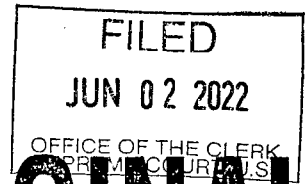


21-8132
No. _____



ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

James E. Sanicki, Jr. — PETITIONER
(Your Name)

vs.

Chris S. Buesgen — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The United States Court Of Appeals For The Seventh Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

James E. Sanicki, Jr. (Doc# 236420)
(Your Name)

Stanley Correctional Institution, 100 Corrections Dr.
(Address)

Stanley, Wisconsin 54768-6500
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

I. Whether errors in jury selection resulted in seating a biased juror, or deprivation of the mandated number of peremptory challenges should have been reviewed under the due process standard that applied when appeal should have been brought and decided, said standard requiring the remedy of reversal.

- The U.S. District Court for the Eastern District of Wisconsin answered: No, and declined to issue a COA.

- The United States Court of Appeals for the Seventh Circuit agreed.

II. Whether petitioner received ineffective assistance of counsel in violation of Strickland v. Washington, 466 U.S. 668 (1984) when counsel failed to request a necessary jury instruction to clarify the crime charged, or when counsel failed to interview or call a witness who would have testified to facts that were otherwise missing and would have provided crucial evidence supporting defense theory.

- The U.S. District Court for the Eastern District of Wisconsin answered: No, and declined to issue a COA.

- The United States Court of Appeals for the Seventh Circuit agreed.

LIST OF PARTIES

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

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

- (Note: Marinette County Circuit Court = MCCC; Wisconsin Court of Appeals = WCA;
ECF Wisconsin Supreme Court = WSC)
- 9-1 • State v. James E. Sanicki, Jr.; No. 1991-CF-105; MCCC; Judgment of Conviction 12/13/1991.
- 1-3 • State v. James E. Sanicki, Jr.; No. XX-14430-CR; WCA; Order dated 12/29/2000.
- State v. James E. Sanicki, Jr.; No. 1991-CF-105; MCCC; New Evidence Motion Proceedings; Motion denied 03/12/2001.
 - State v. James E. Sanicki, Jr.; No. 01-0931-CR; WCA; Order dated 06/07/2001.
 - State v. James E. Sanicki, Jr.; No. 01-0931-CR; WCA; Order dated 08/23/2001.
- 1-3 • State v. James E. Sanicki, Jr.; No. 01-0931-CR; WCA; Decision dated 04/09/2002.
- 1-3 • State v. James E. Sanicki, Jr.; No. 01-0931-CR; WSC; Order dated 06/11/2002.
- 1-3 • State v. James E. Sanicki, Jr.; No. 04-2966-W; WCA; Opinion & Order dated 03/24/2005.
- 1-3 • State v. James E. Sanicki, Jr.; No. 1991-CF-105; MCCC; Machner Hearing Order 01/05/2009.
- 1-3 • State v. James E. Sanicki, Jr.; No. 2009AP293; WCA; Order dated 02/09/2010.
- 1-3 • State v. James E. Sanicki, Jr.; No. 1991-CF-105; MCCC; Memorandum Decision 10/06/2010.
- 1-3 • State v. James E. Sanicki, Jr.; No. 1991-CF-105; MCCC; Memorandum Decision 01/31/2011.
- 9-5 • State v. James E. Sanicki, Jr.; No. 2011AP373; WCA; Decision dated 05/09/2012.
- 9-7 • State v. James E. Sanicki, Jr.; No. 2011AP373; WSC; Order dated 09/27/2012.
- 31 • James E. Sanicki, Jr. v. Jeffrey Pugh, Reed Richardson; No. 14-cv-0005-BHL; U.S. District Court for the Eastern District of Wisconsin; Judgment dated 09/01/2021.
- James E. Sanicki, Jr. v. Chris S. Buesgen; No. 21-2787; U.S. Court of Appeals for the Seventh Circuit; Order dated 03/04/2022.

