-36)
>
> JUDGE DREYFUS: **I know there's been a request for -- Let me just see. What's called police report.** Certainly they've been referenced. Normal procedure we don't provide copies of police report as part of the case.
>
> (R:146:12)
>
> JUDGE DREYFUS: With regard to any of the other exhibits, if they've requested by the Jury, any position of any of the them being sent back? **There were a couple of police reports we've not** -- --
>
> (R:149:62)

Witness credibility was the central issue, and the cumulative deficiencies by counsel prejudiced him as the province of the jury was invaded, and the central issue of credibility was clouded. *Washington v. Smith*, 219 F.3d 620 (7th Cir. 2000). DeGroot properly alleged that

[11] R:146:12; 149:62

because he "[f]aced similar charges by two different alleged victims and 'like occurrences' go to the credibility of a witness, the likelihood that the jury 'abdicated its fact-finding role' to A.L. or N.S., would cause them to believe K.S. as well." (Rep.Br.11-12). The Wisconsin Court of Appeals' decision is unreasonable. There is nothing strategic about counsel's failures and omissions listed above, and DeGroot's trial was fundamentally unfair. There is a reasonable probability that there would be medical and forensic evidence associated with a sexual assault allegation of repeated sexual intercourse through the use of liquid sedatives, compared to that of sexual contact. DeGroot's defense was prevented from looking for this forensic evidence, or preparing a strategy for the specific allegation, because of the nondisclosure. Had counsel and DeGroot been aware of this allegation before trial, the defense could have been prepared to investigate and cross-examine prosecution witnesses, making arguments that the lack of such evidence, where one would expect to find it, suggests the allegations are not true. See *Holsomback v. White*, 133 F.3d 1382 (11th Cir. 1998) (failure to investigate lack of medical evidence supporting sodomy, where case depends exclusively on witness testimony, is ineffective assistance.) As a result of the undisclosed liquid drug/sexual intercourse allegation that the prosecution surprised the defense with, the State reduced its burden to prove DeGroot committed those allegations by claiming it could prove that only sexual contact occurred in order to get a conviction for a sexual intercourse allegation- an allegation which is material to punishment and carries a mandatory minimum of 25 years in prison. *See Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000) at 2357. "An accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason" *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), at 302 (citations omitted).

It is undisputed that the jury was confused about the allegations.

> JURY: Can you clarify for CASE NO.15CF909, why there are two counts of sexual contact, and what is the difference of each count?
>
> JUDGE DREYFUS: No. This will have to be determined by you as the Jury
>
> (R:65;66;67)

The above demonstrates that there is a reasonable probability that DeGroot was convicted of the more serious and undisclosed offense of repeated anal intercourse involving the beaker and liquid drugs, without a unanimous jury verdict. *See also Ramos v. Louisiana*, 140 S.Ct. 1390,

206 L.Ed.2d 58 (2020). Counsel's "repeated failure to object to the testimony in question clearly fell below an objective standard of reasonableness." *Earls v. McCaughtry*, 379 F.3d 489 (7th Cir. 2004), at 494. This Court should grant certiorari review and conclude that cumulative-error analysis is not one of 'kind', but one of 'degree' for determining prejudice, and declare that courts must not look at errors in isolation, but look at the totality of the circumstances. This Court should also conclude that DeGroot was prejudiced by the aggregate effect of his trial counsel's deficient performance.

III. DEGROOT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL THROUGH VARIANCE, NONDISCLOSURE, AND PROSECUTORIAL AND JUDICIAL MISCONDUCT. REVIEW BY THIS COURT WILL CLARIFY WHEN VARIANCE BECOMES FATAL, AND WHETHER OR NOT THE FIFTH AMENDMENT'S DOUBLE JEOPARDY PROTECTIONS SHOULD APPLY IN THIS CASE.

