22-7577

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Lamonte Ealy — PETITIONER
(Your Name)

vs.

DYLON RADTKE — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United states District Cart Eastern District of Wisconsin
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Lamonte Ealy
(Your Name)

P.O.Box 19033, 2833 Riverside Drive
(Address)

Green Bay Wisconsin 54301-9033
(City, State, Zip Code)

N/A
(Phone Number)

QUESTIONS PRESENTED

I. Whether jurist of reason would find it debatable or wrong the District court assessment of Double Jeopardy Multiplicity counts under the same state statute, that was twice invoked, with the same elements, between the same parties? If so, was the State court decision an unreasonable application of Blockburger same elements test and objectively unreasonable?

II. Whether jurist of reason would find it debatable or wrong the District court assessment of Double Jeopardy Issue Preclusion when a jury verdict necessarily decided an issue of ultimate fact adversely to the government that the government need to prove in order to convict beyond a reasonable doubt on a separate count of the same offense, with the same issue of ultimate fact between the same parties?

III. Whether after review of the evidence in the light most favorable to prosecution any rational trier of fact could have found the essential elements of the residual count beyond a reasonable doubt relying on the same evidence the jurors determined was insufficient evidence to convict the elements of a separate count charged? If not, was the State court decision an unreasonable application of Jackson standard and objective unreasonable?

IV. When a petitioner claim fundamental injustice actual innocence exception to consider the merits of the constitutional violation that Probably Resulted in the conviction of a person who is actually innocent shall the Schlup and Carrier gateway open even if there is the impediment of a procedural default?

V. Whether jurist of reason would find it debatable that a pro se petitioner states a cognizable constitutional claim, and reasonable jurist would find it debatable or wrong whether the district court ruling that a procedural bar was correct to precluded review of claims when state court reviewed the merits of the federal claims asserted in a habeas corpus petition?

VI. Whether jurist of reason would have found it debatable that a pro se litigant petition states cognizable constitutional grounds with supporting facts to satisfy the screening threshold inquiry under Rule 4 governing Section 2254? If so, reasonable jurist would find it debatable or wrong that the District court was correct in its procedural ruling when it invoked an affirmative defense of procedural default more appropriate raised and argued by party in their responsive document?

Whether post-conviction counsel provided ineffective assistance to the petitioner during his First state post-conviction proceedings when counsel failed to pursue meritable constitutional violations that the defendant conveyed to counsel resulting in his Second proceeding? If so, was the State court decision an unreasonable application of Strickland two prongs and objectively unreasonable?

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

1. Lamonte Ealy vs. State of Wisconsin milwaukee county case NO., 2013CF005263 milwaukee canty Circuit court Judgment December 15th 2014.
2. State of Wisconsin vs. Lamonte Ealy Case NO., 13CF005263 milwaukee canty circuit court Judgment August 4th 2020.
3. State of Wisconsin vs. lamonte Ealy case NO., 2020AP1443 Judgment November 30 2021, wisconsin court of Appeals.
4. State of Wisconsin vs. Lamonte Ealy case NO., 2020AP1443 Judgment March 16th 2022, Wisconsin Supreme Court.
5. Lamonte Ealy vs DYLON RADTKE Case NO., 22-cv-0736-bhL Eastern District united States District court of Wisconsin Judgment in a civil Action, August 29, 2022
6. Lamonte Ealy V. DYLON RADTKE Case NO., 22-2622 United States Court of Appeals 7th circuit Judgment march 24th 2023.

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WISCONSIN LEGISLATIVE LAW

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

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

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

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

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

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

The opinion of the highest state court to review the merits appears at Appendix _____ 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 24th 2023

[✓] 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

UNITED STATES CONSTITUTION AMENDMENT AND WISCONSIN CONSTITUTION ARTICLE PAGE(S)

UNITED STATES CODES

FEDERAL RULES

SUPREME COURT RULE

STATEMENT OF THE CASE

WISCONSIN COURT PROCEEDINGS

¶1. Ealy speedy trial was held in Milwaukee County Circuit Court between October 20th thru October 22nd, 2014, presiding Judge Daniel K. Konkol based on prosecutors Amended Information document charges between July 1st, 2013, thru September 2nd, 2013:

Count 1: First degree sexual assault of a child under thirteenth years old sec. 948.02(1)(e).

Count 2: Attempted child enticement sec. 948.07(1).

Count 3. First degree sexual assault of a child under thirteenth years old sec. 948.02(1)(e).

Count 4. Exposing gentiles to child sec. 948.10(1) and (1)(a). (Appendix A)

¶2. On October 22, 2014, in Milwaukee County Circuit court the jury verdicts was the following:

Count 1. 948.02(1)(e) Guilty.

Count 2. 948.07(1) NOT Guilty.

Count 3. 948.02(1)(e) NOT Guilty.

Count 4. 948.10(1), (1)(a) Guilty. (Appendix B)

¶3.Wisconsin Statute Section § 948.02 sexual assault of a child provide: (relevant part) (1) First degree sexual assault (e) whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of a class B Felony (Appendix C) twice invoked in counts 1,3 as same elements Wis. JI-Criminal 2102E provides:

1. The DEFENDANT had SEXUAL CONTACT with B.G. And

2. B.G. was under the age of 13 years at the time of the alleged sexual contact. Count 1.(Appendix D) And count 3.(Appendix E)

¶4. Ealy's Sentencing was held on December 15th, 2014, in Milwaukee County Circuit Court presiding judge Daniel K. Konkol who sentenced Ealy as followed: Count 1. 15 years initial confinement, 5 years extended supervision Count 4. 1-year initial confinement 1-year extended supervision to run consecutive to all other counts in this case and other separate related cases (Appendix F)

¶5. Ealy as a pro se litigant filed a sec 974.06 post-conviction motion with Milwaukee County Circuit Court who order scheduled briefing. After timely filed

briefs between the parties on August 4, 2020, Milwaukee Circuit Court issued, Decision And Order Denying Motion For Post Conviction Relief on the merit of his constitutional claims (Appendix G) that is before this court as presented to the federal lower courts.