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

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

OPINIONS BELOW

☐ For cases from **federal courts**:

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

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

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

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

☐ For cases from **state courts**:

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

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 4th, 2022.

☒ No petition for rehearing was timely filed in my case.

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

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

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

☐ For cases from **state courts**:

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

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides in relevant part: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In the last hour of May 27 or the first hour of May 28, 1991, in the city of Niagara, Wisconsin, in Marinette County, Michael Smith (Smith) was shot and killed in an apartment shared by James E. Sanicki, Jr. (petitioner) and James D. Behnke (Behnke). Left in the apartment until dawn (petitioner and Behnke spent the remainder of the night at a friend's house), Smith's body was transported to densely wooded County Forest land in Niagara's Township the morning of May 28 and buried in a shallow grave.

On the morning of July 26, 1991, Behnke contacted police, tearfully confessed to multiple police, verbally, in writing, and on videotape re-enacting how he'd killed Smith, and he led police to the burial site. Later that day, Behnke's parents told police that, just prior to Behnke's surrender, he had told them that he was going to confess but that petitioner had actually committed the murder. Police returned to the jail to question Behnke (who by then had consulted a lawyer) further, and hearing that his parents had advised police of his claim to them, Behnke now claimed that his prior confessions to police were true as to his actions, but that petitioner had been with him during the commission of the murder. In the early evening

of July 26, 1991, petitioner was arrested, declined to give a statement to police, and requested legal counsel.

Over the ensuing months, Behnke's brother, as well as the couple at whose house petitioner and Behnke had stayed the night of Smith's murder, testified in pretrial proceedings that petitioner had confessed to them (the couple were granted immunity for their testimony), and Behnke's statements evolved, to the increasing detriment of petitioner. On December 3, 1991, a week before Behnke's trial was to begin, he entered into a plea bargain in which he agreed to testify against petitioner. Behnke pled guilty to First Degree Intentional Homicide as Party To A Crime (PTAC) and was sentenced to life in prison with parole eligibility in 13½ years (the minimum under Wisconsin law). Behnke's claim now was that petitioner had taken the lead and was the primary actor in the murder of Smith, including having fired the fatal shot.

Petitioner's jury trial ran from December 9th to December 13th, 1991 (1991-CF-105, Marinette County Cir. Ct.). (ECF 9-8 through 9-10.) Behnke testified that petitioner was the shooter and that his confessions to police on the day of his surrender were not true. (ECF 9-8 at 120-255; 9-10 at 254-264.) Behnke's parents (ECF 9-9 at 244-262), brother (ECF 9-9 at 218-243), and friends (ECF 9-9 at

2-154; 9-10 at 240-253) testified. Petitioner testified that he was asleep in his bedroom when Behnke killed Smith; that petitioner had no part in the planning or execution of the murder; that upon waking at the sound of the gunshot and discovering what Behnke had done, he had advised Behnke to bury Smith's body and cover up the crime, but had not accompanied Behnke the following morning for the clean-up and burial, having Behnke drop him at his logging work site instead; and that while petitioner had told others what Behnke had done, petitioner had not claimed or confessed any actual part in the murder of Smith. (ECF 9-10 at 160-234.)

At the jury instruction conference, out of the jury's presence, the court ruled that the form of the verdict would not include the Party To A Crime language from the Information that had been read to the jury during voir dire. (ECF 9-10 at 265-270; 9-8 at 8, 23-24.)

The jury found petitioner guilty of First Degree Intentional Homicide on December 13, 1991. (ECF 9-10 at 376.) The jury included juror Tutaj, who had expressed her unusually low threshold for actual, video, or photographic gory or graphic material and had been assured by the prosecutor that she would not be seeing any video or photographs, only hearing the oral

descriptions in testimony. (ECF 9-8 at 20-21.) The evidence introduced at trial and sent to the jury room included bloody items and photographs of the victim wrapped in a sheet stained with blood and body fluids (photos taken during autopsy). (ECF 9-10 at 275-277.)