This Court should announce a rule that variance becomes fatal in situations where a specific allegation takes the defense by surprise at trial, as to evade the double jeopardy protections of the Fifth Amendment, and prevent the accused from having a meaningful defense, and where the specific allegation in question is material to punishment in that legislature has prescribed a mandatory minimum sentence for that allegation. This will ensure " (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense." *Berger v. U.S.*, 295 U.S. 78, 55 S.Ct. 629 (1935), at 82. It will further protect a defendant from having a jury convict him with less than a unanimous verdict of crimes which carry drastically different statutory punishments. *See Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000) at 2357. "[T]he Sixth Amendment right to a jury trial—as incorporated against the States by way of the Fourteenth Amendment—requires a unanimous verdict to convict a defendant of a serious offense." *Ramos v. Louisiana*, 140 S.Ct. 1390, 206 L.Ed.2d 58 (2020). This Court should also decide that where a judge expresses a fear of dismissal on the record, followed by prosecutorial conduct to provoke a mistrial request and judicial concern for a full-testimony strike, followed by a judicial move to deliberately prejudice the defense by preventing jury review of an exculpatory police report already admitted into evidence, the double jeopardy protections of the

Fifth Amendment bar retrial. *See U.S. v. Tateo*, 377 U.S. 463, 84 S.Ct. 1587 (1964), at FN3; *See also Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083 (1982).

PRINCIPLES OF REVIEW

"[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense,' " *Nevada v. Jackson*, 569 U.S. 505, 133 S.Ct. 1990 (2013), at 509 (*quote source omitted*). Due Process, in accordance with the Sixth and Fourteenth Amendment of the U.S. Constitution require "(1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense." *Berger v. U.S.*, 295 U.S. 78 (1935), at 82. "An accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason" *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), at 302 (citations omitted).

A. Variance here is fatal where the defense was prevented from meaningful preparation, and where the two multiplicitous charges spanned over a wide timeframe and did not contain specific facts necessary to differentiate from each other in order to comply with the Double Jeopardy Clause of the Fifth Amendment.

DeGroot's Due process rights were violated when the prosecution was allowed to remove the burden of proof from itself by not specifically differentiating between the 2 identical charges of sexual assault pretrial, and where it proceeded to broaden the jury instructions at trial after the testimony, so it would be able to convict DeGroot of a more serious offense with less than a unanimous verdict. *See Blockburger v. U.S.*, 284 U.S. 299, 52 S.Ct. 180 (1932). "[A] modification at trial that acts to broaden the charge contained in an indictment constitutes reversible error. *Lucas v. O'Dea*, 179 F.3d 412 (6th Cir. 1999), at 416 (*citing Stirone v. United States*, 361 U.S. 212, 217–19, 80 S.Ct. 270 (1960)). The record conclusively demonstrates the jury was confused over the counts:

> JURY: Can you clarify for CASE NO.15CF909, why there are two counts of sexual contact, and what is the difference of each count?
>
> JUDGE DREYFUS: No This will have to be determined by you as the Jury
>
> (R:65;66;67)

"A variance occurs when the charging terms of an indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment." *U.S. v. Ford*, 872 F.2d 1231 (6th Cir. 1989), at 1234 (*emphasis added, quoting Gaither v. United States*, 413 F.2d 1061, 1071 (D.C.Cir.1969)). The evidence offered at trial of a sexual assault was materially different than the pretrial allegations and took the defense by surprise. (R:151:23). The evidence offered at trial included the elicitation of an allegation from A.L. claiming that DeGroot had made complainant A.L. drink liquid drugs out of a beaker to facilitate repeated anal intercourse. (R:144:88-91; 144:115). The written jury instructions were later broadened to read "sexual contact OR sexual intercourse." (R:68; 146). If extending the time-frame from the initial alleged timeframe a crime constituted fatal variance, *Lucas v. O'Dea*, *supra*, at 417, then broadening the jury instructions to include the surprise allegations of conduct that carries a substantially greater and mandatory minimum punishment, should also constitute fatal variance. *See Apprendi v. New Jersey*, 530 U.S. 466, FN 10. ("[F]acts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition "elements" of a separate legal offense."). Wisconsin requires a mandatory minimum punishment of 25 years for sexual intercourse with a child under 13 years of age. *See* WIS.STAT. § 939.616. Mandatory minimum sentence for child sex offenses. Although the DeGroot was not given the sentence of 25 years initial confinement after he was convicted, the trial judge stated on the record, that specific fact was material to the sentence he would ultimately impose:

