No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MATTHEW MYKE,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE WISCONSIN COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Mark P. Maciolek
Maciolek Law Group LLC
State Bar Number: 1054208
750 Windsor Street #206
Sun Prairie, WI 53590
Phone: (608) 403-3252

QUESTIONS PRESENTED

1. In a criminal case involving accusations of sexual assault in which the prosecution relies solely upon the testimony of the complainant, is it ineffective assistance of counsel to fail to prepare the accused to testify at trial, and ineffective assistance of counsel for the trial lawyer to refuse to offer any advice during the jury trial to the accused about the decision to testify?

2. Is it ineffective assistance of counsel to fail to develop character evidence about the accused because the trial lawyer did not understand the rules of evidence that permit the accused to present evidence of his own character?

LIST OF PARTIES

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

RELATED CASES

There are no related cases.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITES CITED

Cases

Statutes

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

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

OPINIONS BELOW

The opinion of the Wisconsin Court of Appeals, the highest state court to review the merits, appears at Appendix A to the petition and is unpublished. The decision and order of the Brown County trial court appears at Appendix B to the petition. The decision of the Supreme Court of Wisconsin denying review appears as Appendix C to the petition.

JURISDICTION

The date on which the Supreme Court of Wisconsin, the highest state court, issued its decision denying the petition for review was August 2, 2024. A copy of the decision appears at Appendix C. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional provisions:

Sixth Amendment to the Constitution of the United States

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 defence.

Statutory provisions:

Wis. Stat. § 940.04(1)

(1) Character evidence generally. Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(a) Character of accused. Evidence of a pertinent trait of the accused's character offered by an accused, or by the prosecution to rebut the same;

(b) Character of victim. Except as provided in s. 972.11 (2), evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(c) Character of witness. Evidence of the character of a witness, as provided in ss. 906.07, 906.08 and 906.09.

Wis. Stat. 948.025(1)

Whoever commits 3 or more violations under s. 948.02 (1) or (2) within a specified period of time involving the same child is guilty of: A Class C felony if at least 3 of the violations were violations of s. 948.02 (1) or (2).

STATEMENT OF THE CASE

On December 6, 2016, the State of Wisconsin charged Matthew Joseph Myke with repeated sexual assault of a child, contrary to Wis. Stat. § 948.025(1)(e). R. 1, 19. The case proceeded to trial on January 22, 2020. R. 117. Attorneys Shane Brabazon and Quinn T. Jolly represented Matthew at trial. Brown County District Attorney David Lasee represented the State.

After two days of trial, the jury returned a guilty verdict. R. 118 241:7-16. On September 4, 2020, the Circuit Court imposed a 20-year sentence consisting of "10 years initial confinement and 10 years extended supervision." R. 119 69:13-15.

Matthew filed a timely postconviction motion, R. 122, on August 25, 2021, having been granted an extension of time to file such a motion. R. 120, 121. Matthew's postconviction motion argued that "[n]o physical evidence corroborated the complainant's testimony, and no other witnesses corroborated her testimony as to the elements of the charged offense." R. 122, p. 1. Trial would have been a "he said she said" credibility contest – except that Matthew did not testify at trial. His trial counsel did not call any witnesses and did not present any evidence in his defense.

Matthew's trial counsel never advised him as to whether he should or should not testify in his own defense at trial. Trial counsel took no steps whatsoever to prepare Matthew to testify at trial so that Matthew might have been in a position to testify at trial in the event that he decided to do so. In his postconviction motion, Matthew argued that trial counsel was ineffective for failing to advise him about testifying at trial. To be clear, trial counsel explained that Matthew had the right to testify, and it was his decision to testify or not.

However, beyond this boilerplate statement of Matthew's right to testify or not to testify, counsel offered no advice about how to make that crucial decision of whether to testify in his own defense.

During jury trial, the Circuit Court conducted the usual colloquy during trial and determined that Matthew was knowingly deciding to waive his right to testify in his own defense. R. 143, p. 5. The Circuit Court determined that Matthew's trial lawyers were not ineffective, simply because Matthew knew about his right to testify at trial. The Circuit Court denied Matthew's postconviction motion in a written order on June 13, 2022, R. 143. Matthew filed a notice of appeal on June 30, 2022. R. 144.

