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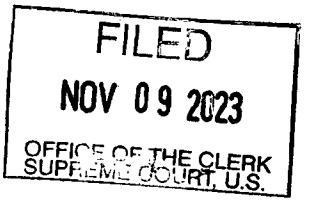

IN THE

SUPREME COURT OF THE UNITED STATES

TERRENCE T. LAFAIVE - PETITIONER

vs.

RECORDS CUSTODIAN WAUKESHA COUNTY DISTRICT ATTORNEY - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE WISCONSIN COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

TERRENCE T. LAFAIVE #594257

STANLEY CORRECTIONAL INSTITUTION

STANLEY, WI, 54768-6500

(414)-254-3779

QUESTIONS PRESENTED

1. Does the Common-Law exception recognized in *State ex rel. Richards v. Foust* - that doesn't require a response from a Records Custodian to a public records request - abridge the First and Fourteenth Amendment rights of a litigant?

A. Does Due Process require a Court to conduct an In Camera review of requested records.

2. Does the Wisconsin Supreme Court's decision in *State ex rel. Richards v. Foust* conflict with this Court's decision in *Missouri v. Frye,* that held formal plea offers and negotiations must be made part of the record?

A. Does a prosecutor waive their qualified privilege derived from the attorney work-product doctrine if both parties concede a final plea offer was made?

PARTIES TO THE PROCEEDING

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RELATED CASES

U.S District Court Of Eastern Wisconsin, Petition for Writ of Habeas Corpus 28 U.S.C. § 2254 *LaFaive v. Buesgen*, 23-CV-1123, 2023 WL 6257620

U.S District Court of Eastern Wisconsin, § 1983 LaFaive v. *Judge R. Dorow v. Lesli S. Boese* 20-CV-1016 Only this Court can rule in this case. (First Amendment claim of unconstitutionally broad parole condition Dismissed due to *Rooker v. Feldman-Doctrine.)*

Wisconsin Supreme Court and Court of Appeals access page, Appeal No(s). 2022AP000391; 2022000392 (No-merit appeals). 2023001325 (Wisconsin Supreme Court Petition for Supervisory Writ).

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STATUES AND RULES

OTHER

Petitioner prays that a Writ of Certiorari is issued to review the judgment below, whereas there will be no other viable avenue of relief left for him to obtain justice.

OPINIONS BELOW

The Wisconsin Supreme Court's decision to deny review is found at Appendix C.

The opinion of the Wisconsin Court of Appeals appears at Appendix A to the petition and is found at *LaFaive v. Records Custodian Waukesha County District Attorney*, 2023 WI App 32, 993 N.W.2d 180 (Table), 2023 WL 3614764.

JURISDICTION

The date on which the Wisconsin Supreme Court denied the review was on September 26th, 2023.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.C.A. CONST. AMEND. I

AMENDMENT I. ASSEMBLY CLAUSE; PETITION CLAUSE

"Congress shall make no law abridging the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S CONST. AMEND. XIV

SECTION 1. DUE PROCESS OF LAW

"Nor shall any State deprive any person of life, liberty, or property, without due process of law."

UNITED STATES CODE ANNOTATED

5 U.S.C.A. § 552

§ 552. FREEDOM OF INFORMATION ACT

"The purpose of the Freedom of Information Act (FOIA) is to require the release of government records upon request and to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."

FEDERAL RULES OF CIVIL PROCEDURE

In camera review is an appropriate and useful means of dealing with claims of governmental privilege to assure that balance between officials' claim of irrelevance and privilege and plaintiffs' asserted need for documents is correctly struck. Fed.Rules Civ.Proc. Rules 34, 37, 28 U.S.C.A.

RULE 37. FAILURE TO MAKE DISCLOSURES OR TO COOPERATE IN DISCOVERY; SANCTIONS

"Failure to Disclose or Supplement. If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless

the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) May order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) May inform the jury of the party's failure; and

(C) May impose other appropriate sanctions, including any of the orders listed in Rule 37(b) (2) (A) (i)-(vi).

WISCONSIN STATUTES

§ 19.35 ACCESS TO RECORDS; FEES

WIS. STAT. § 19.35(4) (A)

"Each authority, upon request for any record, shall, as soon as practicable and without delay, either fill the request or notify the requester of the authority's determination to deny the request in whole or in part and the reasons therefor."