> JUDGE DREYFUS: Obviously the conduct if proven, goes a long way in terms of what may ultimately, be a sentence imposed by a court...
>
> PROSECUTOR THURSTON: The penalties are dramatically different for sexual intercourse, whereby it involves a 24-, 25- year mandatory minimum prison sentence.
>
> (R:146:13-16)

"An accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason" *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), at 302 (citations omitted). DeGroot's counsel specifically asked the trial court to read the presumption of innocence and the substantial elements of the offense and accusations and was denied. Had the trial court done so, there would have been no variance:

COUNSEL MENDEN: Um, Yes. I am asking the court to read it, read instructions for **the elements of the offenses as charged and then the burden of proof and presumption of innocence.**

JUDGE DREYFUS: All right. I would note that we essentially have -- at least a substantial portion of it I've already provided to the jurors in one form or another just in terms of not being -- not to research the case, not discuss the case, a number of other things. Miss Menden?

COUNSEL MENDEN: **I'll still ask the court to read the instruction.** I think there's -- You know, some of it's optional, so we discuss whether everything as far as like questions or transcripts needs to be gone through with you substantively, as well with the credibility of witnesses, definition of evidence. And **substantive instruction and the burden of proof we are asking for.**

JUDGE DREYFUS: Alright. Mr. Thurston?

PROSECUTOR THURSTON I take no position on this, Judge.

JUDGE DREYFUS: **I'm going to specifically deny your request**, Ms. Menden, and certainly, you're free to argue that part of -- at least to raise the issue in terms of opening statements. . . .

(R:143:117-118)

The trial court's refusal to honor the requested instruction on the substantial instruction of the allegations and the presumption of innocence denied DeGroot his right to Due Process. *See Taylor v. Kentucky*, 436 U.S. 478, 98 S.Ct. 1930 (1978) ("trial court's failure to give requested instruction on presumption of innocence resulted in violation of defendant's right to fair trial."). This error removed the burden of proof from the State. After the testimony came in, the trial court expressed concern as to the multiplicitous charges and the ultimate punishment the court would impose if the surprise allegation of using liquid drugs to facilitate repeated anal intercourse with a child was proven:

PROSECUTOR THURSTON: So it's just a stylistic -- I completely agree with your honor that it came in as contact and intercourse. And I know there's 2 counts...

JUDGE DREYFUS: Let me ask this. What are you-- **You have charged two separate counts occurring during the same time period. What are you alleging or defining each of the counts to be?**

PROSECUTOR THURSTON: Well...

JUDGE DREYFUS: We need to have some ability to define each count separate from the other, otherwise you just simply have, you know, two counts, during a given time period. There needs to be from my perspective, there needs to be a little more specificity, than just simply multiple counts of one thing.

PROSECUTOR THURSTON: So -- it's just a -- merely a stylistic thing. I don't feel strongly at all about it...

JUDGE DREYFUS: **Obviously the conduct if proven, goes a long way in terms of what may ultimately, be a sentence imposed by a court...**

PROSECUTOR THURSTON: The penalties are dramatically different for sexual intercourse, whereby it involves a **24-, 25- year mandatory minimum prison sentence.**

(R:146:13-16)

Later, during the deliberations, the jury sent a note to the judge expressing confusion over the allegations, stating:

JURY: Can you clarify for CASE NO.15CF909, why there are two counts of sexual contact, and what is the difference of each count?