¶6. Wisconsin Court Of Appeals decision November 30, 2021, was the last State court to render a decision on the merits of issues presented dated on November 30, 2021, adjudicated Ealy's constitutional issues argued: (1) U.S. Const. Sixth Amend. Constitutional Effective Assistance of post-conviction counsel Esther Cohen Lee; (2) U.S. Const. Fourteenth Amend. Due process under Constitutional sufficient Evidence beyond a reasonable doubt; (3) U.S. Const. Fifth & Fourteenth Amend. Double Jeopardy argued in the context of multiplicious. Wisconsin State court decision was entered the way it feel federal law required such adjudication on the merit of Ealy's constitutional claims, and permit federal court review 28 U.S.C.§ 2254 (a),(b)(1) see (¶8)

¶7. Wisconsin Supreme Court denied Ealy Petition For Review dated March 16, 2022, in case no. 2020AP1443 (Appendix I)

FEDERAL COURT PROCEEDINGS

¶8.28 U.S.C. § 2254 (a) provide: The Supreme court, a Justice thereof, a Circuit judge shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254 (b)(1) states: An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a State court shall not be granted unless it appears that - (A) the applicant has exhausted the remedies available in the courts of the states. Ealy argued identical constitutional claims with Wisconsin Eastern District Court.

28 U.S.C. § 2254 HABEAS CORPUS PETITION GREAT WRIT

¶9. On June 24, 2022, Ealy as a prose litigant filed 28 U.S.C. § 2254 Great writ of habeas corpus petition (hereafter, petition) as a state prisoner in accordance with § 2254 (a) presented five potential cognizable habeas claims:

(1) Prosecutor Joshua M. Mathy violated the prohibition of Double Jeopardy when the Amend Information (Appendix A) charged multiplicious counts of Wis. Stat. Sec 948.02 (1)(e) (Appendix C) have the same elements in count 1.(Appendix D) & count 3. (Appendix E) B.G. claimed sexual contact once and no other time however she conceded to the same material fact of sexual contact statute § 948.02(1)(e) as a lie is the same elements violate U.S. Const. 5th, 14th Amend. Double Jeopardy;

Blockburger v. United States 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). see also United States v. Dixon, 509 U.S. 688, 697, 113 S.Ct. 2849, 125 L.Ed. 2d 556 (1993).

(2) The prohibition of the Double Jeopardy provision Issue Preclusion doctrine bar count 1. conviction of § 948.02(1)(e) (Appendix B) ultimate fact of sexual contact element (Appendix D) is the same ultimate fact of sexual contact acquitted in count 3.(Appendix E) is Germaine to Ealy who has standing and require finality violates U.S. Const. 5th, 14th Amend. Double jeopardy provision; Ashe v. Swenson 397 U.S. 436, 443, 25 L.Ed. 2d 469, 90 S.Ct. 1189 (1970) (issue preclusion analysis; Nathaniel Brown v. State of Ohio 97 S.Ct. 2221 HN8.

(3) At Ealy's credibility trail heavily relying on B.G. testimonial evidence the jury determined the state's evidence as a whole insufficient to convict counts 2,3 (Appendix B) therefore, the same evidence is not constitutionally sufficient on residual counts 1, 4 elements to convict beyond a reasonable doubt (Appendix B) especially, since count 1. § 948.02(1)(e) conviction and count 3. § 948.02(1)(e) acquittal has identical elements determined by the same jury verdict U.S. Const. 14th Amend. Due process clause; Jackson v. Virginia, U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979) (Jackson Constitutional Sufficiency of Evidence Standard); In re Winship 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 2d 368; Also as in Piaskowski v. Casperson 126 v. John Better 256 F. 3d 687 (7th Cir. 2001) affirmed, Piaskowski v. John Bett 256 F.3d 687 (7th Cir. 2001).

(4) Constitutional Effective Assistance of post-conviction counsel Esther Cohen Lee. U.S. Const. 6th Amend. under Strickland v. Washington 466 U.S. 669, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984) (Strickland two prong test deficient performance and prejudice). Ealy conveyed to Esther his wishes to file his constitutional claims Double Jeopardy of Multiplicity and legislative intent violations also Double Jeopardy as Issue Preclusion violation; and Insufficient Evidence of the sexual assault case in which Esther denied was meritable claims in her missive (Appendix J)

¶10. The District court acknowledge in its SCREENING ORDER dated August 5, 2022 states: under Rule 4 of the rules governing § 2254 provide: If it plainly appears from the face of the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner. If the petition is not dismissed the judge must order the respondent to file an answer, motion, or response within a fixed time, or to act the judge may order. (Appendix K) Ealy petition grounds at (¶9) support his contention that his petition on its face is a sufficient pleading for relief with constitutional dimensions in accordance to § 2254(a) therefore the District should have granted for the respondent to reply, similarly and regularly done see

Wisconsin District court order by Chief U.S.D. judge Hon. Pamela Pepper ruled in George Clinton Wilson v. Randell Hepp, slip copy (2020), 2020WL 5798726. Moreover, Ealy satisfied Rule 4 alleging constitutional grounds that was sufficient on the face of the petition for review of his claims with constitutional dimensions therefore the District court Order Dismissing Petition dated August 29th 2022 (Appendix N) and judgement entered August 29th 2022 (Appendix O) erred in its procedural ruling when it self-invoked the procedural default, an affirmative defense under AEDPA is more appropriately raised and argued by a party must be pleaded in the answer or raised at the earliest practicable moment thereafter see Robinson v. Johnson 313 F.3d 128, 137 (3rd Cir. 2002); Morrison v. Mahoney 399 F.3d 1042, 1046 (9th Cir. 2005); Perruguet v. Briley, 390 F.3d 505, 1515 (7th Cir. 2002); Rule 8(c)(1). Fed. R. Civ. Proc. Rule 8, General Rules of pleadings provide: (c) affirmative defenses. (1) In General in responding to a pleading, a party must affirmatively state any avoidance or affirmative defense. Furthermore, to present defenses every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required or by motion see Rule 12 (b).

Double Jeopardy, Multiplicity

¶11.The double jeopardy clause of the Fifth, Fourteenth Amendments to the United States Constitution, the Fifth states in relevant part: .. Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.

¶12. Article I, sec. 8 of the Wisconsin Constitution states, in part: (1)..No person for the same offense may be put twice in jeopardy of punishment.