WIS. STAT. § 19.35(1) (AM)

"Any requester who is an individual or person authorized by the individual has a right to inspect any personally identifiable information pertaining to the individual in a record containing personally identifiable information that is maintained by an authority and to make or receive a copy of any such information."

19.31 DECLARATION OF POLICY

WIS. STAT. § 19.31

"All persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information."

STATEMENT OF CASE

The Petitioner, a criminal defendant currently in post-conviction proceedings, has attempted to oversee and exercise his right to counsel, a right this Court declared extends to the plea bargaining process. The prosecution chose not to disclose a final plea agreement in open court, which resulted in the deprivation of the petitioner's fundamental right to a speedy trial. When the petitioner tried to utilize Wisconsin's public records law to gain independent oversight of the plea bargaining process, the Respondent relied on a common-law exception that shields communications "integral to the prosecution process". In Wisconsin, there is currently a common-law exception that abridges a petitioner from obtaining effective redress from his legal disputes. Specifically, exempting a Records Custodian for a District Attorney's Office to respond to Wisconsin Public Records Requests, or disclose personally identifiable information to the requester that is deemed "integral to the prosecution process".

The factual basis underlying the Petitioner's claim is a constitutional challenge to the common-law exceptions that give less protection than its federal counterpart, The Freedom of Information Act. The Petitioner asserts that a Record Custodian waives their qualified privilege derived from the attorney work-product doctrine if both parties concede a final plea offer was made in open court.

THE COURT: My only request of the parties is that Mr. LaFaive, If he wants me to consider the August 25 date, would need to withdraw the speedy trial request. In the event the plea falls apart, something happens, I'm going to allow the state, obviously to cancel their witnesses, but I need Mr. LaFaive to understand that and be willing to withdraw that speedy trial request.

(August 19th, 2020 Hearing page 3)

The court record reflects conflicting testimony about the nature of the communications exchanged between the Petitioner's trial counsel and the prosecutor regarding the plea bargaining process. The Respondent stated in its motion to dismiss mandamus that the nature of the discussion was about plea negotiations. To the contrary, an investigation of the petitioner's trial counsel - by the **Wisconsin Supreme Court's Office of Lawyer Regulation** - revealed the correspondence **"did not discuss the plea deal" nor was the discussion "substantial". (Appendix D).** The court record suggests that one of the parties potentially concealed the true facts about the nature communications exchanged to circumvent disclosure requirements mandated by Wisconsin's public records law. For all practical purposes, the judge who presided admitted to the cover-up on the record.

THE COURT: The bottom line is that it was withdrawn before speedy trial. And that's my - - I'll be honest. That's my tactical move, right? I ask you to withdraw it even before the plea happens. But that provides some - - I'll be frank, it provides cover to me in the record I realize that's blown up. (August 27th, 2020 Plea and Sentencing Hearing R24:33)

This petition puts the Wisconsin Judiciary's reluctance to enable effective redress for independent oversight of the plea bargaining process centerstage. Without this Court's grant of certiorari review, plea bargaining will be driven further back into the shadows from which it has so recently emerged.

PROCEDURAL HISTORY

LaFaive appeals a Final Order dismissing his Petition for Writ of Mandamus concerning an Open Records request for correspondence between the Waukesha County District Attorney's Office and his prior trial counsel. (R39) Upon request, on or about September 4th, 2020, Attorney Peter Wolff sent the Petitioner a letter along with only two (2) pages of Emails, which were received by the Office of Lawyer Regulation on September 29th, 2020. The Petitioner sent an Open Records request to the Waukesha County Clerk of Court on October 10th, 2021. The request demanded "All correspondence between the State and Attorney Peter Wolff in relation to Mr. LaFaive. This request included but is not limited to emails and text messages. Specifically, the requester sought the text messages that Attorney Boese asserted passed between her and Attorney Peter Wolff in the transcript for L.C # 20CF141 on August 27th, 2020, page 24, line 14 of the circuit court transcripts."(R9) The Clerk of Court hand delivered the request on October 18th, 2021 to the Waukesha County District Attorney's Office. (R24) The Respondent chose not to respond, which caused the Appellant to file a petition for Writ of Mandamus. (R3) Upon request, the remainder of the emails in the Petitioner's possession was sent by the Petitioner's Appellant Counsel Marcella De Peters on or about January 3st, 2022. The Record Custodian was served with a copy of the petition on