On December 18, 1991, petitioner was sentenced to life in prison with his parole eligibility date set by the court at January 1, 2075. The court's comments emphasized the heinous nature of the crime and the lead role upon which petitioner's conviction was based. (ECF 9-11 at 11-13.)

Petitioner timely filed a Notice of Intent to Pursue Post-Conviction Relief. The first appointed post-conviction counsel abandoned the case without filing anything. (ECF 1-3 at 27.) The counsel appointed to replace him filed a postconviction motion raising only a new evidence issue focused on Behnke's recantation prior to his 1992 suicide in prison, but that counsel failed to follow through on that motion or supplement it with corroboration, other viable witnesses and issues, and then he too abandoned the case without notice. (ECF 1-3 at 27.)

Petitioner's family pooled funds to retain private counsel, and an odyssey through the Wisconsin courts began, as is

illustrated by the list of related cases included in this petition. Counsel fleshed out the new evidence motion and attempted to supplement it with corroboration, more new witnesses to Behnke's previously unknown confessions, and several issues prior counsel had failed to identify and raise, including those brought in this petition, seeking to resurrect the direct appeal rights petitioner had not been given the opportunity to exercise. (ECF 1-3 at 3-28.)

On May 14, 2008, a Wis. Stats. § 974.06 motion, a brief in support, and supporting documents were filed in the Marinette County Circuit Court raising issues, including those brought in this petition and the ineffective assistance of prior post-conviction counsel. On December 11, 2008, the court conducted a telephonic hearing in which it notified all parties that he was summarily dismissing the motion, however, he would hold an evidentiary hearing to facilitate completion of the record. The evidentiary hearing was held on December 19, 2008, and the Order following the hearing was dated January 5, 2009. (ECF 1-3 at 15.) Petitioner appealed that ruling to the Wisconsin Court of Appeals. In a decision dated February 9, 2010, the WCA remanded the matter to the trial court to consider

whether prior post-conviction counsel had been ineffective and, if so, to determine the appropriate remedy. (ECF 1-3 at 16-18.) In a written order dated October 6, 2010, the trial court held that prior post-conviction counsel had provided ineffective assistance of counsel which prejudiced petitioner's defense, and as a remedy, the court reinstated petitioner's direct appeal rights. (ECF 1-3 at 28.)

Petitioner's counsel filed a 974.02 Motion for Post-Conviction Relief, raising issues including those brought in this petition, in Marinette County Circuit Court on December 2, 2010, No. 1991-CF-105. The question of whether errors in jury selection resulted in seating a biased juror was raised on pages 4-10 of said motion, presented the federal question by relying on Irvin v. Dowd, 366 U.S. 717, 722 (1961), by relying on state cases that apply constitutional analysis to similar facts, by framing the claims in terms so particular as to call to mind a particular constitutional right, and by alleging a pattern of facts within the mainstream of constitutional litigation. The right to due process and a fair trial before impartial jurors is well-established. The question of whether deprivation of the mandated number of peremptory challenges should have been reviewed under

the due process standard that applied when appeal should have been brought and decided, said standard requiring the remedy of reversal, was raised on pages 7-10 of the motion, and the federal question was fairly presented by relying on Ross v. Oklahoma, 487 U.S. 81, 89 (1988), the holding that would have applied if petitioner's appeal had not been delayed several years due to ineffective assistance of post-conviction counsel, and by relying on state cases that likewise engaged in analysis of the automatic reversal standard in place when appeal should have been brought. The due process and fundamental fairness standards establish a well-known tenet that a defendant, or in this case, an appellant, should not be held to a negative outcome brought about solely due to counsel's failure to provide effective assistance. The question of whether petitioner received ineffective assistance of counsel when counsel failed to request a necessary jury instruction to clarify the crime charged was raised on pages 10-15 of the motion, and the federal question was fairly presented by relying on Strickland v. Washington, 466 U.S. 668 (1984) for the ineffective assistance standard and State v. Marcum, 480 N.W. 2d 545, 551 (WCA 1992), a state