¶13. In Ealy Briefs and Appendix Dated August 23, 2022, in which acknowledge by the District court Order Dismissing Petition (Appendix N) Ealy argued in his pleadings cognizable constitutional Grounds 1 Thru 4: Ground 1. multiplicious counts 1,3 violate double jeopardy clause U.S. Const. 5th, 14th Amend. The seminal case in this regard is Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). see also United States v. Dixon, 509 U.S. 688, 697, 113 S.Ct. 2849, 125 L.Ed. 2d 556 (1993). A subsequent prosecution avoid the double jeopardy bar by satisfying the Blockburger same elements test. Under the Blockburger test, each offense must contain an element not contained in the other, if not, they are the same offense within the clause meaning and double jeopardy bars subsequent punishment or prosecution. id. at 688, 113 S.Ct. 2849. In Ealy case count 1. (Appendix D) and count 3. (Appendix E) both have the same elements as multiplicious counts, charging a single offense under more than one count in an indictment is multiplicious and raises the double jeopardy Spector of multiple punishments. see United States v. Soape, 169 F.3d 257, 266 (5th Cir. 1999). Also see Kimbrough 69 F3d 723, 729 (5th Cir. 1995) (held multiplicious counts); United States v. Polouizzi 564 F.3d 142 (2nd Cir. 2009)(same)

¶14. The District court Order Dismissing Petition focus is wrong claiming double jeopardy clause is not implicated when multiple separate violations of these same provision (Appendix N) Wis. Stat. § 948.02(1)(e) was twice invoked prosecutor Amended Information (Appendix A) in separate counts 1,3 (Appendix D, E) is the same elements of the statute (Appendix C,L) violate legislative intent and U.S. Const. 5th, 14th Amend. double jeopardy.

LEGISLATIVE INTENT

¶15. Ealy contention remain sub. sec. (e) sexual contact is ONE ultimate fact for ONE offense of § 948.02(1)(e) However, two other sexual contact of the statute is available as sub. sec. (am) or (d) (Appendix C) It is well settled that the government may not charge a single offense in several counts see Sanabria v. United States 437 U.S. 54, 66 n. 20, 98 S.Ct. 2170, 57, L.Ed. 2d 43 (1978): A single offense should be normally charged in one count rather than several, even if different means of committing the offense are charged. In determining whether a course of conduct constitute one or more separate crimes, is guided by legislative intent. see Sanabria, 437 U.S. at 70, 98 S.Ct. 2170.

¶16. Wisconsin Statute § 948.02 clearly and specifically identify 5 separate available offenses of first-degree sexual assault of a child as 1. (am); 2. (b); 3. (c); 4. (d); 5.(e) (Appendix C) In Ealy case sub sec. (e) is the one offense under § 948.02(1) that was twice invoked creating count 1. (Appendix D) and count 3. (Appendix E) same elements with the same parties violent Blockburger same elements test U.S. Const. 5th, 14th Amend. double jeopardy clause and Legislative intent.

In support of Ealy conclusion is corroborated with more legislative intent in Wis. JI-CRIMINAL 2102 INTRODUCTORY COMMENT: clearly identify the same 5 separate offenses of § 948.02 (1) (Appendix L) Moreover, Ealy contend Legislative language specifically instruct Prosecutors to select ONE alternative of sexual contact from Wis. JI-Criminal 2101- A (Appendix M) and insert into ONE Wis. JI-Criminal 2102-E (Appendix D) to determine ONE offense for Wis. Stat. § 948.02(1)(e) (Appendix C) Ealy demonstration clearly show a violation of legislative intent in which is compelling and convincing argument multiple counts is not permissible unless it's clear from the statute. Bell v. United states 349 U.S. 81, 82-83 (1955).

¶17. Ground 2. Double jeopardy Issue Preclusion analysis is controlled by Ashe v. Swenson 397 U.S. 436, 443, 25 L.Ed. 2d 469, 90 S.Ct. 1189 (1970); Nathaniel Brown v. State of Ohio 97 S.Ct. 2221 HN8. Ealy contention remain that successive determination of sexual contact fact is prohibited by issue preclusion bar, the same elements of ultimate facts for sexual contact the jury acquitted in count 3. § 948.20(1)(e)(Appendix B) bar count 1. conviction of § 948.02(1)(e) (Appendix B) both alleging the same question of law, whether or not The Defendant had sexual

contact with B.G. ? The jury answered No, in count 3. (Appendix E) However, answered Yes, in count 1. (Appendix D) violate Double jeopardy provision issue preclusion doctrine U.S. Const. 5th, 14th Amend. For an example, the elements did not read count 1.The DEFENDANT had SEXUAL CONTACT with B.G (Appendix D) and

Count 3. B.G. had SEXUAL CONTACT with the DEFENDANT (Appendix E) instead the elements are identical side by side .

The district court assessment and focus is wrong when it states: And there is no logical inconsistency between a conviction on Count 1. and acquittal on Count 3. neither depended on the other because the predicted acts (both of which violated the statute) were different (Appendix N) The Supreme Court stated In United States V. Ball 163 U.S. 662, 669, 16 S.Ct. 1192, 1194, 4 L.Ed. 300: The prohibition is not against being twice punished but against being twice put in jeopardy for same offense at the first trial whether convicted or acquitted is equally put twice in jeopardy.

The Supreme court has identified areas and interest protected by double jeopardy: (1) it protect against a second prosecution for the same offense after acquittal; (2) second prosecution for the same offense after conviction; (3) and it protect against multiple punishments for the same offense. see United States v. Wilson 420 U.S. 332, 343 (1975); North Carolina v. Pearce, 395 U.S. 711, 717, 89, S.Ct. 2072, 2076, 23 L.Ed. 2d 656 (1969) the first interest and protection is germane to Ealy count 3. acquittal bar count 1. conviction (Appendix B) same offense, same ultimate fact of sexual contact is a prima facie case set forth herein.

¶18. Ground 3. Constitutional Sufficient Evidence Controlling law is Jackson v. Virginia, U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979); also Due Process clause U.S. Const. 14th Amend. At Ealy Credibility trial heavily relying on B.G. testimonial evidence where she conceded to the material fact as ultimate fact of sexual contact element is a lie, the jury determined the state's evidence insufficient evidence as a whole to convict counts 2,3 hence their verdict of acquittal (Appendix B) however the same evidence concerning residual count 1. § 948.02(1)(e) and count 4. § 948.10 (1),(1)(a) elements is insufficient evidence to convict beyond a reasonable doubt Moreover counts 1, 3 has the same elements, (Appendix D, E) based on the same evidence argued in length at (¶¶ 46-48) herein.