Matthew Myke is a member of the Cayuga Nation. R. 139 5:4. After mentorship from tribal elders, Matthew became a "faithkeeper," responsible for learning in conducting tribal ceremonies, and responsible for the health of the community and well-being of the sacred medicine of the tribe. R. 139 5:11-18. In addition to attending to tribal ceremonies, as a faithkeeper Matthew was responsible for learning tribal languages, and passing down and preserving his tribe's language and knowledge for future generations. R. 139 6:1-8. As part of his duties as a faithkeeper, Matthew traveled between various North American Iroquois nations. R. 139 6:20-25.

Matthew had been married before to a woman named Melinda (who testified at trial against Matthew). R. 139 8:7. Matthew's relationship with Melinda progressed quickly, and he proposed marriage after the couple learned they were expecting their first child. R. 139 8:16-25. Jossani, daughter of Matthew and Melinda, was born in 2011. R. 139 9:25.

Matthew worked in New York State from time to time, where his father had a business. R. 139 10:16-20. Melinda, Jossani, and Melinda's children from a previous marriage would move back and forth between Wisconsin and New York while Matthew and Melinda were married. R. 139 11:13-21.

As the relationship between Melinda and Matthew deteriorated, Matthew began a romantic relationship with Melanie Bomberry. R 139 15:20-16:14. After Melinda discovered Matthew had started relationship with Melanie, tensions between Melinda and Matthew grew, especially in connection with their daughter Jossani. R. 139 16:20-17:11. Melinda "became very spiteful and bitter" toward Matthew after he started a relationship with Melanie. R. 139 17:10. Melinda used Matthew's close relationship with Jossani to hurt Matthew, interfering with Matthew's relationship with their daughter. R. 139 17:12-17. When Matthew did manage to visit Jossani, he experienced vandalism to his vehicle, his tires being slashed, and threats made by Melinda's family toward Matthew. R. 139 17:16-22. Matthew and Melanie, also known as Mandy, went on to have three children together. R. 139 18:5-7.

At the postconviction motion hearing, Matthew testified he met the alleged victim, ACB, sometime after October 20, 2011, after Jossani was born. R. 139 22:8-14. ACB would watch Melinda's children while Matthew was in New York working. R. 139 22:21-24. ACB would sometimes be around at Melinda's house in Green Bay while Matthew was in town as well; Melinda paid ACB for babysitting the children. R. 139 23:25-24:9. Matthew did not spend time with ACB when no other people were around. R. 139 25:3-5. Matthew denied sexually assaulting ACB. R. 139 25:6-29:22.

Matthew described the relationship Melinda developed with ACB as being sisterly or mother-like, and that Melinda "sort of brought her under her wing and you know, took care of her. She fed her, clothed her, put a roof over her head, and even gave her money to go shopping." R. 139 30:1-6. Matthew suspected that Melinda had something to do with ACB accusing him of sexual assault, because just before he found out about the accusation, Melinda's aunt told Matthew that she did not "agree to what Melinda was trying to do to" Matthew. R. 139 32:13-23.

Matthew described seeing ACB on occasions before she accused him of sexually assaulting her, but after Matthew's relationship with Melinda ended. R. 139 39:15-19. Just a couple of days before Matthew was arrested in connection with this case, he saw ACB, who shook his hand, greeted him and did not seem to be afraid of or nervous around Matthew. R. 139 40:2-9.

Before trial, Matthew met with Attorney Brabazon one time in person, but never met with him for purposes of preparing for jury trial, despite Matthew requesting that they meet for purposes of preparing for trial. R. 139 33:1-7. Brabazon spent 20-30 minutes reviewing his file before testifying at postconviction motion hearing. R. 136 24:17-19. Brabazon's recollections of the case were generally vague. Brabazon did not develop a theory of defense, apart from "Mr. Myke didn't do it, and the inconsistencies of the complaining witness were significant." R. 136 20:1-2.