JUDGE DREYFUS: No this will have to be determined by you as the jury

(R:65;66;67)

It is clear from the record that the jury was left to "infer the presumed fact" to reach a conclusion based on the response by the trial court. "[A] permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved." *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965 (1985), at 314. The Wisconsin Court of Appeals erroneously claimed that the DeGroot did "not describe the notes' contents" listed above, despite them being listed word for word in DeGroot's brief and referenced again in DeGroot's reply brief. (WI-COA-Decision ¶24; Def.Br.43;Rep.Br.11). "[W]here the state courts plainly misapprehend or misstate the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim, that misapprehension can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable." *Sharp v. Rohling*, 793 F.3d, 1216 (10th Cir. 2015) *(quote source omitted).* The trial court's response to the jurors question violates the Due Process Clause of the Fourteenth Amendment as it had "the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime. *Id.*, 313. *See also Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319 (1977), at 215 (*citations omitted).* "[A]ny fact that increases penalty for crime beyond prescribed statutory maximum must be submitted to jury and proved beyond reasonable doubt" *Apprendi v. New Jersey*, 530 U.S. 466. Moreover, the jury must determine that fact unanimously. *See Ramos v. Louisiana*, 140 S.Ct. 1390 (2020) "[T]he Sixth Amendment right to jury trial, as incorporated against the States by way of the Fourteenth Amendment, requires a unanimous verdict to convict a defendant of a serious offense...." *Id.* Wisconsin has a mandatory minimum penalty of 25-years for "sexual

intercourse" allegations. See WIS.STAT.§ 939.616. Thus, pursuant to *Apprendi v. New Jersey,* the jury was required to unanimously find that intercourse had occurred without the alternate element of contact; notwithstanding the choice of the prosecutor charging under a different statute. Moreover, DeGroot needed to be fairly informed (before trial) that the allegation included the use of 'liquid drugs in a beaker' to facilitate the crime. (R:151:23; (Def.Br.39). This information is indisputably "material either to guilt [and] to punishment..." and must be disclosed in order for the defense to meaningfully prepare. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). The record reflects serious concerns about the allegations that came out during trial (R:146:13-16).

In the joining of two or more separate offenses, the Sixth Circuit requires as part of its test for duplicity "that the defendant is appropriately sentenced for the crime charged . . . ." *U.S. v. Alsobrook*, 620 F.2d 139, 142 (6th Cir. 1980). As demonstrated in the record above, that obviously did not happen in DeGroot's case. Both of the multiplicitous counts, and the punishment in connection therewith, were brought into question after the testimony. (Def.Br.32-34). In order to ensure a unanimous verdict, the specific "evidentiary fact" must be listed as element to one of the charges, as to serve as fair notice to the defense, even when the allegations are part of a "continuing series of violations." *See Richardson v. U.S.*, 526 U.S. 813, 119 S.Ct. 1707 (1999). That did not happen here and the jury notes clearly indicate confusion over the variance. As a result, DeGroot was prejudiced by the great likelihood that he was convicted on less than a unanimous jury verdict. (14CF1531:61) "[T]he Constitution itself limits a State's power to define crimes in ways that would permit juries to convict while disagreeing about means . . . ." *Id.*, 814 (*citations omitted*). The Ninth Circuit held this type of confusion to be plain error. *See U.S. v. Payseno*, 782 F.2d 832 (9th Cir. 1986). As noted above, the trial court judge simply refused to instruct the jury that they had to unanimously agree to a particular set of evidentiary facts . . . evidentiary facts that should have been listed as actual elements of the offense in the instructions. (R:65;66;67). *See Richardson v. U.S., supra*; *See also Apprendi,* 530 U.S. 466.

The 7th Circuit uses 4 prongs to determine if variance in allegations is prejudicial to a defendant; (1) the surprise to the defendant; (2) the possibility of subsequent prosecution for the same offense, (3) likelihood of jury confusion as to counts charged; and (4) likelihood of jury

confusion in general. *See U.S. v. Lindsey*, 602 F.2d 785 (7th Cir. 1979), at 787. The variance in DeGroot's case satisfies each one of these prongs. There is nothing preventing subsequent prosecutions within the timeframe, the jury was undisputedly confused over the counts, and the defense was taking by surprise by the testimonial evidence offered at trial:

> ATTORNEY MENDEN: I guess that I would point out **that the most unusual thing that was said during the trial, that I didn't anticipate at all, was this mention of the beaker and the gray liquid.** And it was something that was never mentioned before. I think that we talked about that. That wasn't reported to Muskego Police Department or **never discussed then came out in the trial.**

(R:151:23; *See also* Def.Br.39; R:65;66;67).