¶19. Ground 4. Constitutional Effective Assistance of counsel of Esther Cohen Lee as post-conviction counsel U.S. Const. 6th Amend. Effective Assistance of counsel analysis is controlled by Strickland v. Washington 466 U.S. 669, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984) (two prong test deficient performance and prejudice) Esther Cohen Lee as post-conviction counsel during his first post-conviction proceeding as a constitutional right to effective assistance of counsel resulting in a

second. Ealy conveyed to Esther his wishes to pursue constitutional claims she denied in a letter (Appendix J) acts or omissions of counsel that fall outside the wide range of professionally competent assistance see Strickland, 466 U.S. at 690. To show prejudice, the defendant must demonstrate that the errors was so serious that the result of the proceeding was unreliable id. at 687 argued at length at (¶¶ 24-26).

¶MISCARRIAGE OF JUSTICE- ACTUAL INNOCENCE EXCEPTION

¶20.The District court Order Dismissing Petition is a procedural error when it said: According to Ealy, because these counts were multiplicious, no rational jury could have convicted on count 1. while acquitting on count 3. thus he is in custody in Violation of the double jeopardy clause and failure to consider his petition would result in a fundamental miscarriage of justice. (Appendix N) and judgment (Appendix O) To confront the District court own invoked procedural default in error (Appendix K) Ealy filed a timely Supplemental Brief on August 23, 2022 and asked for permission to proceed based on the miscarriage of justice - actual innocence exception invoking the gateway of Murray v. Carrier 477 U.S. 478, 106 S.Ct. 2539, 91 L.Ed. 2d 397. Ealy shown that his petition constitutional claims argued in length herein as:

(1) had there not been Double Jeopardy violations in the context of Multiplicity violation U.S. Const. 5th, 14th Amend. there would not been a conviction in count 1. (¶¶ 11-16).

(2) Issue Preclusion violation U.S. Const. 5th, 14th Amend the jury verdict of acquittal in count 3. of same ultimate fact of sexual contact bar subsequent conviction in count 1. (¶17).

(3) Constitutional Sufficiency of evidence violate Due Process of U.S. Const. 14th Amend the jury determined the state's evidence insufficient hence acquittal in count 3. the same insufficient evidence to convict count 1. same elements beyond a reasonable doubt at (¶18).

(4) Constitutional Effective Assistance U.S. Const. 14th Amend., (¶19). Petition claims raised are the results of his confinement as a constitutional violation that has PROBABLY RESULTED in the conviction of one who is actually innocent id., at 496, 106, S.Ct. at 2649. actual innocence not proved serves as a gateway which a prisoner may pass whether the impediment is a procedural bar as ruled in Schlup v. Delo 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed. 2d 808 (innocence is procedural rather than substantive, constitutional claims based on his contention he was denied the full panoply of protection afforded by the constitution) also see House v. Bell, 547 U.S. 518, 126 S.Ct. 2064 165 L.Ed. 2d 1.

¶21. The District court erred and abused its discretion in Order Dismissing Petition states: Ealy invokes the fundamental miscarriage of justice exception relief under this exception is limited to situations where a constitutional violation has resulted in a conviction of one who is actually innocent.. To show actual innocence a petitioner must present clear and convincing evidence that, but for the alleged error, no reasonable juror would have convicted him ..to successfully invoke the fundamental miscarriage of justice exception and excuse his procedural default, Ealy needed to show actual innocence. He has not done so. (Appendix N) Ealy disagree with the district court ruling since he satisfied the gateway of Carrier and Schlup that requires a habeas petitioner to show that a constitutional violation has PROBABLY RESULTED in the conviction of one who is actually innocent id. at 496, 106 S.Ct., at 2649. (emphasis added) Actual innocence if proved serves as a gateway through which a prisoner may lass whether the impediment is a procedural bar, as it was in Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808; House v. Bell, 547 U.S. 518, 126 S.Ct. 2064 165 L.Ed. 2d 1 Also see Coleman v. Thompson, 501 U.S. 722, 750 (1991).

¶UNREASONABLE APPLICATION

¶22. U.S.C.A. § 2254(d)(1) provide: (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary or involve an unreasonable application of clearly established federal law, as determined by the supreme Court of the United States or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

¶23. As argued to the federal lower courts the state court unreasonable application and objectively unreasonable of federal law by the Supreme court concerning Ealy constitutional Grounds 1, 3, 4 allow Federal court to review Ealy petition see Terry Williams v. John Taylor, 529 U.S. 362 (2000), 120 S.Ct. 1495 (petitioner was denied his constitutional guaranteed right to effective assistance of counsel when state court adjudication resulted in a decision that satisfy 28 U.S.C.A. § 2254(d)(1)); Also 28 U.S.C.A. § 2254(d)(1) In Ealy's case the Wisconsin Court of Appeals Opinion and Order concerning Multiplicious counts states: The jury, however, acquitted Ealy of one of the two counts, rendering moot any multiplicity claim stemming from the two charges (Appendix H) this decision is a unreasonable application of the Blockburger same elements test at (¶13 -16) concerning Ealy double jeopardy protection from multiplicious counts the district court erred in its procedural ruling dismissing Ealy petition (Appendix N) when federal review is permitted in accordance §2254 (d)(1).

¶24. Wisconsin Court of Appeal further state: Ealy failed to say how and why he suffered any prejudice when post-conviction counsel ignored a moot claim.. because Ealy failed to satisfy the prejudice prong of Strickland analysis, he failed to demonstrate that his post-conviction counsel was ineffective for not raising a Double Jeopardy claim.. (Appendix H) this decision is based on an unreasonable application of Strickland prejudice prong when conflict of counsel failure to present constitutional issue Ealy conveyed to Esther who denied was meritable in her missive to Ealy (Appendix J) is a conflict of interest of actual ineffective assistance warrants a limited presumption of prejudice. Cuyler v. Sullivan, 446 U.S. at 345, 350. An actual conflict of interest adversely affected his lawyer's performance see Cuyler v. Sullivan supra, at 350,349, (citing Strickland, 466 U.S. 668 104 S.Ct. 2052 L.Ed. 2d 674 HN17). In certain sixth amendment context, prejudice is presumed, actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. see United states v. Cronic 466 U.S. at 659 and n. 25, 104 S.Ct. at 206-2047, n. 25 (citing Strickland, 466 U.S. 668, 104 S.Ct. 2052 L.Ed. 2d 674 HN16. Wisconsin court of appeal decision resulted in an unreasonable application of Strickland prejudice prong now permit federal review under § 2254(d)(1) is how the District court erred in dismissing Ealy petition (Appendix N) The District court screening order states: nothing in Ealy petition suggest an external impediment that caused his default. He raise post-conviction counsel alleged ineffectiveness, but errors by counsels in the first round of post-conviction cannot serve as cause to excuse Ealy own default in the second, likewise the record contains nothing close to a showing of actual innocence. (Appendix N) However, Wisconsin court used Strickland two prong to evaluate Ealy constitution claim he presented to considered whether Esther Cohen Lee provided ineffective assistance in Ealy First post-conviction proceedings resulting in Ealy second post-conviction proceeding alleging ineffective assistance of counsel failure to preserve his constitutional claims as a right in his First post-conviction proceeding resulting in his second proceeding shall suffice as cause for the constitutional claims not previously presented in state court until now. The U.S. Supreme court stated cause for a procedural default (in certain circumstances counsels ineffectiveness in failing to properly preserve the claim for review in state court will suffice) Edwards v. Carpenter, 529 U.S. 446, 451, 120 S.Ct. 1587, 146 L.Ed. 2d 518 (2000) But a (claim of ineffective assistance... must be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default) id. (quotation omitted) Also see Luis Mariano Martinez v. Charles L. Ryan, 566 U.S. 1, 132, S.Ct. 1309, (2012). Ealy demonstrated Esther Cohen Lee acts and omissions fell outside the wide range of professionally competent assistance see Strickland, 466 U.S. at 690. To show prejudice, the defendant must demonstrate that the errors was so serious that the result of the proceeding was unreliable id. at 687.