case that applies constitutional analysis to similar facts, to demonstrate the probable ambiguity of the jury's understanding of the charge and the due process issue implicated by such a situation. The question of whether petitioner received ineffective assistance of counsel when counsel failed to interview and call Matthew Geldmeyer as a witness for the defense was raised on pages 10-11 and 17-18, and the federal question was fairly presented by relying on Strickland v. Washington for the ineffective assistance standard, and by alleging a pattern of facts within the mainstream of constitutional litigation regarding the rights to effective assistance of counsel to obtain witnesses in one's favor in order to assure due process of law and the fair trial guaranteed by the 6th and 14th amendments. In a Memorandum Decision dated January 31, 2011, the court denied the motion. (ECF 1-3 at 29-37.)

An appeal of that denial was filed in the Wisconsin Court of Appeals on June 2, 2011 (No. 2011AP373). The question regarding a biased juror was raised on pages 6-10 of the Brief of Appellant and on pages 2-3 of the Reply Brief of Appellant. The federal question was fairly presented in those briefs using the same citations and arguments as were relied

upon in the 974.02 motion in circuit court, referenced above. The question of whether deprivation of the mandated number of peremptory challenges required a due process standard of review and reversal as a remedy was raised on pages 10-13 of the Brief of Appellant and on pages 1-3 of the Reply Brief of Appellant, and the federal question was fairly presented in those briefs using the citations and arguments as were relied upon in the 974.02 motion in circuit court, referenced above. The question of whether petitioner received ineffective assistance when counsel failed to request a necessary clarifying instruction was raised on pages 14-19 of the Brief of Appellant, and the federal question was fairly presented in that brief using the same citations and arguments as were relied upon in the 974.02 motion in circuit court, referenced above. The question of whether petitioner received ineffective assistance of counsel when counsel failed to interview and call Matthew Geldmeyer as a witness for the defense was raised on pages 21-22 of the Brief of Appellant, and the federal question was fairly presented in that brief using the same citations and arguments as were relied upon in the 974.02 motion in circuit court,

referenced above. That appeal was denied by the WCA in a decision dated May 9, 2012. (ECF 1-3 at 38-51).

A Petition for Review was filed in the Wisconsin Supreme Court on June 6, 2012. (No. 2011AP373). The question regarding a biased juror was raised on pages 2-4 of that petition, as was the question regarding deprivation of the mandated number of peremptories, and the federal questions for each was fairly presented in substantially the same manner as in the courts below. Likewise, the questions regarding ineffective assistance of counsel: The failure to request a necessary clarifying instruction was raised on pages 4-6 of the petition; the failure to interview and call Matthew Geldmeyer as a witness for the defense was raised on pages 4, 7, and the federal questions for each of those were fairly presented in substantially the same manner as in the courts below. On September 27, 2012, the Wisconsin Supreme Court denied review (ECF 1-3 at 52).

Petitioner filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on December 18, 2013 in the U.S. District Court for the Eastern District of Wisconsin. (ECF 1.) Petitioner filed a Brief in Support on November 4, 2016,

(ECF 16) and a Reply Brief in Support on March 24, 2017.

(ECF 22.) Those filings continued to raise the questions presented in this Petition for Writ of Certiorari and the fairly present the federal questions related to each one. The order denying that habeas petition and declining to issue a certificate of appealability was dated September 1, 2021. (ECF 30 ¶31.)

Petitioner filed a Notice of Appeal and Application for a Certificate of Appealability in the U.S. Court of Appeals for the Seventh Circuit on October 12th, 2021 (No. 21-2787), pressing the questions raised in this petition and fairly presenting the federal questions. The Seventh Circuit Court of Appeals, in an Order dated March 4, 2022, denied petitioner's request for a certificate of appealability, finding no substantial showing of the denial of a constitutional right.

REASONS FOR GRANTING THE PETITION

After reviewing the district court's order denying petition for writ of habeas corpus and the record on appeal and finding no substantial showing of the denial of a constitutional right, the Seventh Circuit denied petitioner's request for a certificate of appealability.