This allegation that came out at trial, the use of liquid drugs to facilitate repeated anal intercourse, was not appropriately stated in the charging document and is "materially different." *See U.S. v. Ford,* 872 F.2d 1231 (6th Cir. 1989), at 1234. The record conclusively establishes that the defense was taken by surprise at this information. DeGroot's case is in sharp contrast to a Sixth Circuit case where the court reversed the grant of habeas relief reasoning that "[t]he identity of the victim was clear. The nature of the crime was clear. The record demonstrates conclusively that Combs was neither surprised, mislead nor prejudiced in any way by the language of the indictment and statutes, or by the language in the verdict of the jury." *Combs v. State of Tenn.*, 530 F.2d 695 (6th Cir. 1976), at 699 (*citations omitted*). DeGroot's case illustrates that the defense was taken by surprise, and there was judicial concern over the allegations and punishment associated with it. (R:146:13-16). *See Ramos,* 140 S.Ct. 1390; *See also Apprendi*, 530 U.S. 466.

The surprise of these allegations deprived DeGroot of the right to meaningful adversarial testing of the State's case. The alleged beaker was not available for examination even though the mother of A.L. (J.P.) and her ex-girlfriend N.S., claimed to have seen, and possessed the beaker at their residence. (R:115-117). "[A] defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." *Crane v. Kentucky*, 476 U.S. 683, 106 S.Ct. 2142 (1986), at 2147 (*internal quotations and source omitted*); *See also Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555 (1995), at 421. Repeated sexual intercourse allegations that involved drugging are surely more likely to have forensic evidence associated with them. Because of the prosecution's failure to disclose this information, counsel was denied the ability to incorporate the lack-of-evidence to support such an allegation into Degroot's

strategy.[12] Moreover, there is nothing prohibiting the prosecution from charging DeGroot with more counts within the specified time-frame, allowing it to freely bypass the Double Jeopardy Protections of the Fifth Amendment. The jury notes are axiomatic in that the jurors were confused over the counts. *See U.S. v. Lindsey,* 602 F.2d 785 (7th Cir. 1979).

In opposition to fairness, the prosecution played on this variance in closing; blending the idea of the alleged possession of drug paraphernalia" (needles and beakers) crime, with "sexual assault" by showing the jury a photograph taken by police in a RAID of DeGroot's home after K.S. had made allegations. (Def.Br.38-39, 45). The photo of the beaker had nothing to do with A.L., his pretrial allegations, or the pretrial statements of the other prosecution witnesses. Moreover, this chemistry equipment wasn't found, or previously reported to be at the residence of the complainant A.L. It was found at DeGroot's home. The photograph served only to confuse the jury, and impermissibly bolster the credibility of the surprise beaker allegations of A.L., N.S., and J.P. The jury both heard about a beaker, and a saw a picture of a beaker, and as a result, was easily deceived though the erroneous link. (Rep.Br.16; R:144:88-91, 115). The failure of the prosecution to inform the defense of these details of the sexual assault allegations, still create "circumstances under which, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." (*internal quotations and source omitted*) *Lewis v. Zatecky*, 993 F.3d 994 (7th Cir. 2021). The jury wasn't properly instructed to the elements of the offense even after they inquired, (R:65,66,67; 14CF1531:61) and as a result, the nondisclosure, variance, and surprise violated DeGroot's due process rights, and substantially impaired his ability to present a defense. (R:151:23). *Berger v. U.S.*, 295 U.S. 78 (1935). The burden of proof was taken off of the state when the jury was forced to work through their confusion, and the variance of the allegations, to find that DeGroot had either contact, or intercourse without a proper instruction on the correct elements and specific "evidentiary facts." *State v. Eisch*, 96 Wis.2d 25, 291 N.W.2d 800 (1980). These specific evidentiary facts were required be in the jury instructions so that DeGroot would