¶25. Wisconsin Court of Appeals states: .. The only question is whether there was sufficient evidence on which a jury could find all the elements of the crime of conviction Ealy this failed to show how or why his post-conviction counsel performed deficiently.. (Appendix H) though Wisconsin Court of Appeals did not mention any evidence introduced at trial or to refute Ealy mention of specific insufficient evidence nor did that court say the Jackson standard but it did mention one similar to in its decision which resulted in a decision of an unreasonable application of federal law (Jackson Standard) set forth in Jackson v. Virginia, U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979) (Jackson Constitutional Sufficiency of Evidence Standard); In re Winship 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 2d 368; Also as in Piaskowski v. Casperson 126 v. John Better 256 F. 3d 687 (7th Cir. 2001) affirmed, Piaskowski v. John Bett 256 F.3d 687 (7th Cir. 2001) Also see § 2254 (d)(1).

¶ INTERWOVEN LAW OR PRIMARY FEDERAL LAW THE STATE COURT RELIED ON

¶26. In Michigan v. Long 463 U.S. 103 S.Ct. 3469, 77 L.Ed. 2d 1201 (1983) (ruled when a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law) In Ealy's case Wisconsin Court of Appeals decision states: we assess claims of ineffective assistance by applying the two prong test set forth in Strickland v. Washington 466 U.S. 668 (1984) (Appendix H) then that court addressed the merits of Ealy constitutional claims he conveyed her to pursue (Appendix J) as proof Ester Cohen Lee provided ineffective assistance in Ealy first post-conviction proceeding resulting in his second proceeding Therefore Wisconsin Court of Appeals decision appear to decide Ealy's constitutional claims under the Strickland two prong test in Ealy case the way it believed the federal law required it to do see Id. at 1040-1041, 103 S.Ct. at 3476. Strickland is an adjudicated claim by the State court see § 2254 (b)(1) (A) and review is permitted under unreasonable application of Strickland test § 2254 (a),(d)(1), Interwoven law or primary federal law state court relied on jurist of reason would find the district court procedural ruling debatable or wrong (Appendix N) see Slack v. Mc Daniel 529 U.S. 437, 120 S.Ct. 1595, 146 L.Ed. 2d 542 HN7 (2002). Therefore the District court procedural ruling was wrong when the State court decision was not an independent and adequate ruling but fairly appears to rest primarily on federal law or interwoven with federal law and decided Ealy case the way it did because it believed federal law required it to do so. Michigan v. Long, supra 463 U.S. at 1040-1041, 103 S.Ct. at 3476.

COA REQUEST WITH THE DISTRICT COURT & CIRCUIT COURT

¶27. Ealy he filed a Notice Of Appeal asking the District court for a Certificate of Appealability the District Order Denying Motion To Appeal In Forma

Pauperis dated on September 20, 2022 (Appendix P) is a procedural error since Ealy petition on its face allege cognizable constitutional claims (¶9) that was sufficient for the issuance of COA in accordance with § 2253(c)(2) and a denial to proceed caused a procedural error as a conflict decision with circuit court decision argued in length under this petition section reasons for granting the petition (¶¶ 49-51)

¶28. On September 20th 2022 Ealy renewed his COA by filing a Notice Of Appeal and Docket Statement and Motion For Leave To Proceed Without Prepayment Of The Filing Fee all in which was submitted to U.S. Circuit court showing (1) double jeopardy multiplicity see (¶¶ 13-16); (2) double jeopardy issues preclusion (¶¶9,17); (3) Constitutional Sufficiency of Evidence see (¶¶9,18); (4) Constitutional Effective assistance of counsel see (¶¶9,19).

¶29. Ealy's contention is his motion for leave to proceed to the Circuit court satisfied the threshold inquiry § 2253(c) to proceed since the District court decided the merit of Ealy's double jeopardy claim (Appendix N), Ealy made a showing of the five constitutional grounds in his habeas corpus petition (¶9) are adequate to deserve encouragement to proceed further see Miller -EL v. Cockrell 537 U.S. 322, 327, 123 S.Ct. 1029 154 L.Ed. 2d 931 (2003); Barefoot v. Estelle 463 U.S. at 893, and n4, 103 S.Ct. 3383. Pp. 1603-1604.

¶30. A COA shall issue for a petitioner ..only if the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

¶31. U. S. Circuit court denied Ealy a COA finding, no substantial showing of the denial of a constitutional right 28 U.S.C. § 2253(c)(2) (Appendix Q) such ruling conflict with other circuits argued in length herein section Reasons For Granting The Petition (¶¶49-51)

¶32. Ealy argued the District court dismissal of his petition (Appendix N) on the merits is debatable or wrong about his Double Jeopardy context, multiplicity at (¶¶13-16) issue preclusion at (¶¶9,17) to satisfy the threshold inquiry of a COA as in Slack, COA threshold analysis § 2253(c) showing: the petitioner must demonstrate that reasonable jurist would find the district courts assessment not the constitutional claim debatable or wrong see Antiono Tonton Slack v. Eldon McDaniel 529 U.S. 473,120 S.Ct. 1595, 146 L.Ed. 2d 542 HN6, (2002). Since the district court ruled (Appendix N) its dismissal is due to a procedural grounds without reaching the merits of Ealy's claims argued in length of Constitutional Sufficient Evidence at (¶¶9,18), Constitutional Effective Assistance at (¶9,19) is debatable or wrong on claims Ealy made a showing reasonable jurist of reason would find it debatable whether the petition state a valid claim of a constitutional right and jurist of reason would find it debatable whether the district court was correct in its procedural ruling see Slack, 529 U.S. at 484, 120 S.Ct. 1595.