Petitioner respectfully asserts that the contentions and citations to filings below and case law contained in this petition will show that decisions below have been based on unreasonable determinations of facts in light of the evidence presented and have conflicted with relevant decisions of this Court on important federal questions. The questions deal with the integrity of trial processes and the fundamental demands of fairness guaranteed by the 6th and 14th amendments, important issues for anyone whose life and liberty may depend on a fair trial to have their actual innocence defended effectively, and compelling reasons for granting certiorari.

I. Whether errors in jury selection resulted in seating a biased juror, or deprivation of the mandated number of peremptory challenges should have been reviewed under the due process standard that applied when appeal should have been brought and decided, said standard requiring the remedy of automatic reversal.

A. Regarding voir dire of juror Tutaj

Agreeing with the Wisconsin Court of Appeals (hereinafter, WCA)

conclusion that the record failed to show juror bias, the district court fails to examine or recognize the unreasonable determination of facts that was used to arrive at that conclusion regarding juror Tutaj. (ECF 30 at 5-7.) In addition to referring this Court to the facts and law supporting the claims related to juror Tutaj in petitioner's Writ of Habeas Corpus (ECF 1 at 6-7), his Brief in Support (ECF 16 at 9-15), and his Reply Brief (ECF 22 at 3-7), petitioner will address the relevant portions of the district court's order denying petition for writ of habeas corpus (ECF 30 at 5-7), highlighting the unreasonable determinations of the facts and the parts that reasonable jurists could debate, as follows:

The cases and standards cited by the district court (ECF 30 at 6-7) define the parameters of an adequate voir dire well, but the record does not show "that the trial judge engaged in a reasonable voir dire process" (ECF 30 at 6) regarding juror Tutaj. Tutaj's confirmation that she could render a fair and impartial verdict was completely predicated on the false premise that no gory or graphic evidence or photos would be introduced; only oral testimony. Not only did the so-called follow-up fail to address the obvious subject raised by Tutaj's example of her heightened sensitivity to and low personal threshold for gory or graphic material; it also subverted and precluded the necessary process of addressing that key subject. While petitioner argues that it can be clearly deduced and shown that Tutaj was unqualified and should

have been removed by simply comparing her example of what was beyond her threshold for gory and graphic with the actual physical and photographic evidence that was introduced at trial (a blood-stained couch, slug fragments and fiber wadding removed during autopsy, and photos of the victim wrapped in a sheet stained with blood and body fluids), petitioner also argues that the only other reasonable determination of the facts in the record would be to find that this process fell far short of being "an adequate voir dire to identify unqualified jurors" which is "part of the guarantee of a defendant's right to an impartial jury" (paraphrasing the district court's citation from Morgan v. Illinois, 504 U.S. 719, at 729) (ECF 30 at 6). Although Skilling v. United States, 561 U.S. 358, 386 (2010) provides the district court with broad-brush language emphasizing the trial court's substantial discretion in voir dire, reasonable jurists could debate whether there was an unreasonable determination of facts and whether petitioner's citations from the Supreme Court's Remmer v. U.S. (ECF 16 at 11), Smith v. Phillips (ECF 16 at 11, 12, 14), Peters v. Kiff (ECF 16 at 15), Aldridge v. U.S. (ECF 22 at 5), from the 7th Circuit's Oswald v. Bertrand (ECF 16 at 10-11, 15), U.S. v. Lewin (ECF 16 at 12), Thompson v. Alzheimer & Gray (ECF 16 at 12-13), and from the 4th Circuit's U.S. v. Rucker (ECF 16 at 11, 12) apply more pointedly to petitioner's claims and would support the granting of the petition.

Juror Tutaj clearly stated her low threshold for and negative predisposition toward gory or graphic evidence or photos. Telling her that no such evidence or photos would be introduced was false, and the resultant failure to remove her from the jury deprived petitioner of his right to an impartial jury. "To be impartial, a juror must be indifferent and capable of basing his verdict upon the evidence developed at trial." Irvin v. Dowd, 366 U.S. 717, 722 (1961).