Brabazon testified that Matthew was "very adamant that he was not going to testify. He didn't need to because he was innocent." R. 136 40:21-41:2. Brabazon did not recall any other reasons Matthew "would have professed why he would not want to testify." R.

136 42:8-9. Matthew had no prior criminal convictions that could have been used to impeach Matthew, had he testified. R. 117 15:8-10. Despite the absurdity of the assertion, the Court of Appeals accepted at face value the idea that an innocent person would refuse to testify because they are innocent. R. 153.

Regarding whether he advised Matthew to testify or not to testify, Brabazon testified: "I don't know that we had that long of a talk about it because he's always professed he was not planning on testifying." R. 136 42:21-25. Brabazon did not engage in any Q&A type of preparation before trial. R. 136 45:10-16. Brabazon did not suggest preparing Matthew to testify at trial in the event that Matthew ultimately decided to testify at trial. R. 136 45:17-19. Consequently, Matthew was not prepared to testify at trial were he to have chosen to exercise that right. The Circuit Court accepted Brabazon's assertion that Matthew did not want to testify at trial. R. 143, p. 6. It also found that Brabazon explained the risks of testifying at trial, though nothing in the record sets forth what those risks were that Brabazon may have perceived. Id. The Court of Appeals agreed. R. 153.

Brabazon did not give Matthew any advice or framework within which to evaluate whether to testify, or any advice about whether Matthew should testify. R. 136 46:6-10. In his postconviction testimony, Matthew described trying to get advice from Brabazon about the decision to testify at trial. R. 139 48:8-16. Even during trial, Matthew asked for advice about how the trial was going, asking if his lawyers felt that he should testify, or if and testifying might "jeopardize the advantage that we may have." R. 139 49:1-5. Despite Matthew seeking advice about his right to testify, his attorneys at trial again told him only that the decision was up to him alone. R. 139 48:16-19.

Brabazon did not attempt to develop any witnesses who could testify to any of Matthew's pertinent character traits. R. 136 18:19-21. At the postconviction hearing, Matthew testified that his wife, Melanie Bomberry, and the people who wrote character letters for his sentencing would have been able to testify as to his good character at trial, including pertinent character traits such as his reputation for truthfulness and respectful attitude toward women. R. 139 38:1-5. Matthew confirmed that his trial counsel never asked him if anyone could testify about his pertinent character traits. R. 139 38:6-9. Matthew asked trial counsel if it would help his trial to have "people testify on my character, because he had mentioned that it's a he said, she said case, you know, come down to character." R. 139 38:9-13. Trial counsel informed Matthew that character testimony would not help at trial. R. 139 38:13-14.

Brabazon mistakenly believed that evidence of a criminal defendant's character for truthfulness, or other pertinent character traits, would have been inadmissible at trial unless the State first presented evidence attacking Matthew's character for truthfulness. R. 136 19:1-4. Brabazon admitted he did not know that section 904.04(1)(a) expressly permits the defense to offer evidence of any pertinent character trait of the defendant – e.g. truthfulness, respectful of women, not sexually aggressive; he could not recall ever having offered such evidence at trial in the past. R. 136 73:9-12.

The Circuit Court found that Brabazon's strategy at trial was to focus on inconsistencies in ACB's testimony. R. 143, p. 3. It commented that Brabazon believed that it "was not necessary" to present character evidence in Matthew's favor. Id. But the Circuit Court's conclusion is at odds with Brabazon's admission that he did not know he

could present character evidence. Brabazon's mistaken view of the law could not form part of a reasonable trial strategy, or be part of a strategic decision. The Circuit Court went on to speculate that "[e]ven if Attorney Brabazon's view of the law had been corrected, he would not have gone the route of presenting character witnesses." R. 143, p. 10. Because Brabazon did not even contemplate presenting evidence of Matthew's character traits, we do not know what he would have done had Brabazon understood the provisions of Wis. Stat. § 904.04(1)(a). The Court of Appeals agreed that Brabazon's mistake of law was actually good trial strategy, since he'd decided to focus on ACB's inconsistencies. R. 153.