February 18th, 2022 by a Wisconsin resident. (R16) The Assistant Attorney General was appointed to represent the Respondent on March 11th, 2022. (R14) Shortly after, the A.A.G filed a motion to Dismiss/Quash the Petition for Writ of Mandamus. (R20) Honorable Judge Lloyd Carter scheduled the motion hearing for May 9th, 2022. The Petitioner filed a Reply to the Respondent's Motion to Dismiss with attachments on May 12th 2022. This included the transcript from a Plea and Sentencing hearing referenced in the Petitioner's Open Record request, and all of the available remedies at law he utilized in attempt to receive the documents. (R24) Additionally, the Petitioner filed a Memorandum, (R25) and further exhaustion of remedies. (R26). On May 9th, 2022 Mr. LaFaive appeared pro se, via zoom, and A.A.G Ms. Huck appeared via zoom, on behalf of the Respondent, for the Motion Hearing with Judge Carter presiding. Ms. Huck stated three points she would like to address. (R42:9-10). First, the "clear duty" standard not being met due to the categorical exemption recognized by the Courts in *Foust*. (Documents **"Integral to the prosecution process"** are exempt from disclosure). Secondly, she claimed communications between the prosecutor and LaFaive's trial counsel are integral to the prosecution process, and just because the documents may be available through other procedural mechanisms, does not make them available through public records. An observation that Ms. Huck made that morning was that 'approximately Fifteen (15) pages of emails' did not contain any text messages. (R42:10-11). The Court then gave the Petitioner a chance to speak. **LaFaive stated that he understood documents integral to the prosecution process are classified, however the crux of the petition for Writ of Mandamus is that upon the Office of Lawyer Regulation**

investigation, Attorney Peter Wolff stated the text messages do exist, do not discuss plea negotiations, and are not substantive. Mr. Wolff could not recall exactly what the messages stated. (R42:13-14) (R24:44) The Petitioner expressed because the documents are not integral to the prosecution process they should be subject to Wisconsin public record's law. LaFaive also mentioned that despite the Respondent receiving his Notice of Claim & Injury, (R26; R22) The Custodian still deliberately chose not to reply to his Public Record request. The Petitioner sought punitive and statutory damages, asserting replying is not integral to the prosecution process. (R42:16) The Petitioner began explaining what caused the Open Records request to come about, by describing a Plea and Sentencing hearing from his criminal cases that occurred on August 27th, 2020 with the Honorable Judge Jennifer Dorow presiding. (2022AP391, 2022AP392) At the beginning of this hearing, Judge Dorow went over a plea deal with both parties twice, and reached a mutual understanding. (R24:TR.Pg.5-6) But once the Petitioner fully incriminated himself during the plea colloquy, Attorney Peter Wolff informed LaFaive the plea document LaFaive had in his possession was not genuine. (R24:TR.Pg 20-22) The Record Custodian then distanced herself from the plea document by claiming it wasn't in front of her. (R24:TR.Pg 23) The Judge then admitted to having the erroneous plea document in its possession the entire duration of the Plea and Sentencing hearing. (R24:TR.Pg.23)

Next, Attorney Peter Wolff attempted to tell the Court his understanding of the plea agreement was different from what it was during the beginning of the hearing.

(R24:TR.Pg 24). At this point, the Respondent hesitantly revealed that Attorney Wolff had been apparently texting her about plea negotiations.

(R24:TR.Pg.24) This left the Petitioner with the impression that his trial strategy was being tampered with, (R24:TR.Pg 29) and his 90-Day Speedy Trial right was being pushed off because of acts between the Judge, Respondent, and trial counsel. (R24:TR.Pg 31). **Ultimately, Judge Jennifer Dorow, admitted the removal of the Petitioner's Speedy Trial right during his August 19th Plea hearing was a "tactical move", and realized her cover was "blown up".** (Appeal No.:2022AP391-R60, R61) (R.24:33) After numerous attempts of the Petitioner demanding the court to reinstate his Speedy Trial right, the Judge invoked the time limits, but refused to schedule his Speedy Trial 'on the record' by giving him a Plea and Sentencing date instead. (R24:TR.Pg 33)