B. Regarding deprivation of the mandated number of peremptory challenges

The district court relies on Rivera v. Illinois, a current Supreme Court holding, to dispose of this claim. (ECF 30 at 7.) But petitioner only presses forward here with the aspect of his claim that has always asserted that he is entitled to the due process standard of review and automatic reversal as a remedy, because that was in fact the standard and the remedy in both Wisconsin's courts and the U.S. Supreme Court's holdings at the time petitioner's first appeal of right should have been brought and decided, and it is undisputed that the ineffective assistance of postconviction counsel was the reason for the delay. (ECF 1-2 at 2), (ECF 16 at 15-22), (ECF 22 at 7-8.) Had petitioner's appeal been timely pursued by competent counsel, automatic reversal would have been granted, consistent

with Swain v. Alabama, 380 U.S. 202 (1965) at 219: "The denial or impairment of the right is reversible error without a showing of prejudice"; and Ross v. Oklahoma, 487 U.S. 81 (1988) at 89: "the 'right' to peremptory challenge is 'denied or impaired' only if the defendant does not receive that which state law provides."

Reasonable jurists could debate the fundamental fairness of holding petitioner to a standard of review that would not have been applied to his case if two consecutive appointed postconviction counsels' ineffectiveness had not delayed the bringing of his appeal.

The standard of review for the denial or impairment of the right to peremptory challenges contemporaneous with the period of time in which petitioner's first appeal of right should have been completed, filed, and decided (at least seven years after conviction) was a due process standard with an automatic reversal remedy. As such, petitioner's due process rights were violated and reversal is the proper remedy.

II. Whether petitioner received ineffective assistance of counsel in violation of Strickland v. Washington, 466 U.S. 668 (1984) when counsel failed to request a necessary jury instruction to clarify the crime charged, or when counsel failed to interview and call a witness who would have testified to facts that were otherwise missing and would have provided crucial evidence supporting defense theory.

A. Regarding counsel's failure to request a necessary jury

instruction to clarify the crime charged.

Recognizing the district court's finding that petitioner failed to present his jury instructions claim as a separate claim in state court, (ECF 30 at 8-10), petitioner humbly begs this Court to allow him to refer to that direct claim for the foundation it provides for this ineffective assistance claim. In that context, petitioner refers this Court to (ECF 1 at 7), (ECF 1-2 at 1-3), (ECF 16 at 22-28), (ECF 22 at 8-10). Primarily, of course, petitioner refers this Court to his ineffective assistance claims on this subject in (ECF 1 at 8), (ECF 1-2 at 4), (ECF 16 at 30-31), (ECF 22 at 10-13). Petitioner addresses the relevant parts of the district court's order (ECF 30 at 8-12), highlighting the unreasonable determinations of the facts and the parts reasonable jurists could debate, as follows:

Reasoning that, "the chance that the jury recalled the PTAC language in the Information from five days earlier was virtually nonexistent", the WCA made a patently unreasonable determination of the facts in light of the evidence presented, and the district court's acceptance and adoption of that determination (ECF 30 at 12) is equally unreasonable.

The charge, including PTAC, was read to the jury during voir dire (ECF 9-8 at 8), and a pointed exchange between the prosecutor and jurors followed, during which the jurors'

anecdotal understanding of PTAC liability was confirmed. (ECF 9-8 at 23-24.) This was not a peripheral matter or minor point of law. Rather, it was the definition of the parameters of the very charge it was going to be the jury's duty to weigh the evidence against. It defies reason to suggest that the jurors simply forgot this central focus of their duty over the course of the ensuing four days of trial.

Further, the WCA and the district court unreasonably determine the facts by failing to acknowledge that the way the charge was read to and discussed with the jury during voir dire left a clear impression that PTAC was an inextricable part of the charge, as the charge was summarized thusly: "This charge is commonly referred to as first degree intentional homicide" (ECF 9-8 at 8), and the prosecutor made this point: "You all understand that? Is there anybody who does not? There's no one here that believes the only way you can be guilty of murder is if you actually did the Killing?" (ECF 9-8 at 23-24.)