Matthew's character reference letters demonstrate that numerous witnesses were available to testify to pertinent character traits, such as:

- Matthew would never harm a child. (Shana Elijah statement – R. 87, p. 2)
- Matthew is respectful of the matriarchal culture he was raised in. (Michael Longboat statement – R. 87, p. 5)
- Matthew is kindhearted. (Sandra Steeprock statement – R. 87, p. 6)
- Matthew is a respectful and tender parent to his daughter. (Barbara Miller statement – R. 87, p. 11)
- Matthew is loving, caring, and responsible. (Adohwehjina Zachariah statement – R. 87, p. 15)
- Matthew is trustworthy. (Julie Bomberry statement – R. 86, p. 1)
- Matthew is compassionate. (Colton Clause statement – R. 86, p. 5)

- Matthew is honest, trustworthy, and dependable. (Justine Myke statement – R. 86, p. 11)
- Matthew is respectful toward women. (Tracey Printup statement – R. 86, p. 19)

We know that these witnesses were identifiable, because their letters are part of the record. We know that they had positive character evidence to offer, that the jury never heard. At trial, only five witnesses testified – ACB, R. 117 127-201; Jennifer Berg-Hargrove, ACB's aunt, R. 117 211-227; police officer Rochel Smith, R. 118 5-59; Melinda Myke, R. 60-90; and expert witness Susan Lockwood, R. 118 92-138. Only ACB provided any direct testimony about the alleged sexual assaults.

Melinda testified that she had not encouraged ACB to accuse Matthew of having sexually assaulted ACB. R. 118 71:18-19. Melinda did testify that at the time ACB accused Matthew, she had an "ongoing custody dispute" with Matthew. R. 118 71:20-23. The prosecutor thereafter examined Melinda about the dates of family court hearings and orders. R. 118 72:5-73:13. Melinda testified she never saw Matthew doing anything inappropriate with ACB. R. 118 73:21-23. Melinda also acknowledged that Matthew treated ACB well, just like "any one of the other kids." R. 118 73:24-74:1.

Jennifer Berg-Hargrove testified that ACB told her that Matthew had sexually assaulted her, the conversation taking place in January of 2016; ACB did not provide Jennifer a detailed description of the alleged assaults. R. 117 216:8-217:22. None of the State's witnesses, apart from ACB, had any information about the alleged assaults. Trial counsel defended Matthew based on a purely reactive strategy, presenting no testimony,

calling no witnesses, and essentially putting on no defense at all beyond cross-examining ACB.

REASONS FOR GRANTING THE WRIT

Matthew's trial was unreliable because he was unprepared to testify in his own defense, was not advised about whether he should exercise the right to testify, and was only informed that the decision was ultimately up to him. Trial counsel's failure to develop any supporting witnesses, including character witnesses, fed back into Matthew's inability to rationally exercise his right to testify and prejudiced his defense.

A. Legal standard for ineffective assistance of counsel.

In order to find counsel rendered ineffective assistance, the defendant must show trial counsel's representation was deficient and that he was prejudiced by counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984); *State v. Thiel*, 2003 WI 111, ¶18, 264 Wis.2d 571, 665 N.W.2d 305.

Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness. *Id*. at 688. Ultimately, the focus of this inquiry is not on the outcome of the trial, but on the reliability of the proceedings. *State v. Thiel*, 2003 WI 111, ¶1, 264 Wis. 2d 571, 665 N.W.2d 305.

B. By failing prepare Matthew to testify at trial, and failing to even meaningfully discuss the consequences of not testifying at trial, trial counsel prejudiced Matthew's chances of prevailing at trial.

The right to testify is critically important and any waiver of that right can only stem from an informed choice. It ranks alongside the decision whether or not to plead guilty or to proceed to trial. In advising a client about whether or not to exercise this crucial right, trial counsel must do more than tell the client it is up to the client entirely. *State v. Lux*,

2018 WI App 62, 384 Wis. 2d 272, 921 N.W.2d 3. Effective representation requires that counsel ensure that the client makes an *informed* choice about whether or not to testify.