¶33. Ealy argued why the District court procedural err in its ruling and was wrong: (1) Ealy petition at the threshold screening was sufficient to satisfy § 2254 (a) when the petition identify issues with constitutional dimensions that he is in custody in violation of the constitution argued at (¶¶8,9,10) the District court created a procedural error itself invoking an affirmative defense of procedural default when dismissing a sufficient petition (Appendix N) argued in length at (¶10) and (¶8) (2) Wisconsin Court of Appeals decided the merits of Ealy federal claims (Appendix H) resulting in unreasonable application of federal law permit petition to be granted in accordance with § 2254 (d)(1) argued at length at (¶¶22-25);

¶34. In the U.S. Circuit court Ealy renewed his motion titled Memorandum In Support Of PLRA Motion For Leave To Proceed On Appeal In Forma Pauperis dated September 27th 2022 in compliance with Fed. R. App. P. 24 (a)(1)(c) since the District court denied Ealy In forma Pauperis status he stated the issues that he a party intended to present on appeal so Ealy summarized his constitutional grounds asserted in his petition with the District court again with the circuit court as arguments set forth herein.

¶35. Now Ealy file this here Petition Of Writ For Certiorari with the United States Supreme Court requesting this court to grant his Petition For Writ Of Certiorari under this court jurisdiction discretion Rule 10(a),(c).

REASONS FOR GRANTING THE PETITION

¶36. Rule 10 provide: (a) a United States Court of Appeals has entered a decision in conflict with the decision of another court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings. (c) a State court or a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflict with relevant decisions of this court.

DOUBLE JEOPARDY PROVISION VIOLATION(S) MULTIPLICIOUS COUNTS DIVISION BETWEEN SEVENTH CIRCUIT & SECOND, FIFTH CIRCUIT.

¶37. Ealy contention remain that he has set forth a prima facie case (¶13) of multiplicious counts 1,3 (Appendix A) twice invoke one Wis. Stat. § 948.02(1)(e) that violate the U.S. Const. 5th, 14th Amend. double jeopardy provision and legislative intention which was denied in Ealy case by both the District court (Appendix N) and U.S. Circuit court determined no substantial showing of the denial of a constitutional right (Appendix Q)

¶38. Now Ealy can show a division with the U.S. Fifth Circuit Court case very similar to Ealy constitutional issue argued and District court and U.S. 7th Circuit court require this court to exercise its jurisdiction discretion Rule 10 (a),(c) above (¶36) in the interest of citizens as prisoners who find themselves in a similar situation and relying on U.S. Const. 5th, 14th Amend double jeopardy roots in which are antiquity but is the least understood Bill of rights that need consistent and clear ruling by this court in this prima facie case set forth.

MULTIPLICITY ANALYSIS

¶39. The seminal case in this regard is Blockburger V. United States 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932) (same elements test); Also see United States v. Dixon 509 U.S. 688,n 3 S.Ct. 2849, 125 L.Ed. 2d 556 (1993); U.S. const. 5th 14th Amendment. In Ealy's case sec 948.02(1)(e) in both counts 1,3 has the same elements 1.The DEFENDANT did have SEXUAL CONTACT with B.G. 2. B.G. was under the age of 13 at the time of the sexual contact (Appendix D & E)

¶40. In the Fifth Circuit In United States v. Kimbrough 69 F3d 723, 729 (5th Cir. 1995) held that an indictment was multiplicious when it charged the defendant with two counts of 18 U.S.C. § 2252(a)(4)(B) on or about same date 69 F.3d at 730. The only difference between the two charges was the way in which the jurisdictional elements of the statue was satisfied - one charge alleged that the pornographic picture had traveled in interstate commerce, and the other alleged that the material used to make the pictures had traveled in interstate commerce id.) Moreover Ealy case count 1,3 has the same date alleged between 07/01/13 and 09/02/13 (Appendix A) similar as Kimbrough, on or about same date and different than Snyder, case that had different days as (many weekends) made them different. In Ealy's case, at

trail B.G. allege sexual contact of § 948.02(1)(e) occurred once and no other time while conceding to sexual contact of § 948.02(1)(e) the elements in count 1. (Appendix D) is the same elements as count 3 (Appendix E) and violate Blockburger same elements test. The sole issue between Ealy and the lower courts is can the government charge a defendant with two counts of the same Wis. Stat. Section 948.02(1)(e) given Blockburger same elements test?

¶41. Ealy contend in his case the district court assessment of the merits of multiplicity (Appendix N) and denial of a COA (Appendix P) and the U.S. Court of Appeals order denying a COA (Appendix Q) conflict on Multiplicity also show a division with the Second circuit in United States v. Polouizzi 564 F.3d 142 (2d Cir. 2009) Polouizzi was charged with 11 counts of possession a single collection of child porn constitute only a single violation of 18 U.S.C. § 2252 (a)(4)(B) the Court of Appeals vacated the District court order and with instructions to vacate all but one of the 11 counts.

¶42. In Ealy case Wisconsin Court of Appeals ruling on this federal question of multiplicious counts: The jury acquitted Ealy on one of the two counts, rendering moot any multiplicity claim stemming from the two charges (Appendix H) The district court ruling is wrong when determining no double jeopardy violation because the predicted acts are different (Appendix N) the focus of the reviewing court remain the same elements only test of Blockburger. Furthermore, the double jeopardy is being twice put in jeopardy of the same offense see United States V. Ball 163 U.S. 662, 669, 16 S.Ct. 1192, 1194, 4 L.Ed. 300: The prohibition is not against being twice punished but against being twice put in jeopardy for same offense at the first trial whether convicted or acquitted is equally put twice in jeopardy.

¶43. The District court in Ealy's case focus is wrong claiming no double jeopardy violation both counts violate the statute is (Appendix N) Ealy contend such ruling is in conflict with U.S. Supreme court decisions. It is well settled that the government may not charge a single offense in several counts see Sanabria v. United States 437 U.S. 54, 66 n. 20, 98 S.Ct. 2170, 57, L.Ed. 2d 43 (1978): A single offense should be normally charged in one count rather than several, even if different means of committing the offense are charged. In determining whether a course of conduct constitute one or more separate crimes, is guided by legislative intent. see Sanabria, 437 U.S. at 70, 98 S.Ct. 2170.