Petitioner reiterates and stresses the foregoing points because there can only be a reasonable application of federal law if there is a reasonable determination of the underlying facts. Based on this record, the only reasonable determination of the facts would be to conclude that the jury believed

that PTAC was part of the charge and did not understand there was even a possibility that PTAC liability could be removed from the charge and from their consideration.

In light of that reasonable determination of the facts, the basic question is whether the mere omission of the PTAC wording from the final charge to the jury (ECF 9-10 at 358) was sufficient to alert the jury to the removal of PTAC liability as an avenue to conviction and, if not, was counsel ineffective for failing to request a clarifying question to that effect?

The district court's finding that defense counsel's comments in closing arguments provided clarification fails to take into consideration the trial court's jury instructions that advised the jury: "Remarks of the attorneys are not evidence", and, "their arguments and opinions are not evidence." (ECF 9-10 at 364, 365.) Only the trial court himself could have effectively conveyed the necessary clarifying instruction to the jury to ensure the soundness of the trial mechanism and the verdict. Competent counsel would have recognized and requested such an instruction based on the circumstances of this trial.

The district court's citation of McAlister v. Thurmer, (citing Estelle) (ECF 30 at 10) states the proper question to ask regarding claims of this sort, and in petitioner's trial, the

absence of the necessary clarifying instruction "so infected the entire trial that the resulting conviction violates due process." The sufficiency of the evidence is irrelevant if the jury is not even weighing the right question, so the district court's reference to the prosecution's "ample evidence that Sanicki pulled the trigger" means nothing if the jury is not viewing that evidence through the lens the trial court has determined to be appropriate in this case. From this record, it is highly probable that some or all of the jurors believed it was not necessary to answer the "triggerman" question, and therefore never asked it, instead relying on a vague PTAC liability standard that the trial court had found to be completely inappropriate. Reasonable jurists could debate whether counsel's failure to request a clarifying instruction was ineffective assistance that allowed a fundamental defect in the trial mechanism.

The district court's analysis correctly states that "eliminating the possibility of 'party to a crime' liability was a strategic win for the defense." (ECF 30 at 10.) But counsel's failure to request the clarifying instruction necessary to convey that elimination to the jury effectively gutted that win. That was deficient performance. The resulting prejudice was the probability that the jury's

guilty verdict was based on a charge including parameters that no longer applied, violating petitioner's rights to a fair trial and due process guaranteed by the 6th and 14th amendments. If the jury was not weighing the proper charge, they could not deliver a reliable, valid verdict. Middleton v. McNeil, 541 U.S. 433 (S.Ct. 2004), at 437:

If the charge as a whole is ambiguous, the question is whether there is a "reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." Estelle v. McGuire, 502 U.S. 62, 72 (S.Ct. 1991) (quoting Boyd v. California, 494 U.S. 370, at 380 (S.Ct. 1990)).

Henderson v. Kibbe, 431 U.S. 145 (S.Ct. 1977) at 154:

An appraisal of the significance of an error in the instructions to the jury requires a comparison of the instructions which were actually given with those that should have been given... The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process", Cupp v. Naughten, 414 U.S. 141, 147.

For the duration of petitioner's trial, the jury's only description of the crime charged was the one including PTAC liability which was read to them and discussed with them during voir dire. Competent counsel would have understood that the mere omission of six words and one number ("as a party to the crime"... "939.05") was insufficient medicine in the final instructions to the jury to remove that infection.

B. Regarding counsel's failure to interview or call a witness crucial to the defense

The district court's rejection of this claim adopts the WCA's

unreasonable determination that Matthew Geldmeyer's testimony would have been merely cumulative, and then makes the puzzling assertion, "But Sanicki does not explain how this additional, cumulative testimony would have made a difference." (ECF 30 at 13) Petitioner respectfully submits to this Court that thorough explanations of how Geldmeyer's testimony was not merely cumulative and how it would have made a significant difference in the trial were made in (ECF 1-2 at 4-6), (ECF 16 at 31-33), (ECF 22 at 14-16). While the content of Behnke's confession to Geldmeyer is important and material (Behnke confessing sole responsibility for the murder), it is the timing of the confession and the motivation behind it that make Geldmeyer's testimony a revelatory, vital "missing piece" for petitioner's defense theory.