LaFaive Alleged to Judge Lloyd Carter that due to the conflicting statements about the nature of the documents between the Record Custodian, and Attorney Peter Wolff, combined with Judge Jennifer Dorow's admission, Official Cover-Up existing in this circumstance is highly probable. (R42:TR.Pg 17) The Petitioner went to mention that due to laws against hybrid-representation; other procedural mechanisms to obtain documents are limited. (R42:TR. Pg.19) LaFaive attempted to contact his trial counsel immediately, who responded by sending only two (2) emails along with a motion to withdraw from his case. LaFaive attempted citing *Nichols v. Bennett*, expressing that the public documents he's seeking may have been placed into a prosecutorial file to circumvent disclosure requirements. The Petitioner suggested that an In-Camera inspection would be

appropriate, and that the public deserves answers for what took place on August 27th, 2020. Moreover, he cautioned the court that past, current, and future litigants could be harmed if the petition for Writ of Mandamus was not granted. (R42:TR.Pg 20)

Overall, Judge Carter began to rule on the motion hearing by stating as of that day, *Foust* still directed the court to address the case (R42:24). The Court didn't disagree with some statements about Public Policy, and Wisconsin Open Records law recited by the Petitioner. The Court also reread the transcript of the August 27th, 2020 Plea Hearing and understood how this all developed. (R42:23-25) But all in all, the court deemed that the requested documents referenced by the Petitioner are "integral to the criminal investigation and process", therefore they are protected by the *Foust* determination. Ultimately, the Petition for Writ of Mandamus was dismissed (R24:28). (Appendix B).

LaFaive appealed the circuit courts Final Order asserting that Trial Counsel's admission to the Office of Lawyer Regulation conflicts with the Circuit Court's determination, making it clearly erroneous. The Court Of Appeals affirmed the circuit court's order on May 24th 2023. Despite the conflicting information suggesting misconduct the Court affirmed the Circuit Court's decision. (Appendix A).

"We are unmoved"

(WCOA Decision *State ex rel. LaFaive v. Records Custodian Waukesha County District Attorney,* Court of Appeals of Wisconsin. May 24, 2023, 2023 WI App 32993 N.W.2d 180 (Table) 2023 WL 3614764 at ¶8)

On September 26th, 2023 the Wisconsin Supreme Court denied LaFaive's petition for review. Appendix C. LaFaive now seeks this Court's grant for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

I. THE CATEGORICAL EXEMPTION RECOGNIZED IN STATE EX REL. RICHARDS V. FOUST IS UNCONSTITUTIONALLY VAGUE, AND IMPEDES A PETITIONER'S FUNDAMENTAL RIGHT TO AND EFFECTIVE REDRESS, AND EXPECTATION OF TRANSPARENCY.

The First and Fourteenth Amendments are intrinsic to government transparency. *John Doe No. 1 v. Reed*, 561 U.S 186 (2010). The fundamental right to effective redress is "deeply rooted in this nation's history and tradition". [*Moore v. City of East Cleveland, Ohio,* 431 U.S 494] (1977) at 503 (Plurality opinion); *Snyder v. Massachusetts*, 291 U.S 97, 105 (1934). In Wisconsin, this right is being abridged by the common-law exemption in *Foust* when attempting to obtain independent oversight of plea bargaining negotiations in a prosecutor's file. *State ex rel. Richards v. Foust,* 165 Wis.2d at 434, 477 (1991); *Nichols v. Bennett,* 199 Wis. 2d. at 275 (1996). (Clarifying documents "integral to the criminal investigations and prosecution process" are not subject to disclosure under Wisconsin public records law). **As it stands, a prosecutor need not even respond to a public record request due to the common law exception recognized in *Foust*. *Foust*, supra.**

"It has long been interpreted to forbid restrictions of free speech by all agencies of government". *Fiske v. Kansas,* 274 U.S 380, 386-87 (1927); *U.S.C.A Const. Amend I.*

Generally, Blanket restrictions on access to records are disfavored. *Globe Newspaper Co. v. Pokaski 868 F.2d 497* (1st Cir. 1989).