WISCONSIN LEGISLATIVE INTENT DEMONSTRATION

¶44. Ealy argued in length at (¶¶15-16) Clear and specific legislative intent of Wis. stat. § 948.02(1) (Appendix C) identify 5 offenses as 1.(am); 2.(b); 3. (c); 4. (d); 5.(e). Here, sub sec. (e) is the one offense twice invoked (Appendix A) with the same elements in count 1,3 (Appendix D, E) concerning one accuser violent Legislative intent is proof demonstrated that sub sec (e) sexual contact is one offense for other sexual contact under the same statute. However, there are two other separate sexual contact of the statute in question is sub. sec. (am) or (d) review the Wis. Stat. § 948.02(1) (Appendixes C) Also see corroborating legislative

language that identifies the same 5 offenses of sec 948.02(1)(e) is clear and convincing (e) is one offense and not two (Appendix L) argued with supporting law authorities see (¶¶ 15,16)

¶45. Ealy Respectfully ask for this Supreme court to exercise its jurisdiction discretion in the best interest of the public to further bring harmony on this issue for both Wisconsin courts and defendants similar situated to Ealy prima facie case of multiplicity set forth contrary to double jeopardy U.S. Const. 5th 14th Amend. and clear legislation enacted as 2007 Wisconsin Act 80 (effective date: March 27, 2008.) resulted in Wis. JI-Criminal 2102 Introductory Comment: (Appendix L) Relevant Wisconsin case law: State v. Eisch 96 W. 2d. 25, 36 (1980); (proof of legislative intent and multiplicious counts ruled against similar situated defendants like Ealy's contention set forth herein); State v. Sauceda 168 W. 2d 486 (1992); State v. Hirsch 140 W. 2d 468 (1987); State v. Kuntz 160 W. 2d 722 (1991); State v. Rabe 96 Wis. 2d 48, 291 N.W. 2d 809, (1980)

CONSTITUTIONAL SUFFICIENCY OF THE EVIDENCE ANALYSIS.

¶46. This court analysis on this issue is controlled by Jackson v. Virginia 443 U.S. 307, 321, 99 S.Ct. 2781, 2790, 61 L.Ed. 2d 560 (1979) (constitutional sufficiency of the evidence standard) citing, In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 2d 368, (1970) (reasonable doubt standard).

¶47. Ealy argued at length supporting facts at (¶19) the juror's verdict of acquittal (Appendix B) determined insufficient evidence as a whole to convict count 3. sexual contact element (Appendix E) therefore is the same evidence not sufficient to convict residual count 1. same sexual contact element (Appendix D) beyond a reasonable doubt. The district court decision is wrong (Appendix N), and the Circuit court denial of a COA (Appendix Q) Ealy contend the Circuit courts affirm a conviction if a rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt id. If a reasonable jury would doubt whether the evidence proves an essential element the Circuit court must reverse see U.S. v. Onick 899 F. 2d 1425, 1428 (5th Cir.1989) all credibility determination and reasonable inferences are to be resolved in favor of the jury verdict United States v. Nguyen 28 F. 3d. 477, 480 (5th Cir. 1994) the court do not concern themselves with the correctness of the jury verdict, rather determine whether the finding of guilt is reasonable under all the circumstances Jackson, 443 U.S. at 318-319, 99 S.Ct. at 2788-89. In Ealy case B.G. testimonial evidence she admitted to lying about sexual contact is not credible or sufficient evidence to convict sexual contact in count 1 beyond a reasonable doubt when the jury verdict of acquittal (Appendix B) preclude any liability on Ealy. In Piaskowski v. Casperson 126 F. supp. 2d 1149 it was determined testimonial evidence in that case was sufficient and held that Wisconsin court unreasonable application of Jackson standard and was objectively unreasonable granting the petitioner relief concerning testimonial evidence heavily relied on. affirmed, Piaskowski v. John Bett 256 F. 3d 687 (7th Cir. 2001).

¶48. In Ealy case the District court erred in dismissing his petition (Appendix N) as procedurally barred when Ealy creditable showing and the State court reviewed the merits (Appendix H) see The fifth Circuit in Abdul Hakeem Muhammad v. Gary L. Johnson, 166 F. 3d 341 granted COA on the issue the district erred in determining that Federal review of the sufficiency of evidence is precluded by the procedural bar therefore held Muhammad made a creditable showing that the District court committed a procedural error. The District court ruling was vacated, and case remanded to the district court for review on the merits and a determination whether COA should issue on insufficient evidence claim see Whitehead, 157 F.3d at 388. Also see The Second Circuit in Benny Williams v. Robert Kullman & Robert Abrams, 722 F. 2d 1048 (1983) ruled petition constitutional claim was not insufficient on its face and should not therefore, have been dismissed sua sponte. Ealy contention is when It is clear that a state prisoner who alleges that the evidence in support of his state conviction cannot be fairly characterized as sufficient to have lead a rational trier of fact to find guilt beyond a reasonable doubt has stated a federal constitution claim Jackson v. Virginia 443 U.S. 307, 321, 99 S.Ct. 2781, 2790, 61 L.Ed 2d 560 (1979) citing In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970) Similarly the second court has recognized that the inclusion in the Habeas petition of comparably broad language adequately states a constitutional claim see e.g., LaBruna v. U.S. Marshal, 665 F. 2d 439, 441 (2d Cir. 1981) (no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt) This showing that Constitutional sufficient evidence decisions show a division between the Second, Fifth and other Seventh Circuit. Ealy ask for this court to exercise of judicial discretion pursuant to Rule 10(a),(c).

DIVISION BETWEEN THE CIRCUIT COURTS THRESHOLD INQUIRY.

¶49. In Ealy petition sufficiently alleges constitutional claims (¶9,10) that he is in custody in violation of the constitution pursuant to § 2254 (a) was dismissed by the District court (Appendix N) created a procedural error. Then both the District court (Appendix P) and the U.S. Circuit court denied Ealy Certificate of appealability (Appendix Q) show a division, between the Circuits conflict with Hunter v. United States 559 F. 3d 1188, 1190 (11th Cir. 2009) held even though an appellant must make a substantial showing of the denial of a constitutional right to get a COA this aspect of the Circuit court threshold inquiry is satisfied even is only debatable constitutional claims.