At trial, the prosecution very successfully hammered in a narrative that defined Behnke's original confessions to police (made when he turned himself in two months after the murder), in which he admitted sole responsibility, as a short-lived, spur-of-the-moment attempt on the day of his arrest to "take the rap for his friend Jamie Sanicki." (ECF 9-8 at 66). On six of the 21 pages of opening statements (ECF 9-8 at 60, 64, 65, 66, 68, 74), and on six of the 31 pages of closing arguments (ECF 9-10 at 289, 294, 295, 296, 352, 353), the prosecution hammered in this excuse for Behnke's supposedly "false" confessions. Undoubtedly,

this was convincing for the jury and highly detrimental to petitioner's defense, which claimed Behnke's initial confessions were true and that petitioner's only statements about the matter were descriptions to others about what Behnke had done, and that petitioner himself was asleep in his bedroom at the time Behnke killed Michael Smith.

1 The testimony of Geldmeyer would have provided crucial support for the defense, revealing that Behnke's initial confessions to police were actually consistent with the truth he had remorsefully been confiding to friends like Geldmeyer for several weeks, and not a lie he had come up with on the day of his arrest to protect or take the rap for someone else's crime. Geldmeyer's testimony thus would have bolstered the defense contention that Behnke's lies began when he first claimed petitioner was part of the murder plot, and continued as those claims evolved, until Behnke's final version in exchange for a plea bargain placed the bulk of the blame and the shooting itself on petitioner. And in addition to giving the defense crucial evidence that was otherwise missing and unknown, Geldmeyer's testimony undermines what the prosecution clearly deemed to be a foundational aspect of their theory—the short-lived nature of Behnke's initial confessions of sole responsibility supporting their theory that those were last-minute fabrications.

The prosecution spent all that time belaboring that point in opening

and closing arguments because they knew it was a significant point. It is even more significant that Geldmeyer's testimony would have shown that point to be false. No other evidence available at trial could do that. It is unique and powerful. It is not cumulative. Declaring it so is an unreasonable determination.

Counsel's failure to interview and call Geldmeyer to testify was deficient performance, and in a "swearing match" such as this case, that failure prejudiced petitioner, as Geldmeyer's testimony would have given petitioner a reasonable chance of being acquitted. Stanley v. Bartley, 465 F.3d 810 (7th Cir. 2006) at 814:

When a defendant's lawyer has failed to interview key actual or potential witnesses, as in this case, and in postconviction proceedings the witnesses give testimony that the defendant contends a competent lawyer could have elicited... and could have used effectively at trial, two questions arise. The first is whether they would have told the lawyer the same thing before trial, and the second is whether, if they had, the defendant would have had a reasonable chance of being acquitted.

Counsel's failure amounts to ineffective assistance of counsel in violation of the standards enunciated in Strickland v. Washington, 466 U.S. 668 (1984).

Proper Assertion of Federal Claims

It is petitioner's belief and contention that the claims contained in this petition for writ of certiorari have properly

asserted and fairly presented a federal claim at each level of the state courts, in conformity with the standards set forth in McDowell v. Lemke, 737 F.3d 476, 482 (7th Cir. 2013) and Ellsworth v. Levenhagen, 248 F.3d 634, 639 (7th Cir. 2001), by either relying on federal cases that engage in constitutional analysis, or by relying on state cases that apply constitutional analysis to similar facts, or by framing claims in terms so particular as to call to mind a specific constitutional right, or by alleging a pattern of facts within the mainstream of constitutional litigation, such as: the right to due process and an impartial jury to ensure a fair trial; the right to the effective assistance of counsel to ensure an unambiguous charge and instruction to the jury, and to interview and call witnesses with relevant, material evidence to testify, which are also major aspects of the right to a fair trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

James E. Smith

Date: June 2, 2022