Due to the conflicting statements regarding the nature of the records sought, the term "Integral to the prosecution process" has become unconstitutionally overbroad as applied under the First and Fourteenth Amendment to the United States Constitution. This Court has clearly established that the First Amendment Petition Clause secures an individual's right to "appeal to the courts and other forums established by the government for a resolution of legal disputes" *Borough of Duryea, Pa v. Guarnieri,* 564 U.S 379, 387 131 S. Ct 2488, 180 L. Ed. 2d 408 (2011). **It is undisputed that the Respondent did not respond to the petitioner's public record request in any way, in direct opposition to the First and Fourteenth Amendments to the, United States Constitution.** The Wisconsin Supreme Court acknowledged the lack of a response being a novel issue stating:

"Because the prosecutor in this case did respond to the request for information, this issue was not before us. Should he have declined to do so, the court could have been compelled to carve out yet another exception to *Foust*, since replying to such a request presumably does not jeopardize and is not "integral to the criminal investigation and prosecution process". *Nichols v. Bennett,* 199 Wis.2d 268544 N.W.2d 428 (1996) at FN 4. The federal courts have dedicated a rule to infer an inference of malice for a failure to disclose. See Fed.R.Civ.P.37(c) (1). (Imposing sanctions, advising jury of untimely disclosure).

Wisconsin Supreme Court Justice Abrahamson had it right when she dissented against the categorical exception in recognized in *Foust* stating:

"The Wisconsin Judiciary has failed to appraise different policy considerations governing prosecutors' open and closed files, and has failed to appreciate that government operations and the public interests remain protected when circuit courts examine on *a case by case* basis, a prosecutor's closed files *in camera* to determine whether they should be made public. *Foust*, 165 Wis.2d 42948 (1992) at 445 (Abrahamson, J dissenting).

This Court should find the Wisconsin's appellate court's failure to acknowledge the undisputed fact of the lack of response to LaFaive's public record request a manifest injustice, that "seriously affecte[ed] the fairness, integrity of the public reputation of judicial proceedings". *U.S v. Olano*, 507 U.S. 725, 113 S. Ct. 1770, 123 (1993).

This Court must find the potential malice for failure to respond - in a conspiratorial context – a circumstance that warrants an *in camera* review. *United States v. Nixon*, 418 U.S. 683, 706, 94 S.Ct. 3090, 3106, 41 L.Ed.2d 1039 (1974); *Pennsylvania v. Ritchie*, 480 U.S. 39107 S.Ct. 98994 L.Ed.2d 40 (1987). (A Court must itself determine whether the material is privileged and not subject to disclosure to the party)[1]. Access to records of completed cases is necessary to ensure that the government's official records accurately reflect what actually transpired. *CBS, Inc. v. United States District Court,* 765 F.2d 823, 826 (9th Cir. 1985). The fact of the matter is a Wisconsin Supreme Court Office of Lawyer Regulation Investigation of the Petitioner's attorney, revealed conflicting statements that the Respondent asserts about the nature of the documents sought. "Confidence in the accuracy of its records is essential for a court and for the authority of

[1] Due process requires in camera review. See also Love v Johnson, 57 F.3d 1305 (4th Cir. 1995)

its rulings and the respect due its judgments. Id. "If public records cannot be compared with sealed ones, all of the former are put in doubt". Id.

The Declaration of Policy for the State of Wisconsin States ""All persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. Wis. Stat *§ 19.31.* "Such information is declared to be an essential function of a representative government and integral part of routine duties of officer and employees whose responsibility to provide such information" *Id.* "The purpose of the Freedom of Information Act (FOIA) is to require the release of government records upon request and to ensure an informed citizenry." *5 U.S.C.A § 552.* The "cases interpreting FOIA can be used as persuasive authority in deciding Wisconsin Public Record Cases". Id; Wis. Stat Ann § 19.31 et seq. The Constitution prohibits rules and laws that force a person to give up a constitutional right as a condition precedent to a benefit or exercise of another constitutional right. *Koontz v. St John's River Water Management District*, 570 U.S 595, 604 (2013) at 604-05, 619. At first glance, a reasonable jurist may be led to believe that Wisconsin's public records law is correlative to its federal counterpart, the Freedom of Information Act. However, The *Foust* exemption combined with laws against hybrid-representation leave a petitioner with the choice of either exercising his Sixth Amendment right to counsel, or asserting his First amendment right to effective redress. *Debra A.E 188 Wis.2d 111 523 N.W.2d 727 (1994).* (Hybrid representation prohibited in Wisconsin). This choice

presented to the petitioner is "constitutionally offensive and cannot be voluntary". *Wilks v. Isreal*, 627 F.2d 32, 35 (7th Cir. 1980).