[12] After DeGroot's sentencing, J.P and N.S. were instructed by the trial court to bring receipt evidence of A.L.'s psychologist bills, costs alleged to have been incurred as a result of this controversy, but they were unable to produce the evidence at the restitution hearing and DeGroot's restitution was set to zero.

be protected against Double Jeopardy. *Id.*, at 33. Notwithstanding variance, sexual intercourse, aggravated by the use of liquid sedatives, is still "material to guilt or punishment" pursuant to *Brady and Apprendi* in that there is a mandatory minimum associated with that allegations and the allegation was required to have been disclosed to the defense before trial in order for the defendant to have adequately prepared and presented a meaningful defense. *See* WIS.STAT. § 939.616; *Brady v. Maryland*, 373 U.S. 83; *Apprendi v. New Jersey*, 530 U.S. 466. "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, at 696. "Surprise can be as effective as secrecy in preventing effective cross-examination, in denying the opportunity for (defense) counsel to challenge the accuracy or materiality of evidence." *Smith v. Estelle*, 602 F.2d 694 (5th Cir. 1979), at 698 (*internal quotes and source omitted*).

The Wisconsin Court of Appeals unreasonably applied federal law when it failed to address DeGroot's argument. *Pro se* litigant's pleadings are to be construed liberally. *Erickson v. Pardus*, 551 U.S. 89, 127 S.Ct. 2197 (2007). No matter how vague, conclusory, or inartfully pleaded, courts must construe *pro se* pleadings liberally. *Burris v. United States*, 430 F.2d 399, 403 (7th Cir.1970), 402; *See also McCormick v. Butler*, 977 F.3d 521 (6th Cir. 2020) at 528; *Ward v. Jenkins*, 613 F.3d 692 (7th Cir. 2010). The Wisconsin Court of Appeals called DeGroot's arguments "speculative" and "conclusory" (*citing State v. Jackson*, 229 Wis.2d 328, 600 N.W.2d 39 (Ct. App. 1999)). In that case Jackson did not refute the officers' representation of the urinalysis in his briefing. Contrary to *Jackson*, DeGroot actually made an offer of proof that the phone evidence was false, and alleged it was misrepresented by the police and the prosecutor to the defense and the jury. The Court of Appeals also cited *State v. Pettit*, 171 Wis.2d 627, 492 N.W.2d 633 (Ct. App. 1992). In that case, *Pettit* violated a "host of appellate rules." (1) He didn't arrange his arguments in the "order of statement of of issues" (2) he didn't cite "[l]egal authority in support of these claims" and (3) he referred to "transcript[s]...not included as part of the record on appeal." *Id.*, at 646. In sharp contrast to *Pettit*, DeGroot's brief is properly arranged, and complies with the rules. He used with verbatim quotes that are properly cited to their location in the record, and substantial legal authority was included to support his claims. *Pettit* does not apply to DeGroot's case, and the state-courts' application of it is unreasonable. DeGroot's pleadings were to be construed liberally. *Erickson v. Pardus, supra.* This Court should conclude that DeGroot did not forfeit or waive this argument. The basic

rationale of DeGroot's arguments are "readily discernible." *Perruquet v. Briley*, 390 F.3d 505 (7th Cir. 2004), at 512. This Court should grant certiorari review, address this issue, and ultimately declare variance in this case to be fatal.