In Williams v. Calderon, 83 F.3d 281, 286 (9th Cir. 1996) stated: the standard for obtaining a certificate of appealability under the Act is more demanding than the standard for obtaining a certificate of probable cause under the law as it existed prior to the enactment Murphy v. Johnson, 110 F.3d 10,11 (5th Cir. 1997).

In Laurson v. Leyba 507 F.3d 1230, 1232 (10th Cir. 2007) (Certificate of appealability analysis) And In Lennox v. Evans, 87 F.3d 431 (10th Cir. 1996) The 10th Circuit disagreed with the 9th Circuit and claim requiring an appellant for a

COA to make substantial showing of the denial of a federal right. Barefoot ensured that appellate review of habeas process should be limited to petitions that make a colorable showing of a constitutional error see Barefoot, 463 U.S. at 892-93 & n. 4, 103 S.Ct. at 3394 & n. 4. Also see In Whitehead v. Johnson 157 F.3d 384, 386 (5th Cir. 1998): only when a showing of error is made will the court then consider whether the petitioner has made a substantial showing of a denial of a constitutional right on the petitioner habeas corpus. Therefore in Ealy case his petition set out potential cognizable claims that is recognizable with supporting facts as a sufficient pleading at (¶9,10) sufficient at the threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims United States v. Silva, 430 F3d 1096, 100 (10th Cir. 2005) (quoting Miller - El, 537 U.S. at 336, 123 S.Ct. 1029). Also see Barefoot, 463 U.S. at 892-93 & n. 4, 103 S.Ct. at 3394 & n. 4. see In Whitehead v. Johnson 157 F.3d 384, 386 (5th Cir. 1998): only when a showing of error is made will the court then consider whether the petitioner has made a substantial showing of a denial of a constitutional right on the petitioner habeas corpus.

¶50. The First Circuit court stated: habeas corpus is a special proceeding to right wrongs, not a routine proceeding to search for them... Bernier v. Moore, 441 F.3d 395, 396 (1st Cir. 1971) see Aubut v. Maine 431 F. 2d 668, 689 (1st Cir. 1970). Therefore, U.S. Circuit court decisions (Appendix Q) resulted in procedural errors when denying to grant Ealy a COA on his cognizable constitutional claims presented of Double Jeopardy in the context of multiplicity argued in length at (¶13) and issue preclusion at (¶18) the District court erred in its assessment of Ealy Double Jeopardy claims that warrant his petition should not have been dismissed (Appendix N) Ealy satisfied § 2254(a) and (d)(1), and a showing for a COA under § 2253(c).

¶51. Ealy claim this court ruling is essential concerning prisoners as pro se litigants as in his case file § 2254 (state prisoners) or § 2255 (federal prisoners) claiming to be in custody in violation of the constitution § 2254 (a) and the District court dismissed the petition (Appendix N) that have potential cognizable issues of constitutional dimensions and sufficient on the face of the petition, exhibits and Brief, and both the District court (Appendix P) and the Court of Appeals denied a COA to proceed (Appendix Q) ..has so far departed from the accepted and usual course of judicial proceedings.. citing Rule 10(a) require this court judicial discretion on this issue in the interest of consistent and clarity since the threshold stage of COA to appeal adverse decision when he collateral attack his imprisonment without undue burden and delay. This showing that Certificate Of Appealability Threshold Inquiry division between the First, Fifth, Ninth, And Tenth Circuit courts Ealy respectfully ask for this court to exercise of jurisdiction discretion pursuant to Rule 10(a),(c) so there can be a ruling on the threshold showing issue.

ISSUE PRECLUSION DOCTRINE

¶52. This court controlling precedent on this issue is set by Ashe v. Swenson 397 U.S. 436,443, 25, L.Ed. 2d 469, 90 S.Ct. 1189, (1970) recognized that when an issue of ultimate fact has once been determined by a valid and final judgement, that issue cannot again be litigated between the same parties in any future lawsuit id.

¶53. The district court focus is wrong denying double jeopardy occurred and claimed the predicted acts are different (Appendix N) Ealy contention remain counts 1, 3. has the same question of law is whether or not the DEFENDANT had SEXUAL CONTACT with B.G. ? (Appendix D & E) the jury acquittal on count 3. bar count 1. conviction of same ultimate fact, material fact of sexual contact (Appendix B) is in conflict with Supreme court decisions Rule 10 (c). The Supreme Court requirement for issue preclusion in Taylor v. Sturgell, 553 U.S. 880, 128 S.Ct. 2161, 171, L.Ed. 2d 155 (2008) ruled issue preclusion.. bars a successive litigation of an issue of fact of law actually litigated and resolved in a valid court determination essential to the prior judge even if the issue recurs in the contest not a different claim Id. at 2171. The District court decision is in conflict with this court decision in Taylor v. Sturgell, 553 U.S. 880, 128 S.Ct. 2161, 171, L.Ed. 2d 155 (2008). Also see, Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 2225, 53 L.Ed. 2d 187 (1977) states: If two offenses are the same.. for purpose of barring successive sentences at a single trail they necessarily would be the same for successive prosecution. Brown v. Ohio, supra, 432 U.S. at 166, 97 S.Ct. at 2225. Ealy contend its clear count 1. conviction is barred by count 3. acquittal (Appendix B) The district court denied Ealy contention here (Appendix N) and the Circuit court denial of a COA state no substantial constitutional violation (Appendix Q) conflict with the supreme court decision Rule 10 (c) The Supreme court has identified areas and interest protected by double jeopardy: (1) it protect against a second prosecution for the same offense after acquittal; (2) second prosecution for the same offense after conviction; (3) and it protect against multiple punishments for the same offense. see United States v. Wilson 420 U.S. 332, 343 (1975); North Carolina v. Pearce, 395 U.S. 711, 717, 89, S.Ct. 2072, 2076, 23 L.Ed. 2d 656 (1969) the first interest and protection is germane to Ealy count 3. acquittal bar count 1. conviction same offense, same ultimate fact is a prima facie case set forth herein see (¶17) Ealy claim a defendant right of protection from a conviction for the same offense after a jury verdict if acquittal of same ultimate fact offered by double jeopardy issues preclusion U.S. Const. 5th,14th Amend. is a fundamental right interest and right of protection which enforce finality and in this case before the court compelling reason for this court to exercise judicial discretion to decide the merit of issue preclusion presented for consideration in accordance to Rule 10 (a), (c).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Lamonte Ealy

Date: April 26th 2023