II. WISCONSIN'S EXCEPTIONS TO DISCLOSURE UNDER PUBLIC RECORDS LAW CAUSES A COLLATERAL CONFLICT WITH THIS COURT'S DECISION IN MISSOURI V. FRYE, WHERE IT HELD THAT PLEA OFFERS BE MADE PART OF THE RECORD.

This petition addresses a petitioner's Fourteenth Amendment "right... to the plea bargainging process". *Lafler v. Cooper,* 566 U.S 156, 132 ¶56, 699 N.W. 2d 551 (2012). In October 2021, LaFaive made a public records request to "Records Custodian Waukesha Cnty. Dis. Atty" for:

"All correspondence between the State and atty Peter Wolff in Relation [to Mr.] Terrence LaFaive. This request includes but is not limited to emails and text messages. Specifically, the requester is seeking the text messages that Atty Boese assered passed between her and atty Wolffe in the transcript for L.C. #20CF141 on August 27, 2020 on page 24, line 14 of the circuit court transcripts". (Wisconsin public record request, R.9).

Due to laws against hybrid representation combined with the exemption recognized in *Foust,* a Petitioner must rely on the adversarial process protected by the Sixth Amendment, which requires that the accused have "counsel acting in the role of an advocate". (Citations omitted) *U.S v. Cronic*, 466 U.S 646, 104 S. Ct. 20 39, 80 L.Ed. 2d. 657 (1984). "As a general rule, defense counsel has a duty to communicate formal prosecution offers to accept a plea on terms and conditions that may be favorable to the accused". *Missouri v. Frye,* 566 U.S 134, 132 S.Ct 1399 (2012). Federal courts have dedicated rules that require the judge to disclose any plea agreement in open court. Fed.R.Civ.Proc. (e) (2)."The American Bar Association has recommended standards for prompt communication and consultation...that has been adopted by numerous state and

federal courts...to ensure against late, frivolous, or fabricated claims." *ABA Standards for Criminal Justice, Pleas of Guilty* 14 3.2(a) (3d.ed.1999). Moreover, The Court record is subject to Wisconsin public records law. Wis Stat. § 19.35(1)(a). ("Except as provided by law, any requester has a right to inspect any record"). This Court must recognize the unhealthy subterfuge that allows for a prosecutor, judge and trial counsel to omit stating the plea bargain in open court. Safeguards must be implemented to secure a Petitioner's Fourteenth Amendment right to the plea bargaining process. *Lafler v. Cooper*, Supra.

The factual basis underlying LaFaive's claim is a constitutional challenge about the failure to communicate a truthful plea deal on the record prior to a subsequent sentencing hearing. (R.9).

A copy of the Plea and Sentencing transcript from case number #2020CF141 is at (R.24:7-43).

LaFaive's public record request references the following exchange in which trial counsel and the Respondent discuss a "misunderstanding" regarding the terms of the plea:

THE COURT: The delivery charge is listed in the paperwork as a term of 3 years' probation. So I think that may have changed and I don't think Mr. LaFaive - - He may not necessarily understand all of that,

MS. BOESE: Correct. I would agree with that. I want to be perfectly clear that the State wanted to, we could ask for probation on both counts, for the maximum term of imprisonment on both counts, consecutive to one another. We can - - Both sides are free to argue.

THE COURT: Attorney Wolff, is that different than what you thought is - -

MR WOLFF: That's different from what I discussed with Mr. LaFaive, Your Honor. So I just want - - I know that Mr. LaFaive - - I just want him to understand that my understanding is the State is offering probation on count - - on the delivery case.

MS. BOESE: That is not true.

THE COURT: Well, that's on his paperwork, so - - Unless he agrees to go forward on that, we're going to have an issue because I don't think he understands that that entire offer at some point morphed it sounds like. Or at least his understanding.

MS. BOESE: I would agree with that. I think there - - Attorney Wolff has been, been texting me. And it does appear, based upon the comments in court and his comments, that there was some miscommunication

My understanding was - - and that's I think what I wrote down - - is that both are free to argue. That was the agreement for the State to modify what charges he was pleading to.

So both sides free to argue means to me we can argue anything that we want, and I think it meant something else to Mr. Wolff and that was relayed to Mr. LaFaive.