B. The Double Jeopardy Clause of the Fifth Amendment should bar retrial given prosecutorial and judicial misconduct.

The prosecutor repeatedly told the trial court the State wouldn't be using the CARE CENTER video, and the court did not need to review the video. (R:141:3;142:5). But during trial, the prosecutor introduced the video into evidence anyway, without playing it, inviting the jury to trust his view of the evidence. *See U.S. v. Young*, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), at 18-19 (*citations omitted*). Attorney Menden ineffectively objected without explaining why the prosecutor is not allowed testify to the authenticity of evidence. This was impermissible vouching and violated the advocate-witness rule. *See U.S. v. Prantil*, 764 F.2d 548 (9th Cir. 1985). The transcript reads:

> PROSECUTOR THURSTON: Okay, We'd tender 51 into evidence, Judge.
>
> JUDGE DREYFUS: Miss Menden, any objection?
>
> ATTORNEY MENDEN: Well, he's just showing him a disc, so --- I don't know how he can say that that is what he watched and be able to authenticate that for into evidence.
>
> PROSECUTOR THURSTON: **Well, I could assert as an officer of the court that's the CD that watched this morning and if there's further foundational issues we can address it...**
>
> JUDGE DREYFUS: At least at this point, it will be received for what it is.
>
> (14CF1531:144:102)

"[I]t is reasonably probable that the prosecutor acting as both advocate and witness misled the jury because of the likelihood that the prosecutor's credibility was enhanced by the prestige of his office." *Walker v. Davis*, 840 F.2d 834 (11th Cir. 1988), at 838. An attempt to blatantly create "foundational issues" by deliberately violating the law and attorney code of ethics, are "actions . . . to goad the [defendant] into requesting a mistrial. *State v. Lettice*, 221 Wis.2d 69, 585 N.W.2d 171 (Ct. App. 1998), at 81 (*citing Oregon v. Kennedy*, 102 S.Ct. 2083, at 673). Let it be noted that the prosecutor also 1) violated the sequestration order and witnesses were discussing proposed testimony; 2) played a crucial role in eliciting the undisclosed testimony of the beaker and perjured testimony of the breaking of the phone (R:144:88-91,115; 14CF1531:144:126-127) and 3) engaged in a closing argument that any reasonable jurist would conclude that he knew

was impermissible and justifying a mistrial request by the defense (R:149:15-40). Where the prosecutor's actions give rise to a motion for mistrial "in order to goad the [defendant] into requesting a mistrial," the Double Jeopardy Clause of the Fifth Amendment bars reprosecution. *Ibid.*

Likewise, where judicial comments goad the defense into a mistrial request or express a fear of acquittal and are accompanied by impropriety, retrial is also barred. *Id.*, 2088 (*citing United States v. Tateo*, 377 U.S. 463 (1964)). Here, Judge Dreyfus had passively invited the Defendant into a mistrial request by stating that the defense could likely ask for all the testimony to be struck the following day. (R:146:20). He also implied the ultimate resolution was retrial and tempted the jury to look up information on courthouse terminals by instructing them of their existence and specific value in containing a "great deal of information."

> JUDGE DREYFUS: In terms of the case, with **the ultimate resolution**, whether it may be with -- even to the point where it can **and does result in cases having to be retried...**
>
> JUDGE DREYFUS: There's a procedure to do that, in fact **we have terminals here in the courthouse where somebody can come and, you know look up a file, and they can and will contain a great deal of information. . . .**

(R:143:115)

The Seventh Circuit has previously spoke of Judge Dreyfus as "obviously realiz[ing], the process of jury selection was being poisoned." *Oswald v. Bertrand*, 374 F.3d 475 (7th Cir. 2004), at 480. But here, unlike *Oswald's* case, Judge Dreyfus not only attempted to the poison the jury with prejudice by tempting them to look up information on the terminals, but he stated on the record he was concerned that if he were to reiterate the presumption of innocence, and explain to the jury the substantial elements of the offenses, that the charges would be dismissed, and the State would lose a conviction:

> JUDGE DREYFUS: My concern though, is that we **provide essentially elements of those offenses** and we need to do so with regard to all 6 of them which **as a result of this one, more of the charges are -- simply are dismissed, and at the close the -- of the State's case . . .**

(R:143:118)