So I think there's definitely a misunderstanding or miscommunication about the offer, the recommendation. (R.24:29-42)

DDA Boese's statement that Attorney Wolff "has been, been texting me" (R.24:30) relates to the petitioner's arguments in his appeal.

If the petitioner requested public records from the Respondent that clearly fell within a statutory or common law exception to Wisconsin public records law, then an in camera review would not be necessary. *United States v. Nixon,* 418 U.S. 683, 706, 94 S.Ct. 3090, 3106, 41 L.Ed.2d 1039 (1974). (Dealing with claims of the assertion of government privilege).

An investigation conducted by Wisconsin's Office of Lawyer Regulation of Attorney Peter Wolff revealed:

"The text message(s) in question were not substantive and did not discuss the plea deal... They said something to the effect of: I sent you an email" (R: 24:44.)

Plea agreements are essentially contracts, so "when a defendant agrees to a plea bargain, the Government takes on certain obligations". *Puckett v. U.S,* 556 U.S. 129129

S.Ct. 1423173 L.Ed.2d 266 (2009). Due to the conflicting statements about the nature of the records – in this case open court plea negotiations- this court needs to make a ruling consistent with *Pennsylvania v. Ritchie* that - at minimum - the trial court needs to intervene and conduct an in camera review. 480 U.S. 39107 S.Ct. 98994 L.Ed.2d 40 (1987). Without access to records submitted in connection with criminal proceedings, the public would not have a "full understanding" of the proceeding and therefore would not always be in a position to serve as an effective check on the system. *Associated Press v. U.S Dist. Court for Cent. Dist of California,* 705 F.2d 1143 (9th Cir. 1983) at 1145. Open government policies, and transparency of plea bargaining negotiations should serve to keep the process from "returning back into the shadows" and oversee the apparent "horse-trading" [that] determines who goes to jail and for how long. *Bordenkircher v. Hayes, 434 U.S. 357, 98 S. Ct. 663, 54 L.Ed.2d (1978) at 365;) Scott & Stuntz, Plea bargaining as a contract, 101 Yale L.J. 1909, 1912 (1992)* (Two Yale scholars describing the plea bargaining process as "horse-trading").

A. Does A Prosecutor Waive Their Qualified Privilege Derived From The Attorney Work-Product Doctrine If Both Parties Concede A Final Plea Offer Was Made?

Wisconsin's overly broad interpretation of the *Foust* exception runs afoul to constitutional dictates of the First and Fourteenth Amendment. See Fed. Rule Crim. Proc. 11(e) (2). (Provides that the judge shall require the disclosure of any plea agreement in open court).

A prosecutor waives their qualified privilege of attorney work-product once they indicate they make a final plea offer. *U.S v. Nobles*, 422 U.S 255, 238 (1975). Although attorney work product-privileges apply to open record requests regarding trial preparation and trial strategy, such exceptions do not apply to plea offers that must be put on the record.

In *Kyles v. Whitley,* the U.S Supreme Court acknowledged it's not beyond the prosecutor to knowingly use perjured testimony to convict a criminal defendant. 514 U.S. 419, 115 S. Ct. 1555, 131 L.Ed .2d 490 (1995). Therefore, why would it be a surprise that a prosecutor would conspire with defense counsel to deprive a defendant of his constitutional right? Indeed, even a court itself can conspire with defense counsel as illustrated in the concurring opinion of Justice Stevens in *Bousley v. United States*, "Its consequences for petitioner were just as severe, and just as unfair, as if the court and counsel had knowingly conspired to deceive him in order to induce him to plead guilty to a crime that he did not commit".523 U.S 614, 118 S.Ct. 1604 (1998). The state-created, common-law exception in *Foust so easily allows for a conspiracy to occur-* for the obvious reason that there's no government transparency within the exception. *State ex rel. Richards v. Foust*, 165 Wis.2d at 434, 477 (1991). It is inconsistent with this Court's ruling in *Missouri v. Frye*, which held a Defendant has a right to counsel- "a right that extends to the plea bargaining process". 566 U.S 134,132 S.Ct 1399 (2012) at 407; See also *McCoy v. Lousiana*, 584_U.S (2017). (Describing the Sixth Amendment declared the Defendant is the "autonomy to decide...the objective of his defense").