An action to avoid an acquittal came subsequent to this expression where Judge Dreyfus removed admitted exculpatory evidence from jury review. The defense was taken by surprise at the undisclosed evidence and allegations, but counsel at that time still attempted to prove fabrication by introducing Detective Sheridan's police report to show the jury that there was

never a mention of a beaker or liquid drugs in any pretrial allegations. (R:145:35-36); conveying to the jury that if the allegation even had the potential to be true, it would have been reported. (R:151:23; (Def.Br.39)). The Detective's police report, which was admitted into evidence, was requested to be sent back to the jury for review. Judge Dreyfus however, decided to interfere with the jury's examination of this exculpatory evidence, and refused to send the report back for jury review. His actions deprived DeGroot of fundamental fairness and the right to present a defense - even an incomplete one. The record reads:

> JUDGE DREYFUS: **I know there's been a request for -- Let me just see. What's called police report.** Certainly they've been referenced. Normal procedure we don't provide copies of police report as part of the case.
>
> (R:146:12)
>
> JUDGE DREYFUS: With regard to any of the other exhibits, if they've requested by the Jury, any position of any of the them being sent back? **There were a couple of police reports we've not -- --**
>
> (R:149:62)

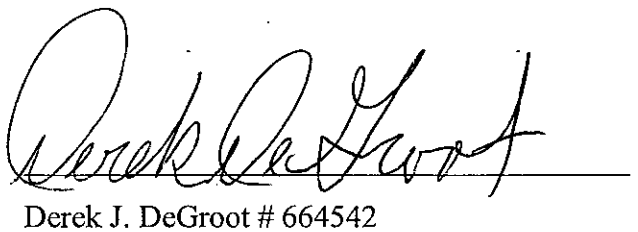
The above demonstrates that the judge's actions were "seeded in a state of mind [] which intend[ed] to frustrate the defendant's valued right to but one trial." *State v. Harrell*, 85 Wis.2d 331, 270 N.W.2d 428 (Ct. App. 1979), at 335-336. The record clearly shows that the judge had a concern that charges against DeGroot would be dismissed. (R:143:118). *See U.S. v. Tateo*, 377 U.S. 463, at FN3. "[T]he Double Jeopardy Clause bars retrials where "bad-faith conduct by judge or prosecutor," ...threatens the '(h)arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant . . . . " *U.S. v. Dinitz*, 424 U.S. 600, 96 S.Ct. 1075 (1976) (*internal quote sources omitted*). "[A] power in government to subject the individual to repeated prosecutions for the same offense would cut deeply into the framework of procedural protections which the Constitution establishes for the conduct of a criminal trial." *U.S. v. Jorn*, 400 U.S. 470, 91 S.Ct. 547 (1971), at 479. "[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 78 S.Ct. 221 (1957), at 187-188. The trial court's *sua sponte* decision to prevent jury review of admitted exculpatory evidence that was offered to

impeach the surprise allegations violated DeGroot's right to a present a defense, and frustrated his right to a single fair trial. *Nevada v. Jackson*, 569 U.S. 505 (2013), at 509. The record demonstrates the judge had excluded the admitted evidence with the pre-existing fear of acquittal. (R:143:118). As a result, DeGroot should have his conviction reversed and be protected from further prosecution. *See U.S. v. Tateo*, 377 U.S. 463 (1964); *See also State v. Harrell*, 85 Wis.2d 331, 270 N.W.2d 428 (Ct. App. 1978), at 335-336 (same).

CONCLUSION

Our legal system depends on the principle of *stare decisis*, and a ruling from this Court is necessary to ensure that the lower courts follow this Court's precedential decisions and do not create exceptions to those decisions that this Court has not announced. A declaration must be made to the importance of a defendant's Sixth Amendment right to represent himself at any stage of the proceeding, especially where a mid-trial conflict of interest manifests between him and his attorney. Cumulative error analysis should be made mandatory regarding ineffective assistance of counsel claims. This Court should grant certiorari review and once again condemn the use of surprise allegations, and false evidence to obtain a tainted conviction; and clarify what remedy shall be provided where a judge, who asserts his fear of dismissal on the record, removes exculpatory evidence from jury review to deliberately prejudice a criminal defendant.

Dated this 27th of May, 2022



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