Take the decision to plead guilty or proceed to trial as an example. Courts do not simply allow defendants to plead guilty with no guidance whatsoever (absent a knowing and intelligent waiver of the right to counsel). Rather, the plea process presumes active guidance from counsel. As with the decisions to proceed to trial and to testify, the decision to plead must be informed by the specific facts of the case, the strength or weakness of the charges, and many other intangible factors that counsel must synthesize if counsel is to serve any meaningful role in the process. We would not countenance a plea where counsel has merely described the potential consequences (i.e. maximum sentence) and told the defendant, "It's up to you" whether to plead. While the ultimate decision still the defendant's "choice," it would be far from knowing and intelligent for a defendant to make such an important decision without the *advice* of counsel.

Imagine a surgeon with a patient diagnosed with a serious health condition. Suppose that the surgeon explains the general risks of surgery, and informs the patient that it is up to the patient to decide to have surgery or not. This hypothetical surgeon has provided accurate information, and is correct that it is the patient's choice to undergo surgery or forgo surgery. But no one would say that a surgeon who does not give specific advice based upon the patient's circumstances, history, and the specific facts of the patient's condition acted competently. We expect and trust physicians to recommend a course of action because doctors have extensive knowledge in their field of expertise.

Just like the hypothetical patient, Matthew expected his counsel would give him candid advice about whether counsel recommended he testify at trial, advice he never received. Further aggravating this hands-off, cursory approach in merely restating the law that clients have the final say about whether or not to testify, counsel did not advise Matthew about the importance of being prepared to testify, in case he decided to testify.

Trial work involves making difficult tactical decisions in the heat of trial, and it is unreasonable to fail to prepare the only other witness in the courtroom who could refute the accuser's account of the alleged offenses. The risk to Matthew of testifying in his own defense appears to have been virtually nonexistent – he had no criminal convictions and nothing in the record suggests he made any pretrial statement that could have undermined his credibility during cross-examination.

The Circuit Court credited Brabazon's testimony that Matthew made a final decision not to testify before trial ever began. According to Brabazon:

> "When he said he was not planning on testifying. I took that as his decision. Again, it wasn't a question. It was never, "I'll think about it." It was never, "let me contemplate that." It was I – I'm not testifying. I didn't do this. There's no reason for me to have to testify." R. 143, p. 6, quoting R. 136 46:10-15.

Brabazon's assertion makes no logical sense. If Matthew really did tell Brabazon that he felt he did not need to testify because he was innocent, that should have been counsel's cue to educate Matthew about how jury trials work. Notwithstanding the potential unpleasant experience of testifying and being cross-examined, Brabazon should have explained that Matthew was the only person who could directly controvert ACB's false allegations against him. Notably, Brabazon could not identify any cogent reason why

Matthew would not want to testify. The assertion that his testimony was unnecessary because he was innocent makes no sense. Taking a step further the hypothetical surgeon above who refuses to give a patient advice, imagine if the surgeon realized the patient harbored a serious misconception about the surgery in question? It is enough for the surgeon to have explained the general risks of surgery, and make no effort to correct the patient's misapprehension? One simply cannot justify trial counsel's failure even to explain the possible utility of Matthew's trial testimony.

The Circuit Court found "counsel apprised the defendant of his right to testify, and the risks associated with testifying." R. 143, p. 8. The Court of Appeals agreed, relying on minimal discussions of the right to testify. R. 153. But is that enough? While Matthew ultimately had to decide whether or not to testify, as a person with no prior experience with jury trials, he could not possibly be expected to understand the nuances and tactical dimensions of that decision. Awareness of one's right to make a decision cannot be sufficient to safeguard the constitutional right to testify in one's own defense. Guidance from trial counsel is indispensable in such situations.

When asked if he advised Matthew whether he should testify or not, and supplied reasons for his advice, Jolly responded, "No. I'd never sway a client one way or another." R. 136, 98:17-19. Jolly was then asked if that means he refused to share his opinion about whether Matthew should testify, Jolly responded, "I always give my opinion, but I can't force my client to testify." R. 136, 98:22-99:2. Despite his practice to always give his opinion about the decision to testify to his clients, Jolly could not recall if he shared his opinion about Matthew's potential trial with Matthew. R. 136, 99:3-4.

While he recalled specifically the conference room in which he supposedly advised Matthew about the decision to testify after the State rested its case, Jolly could not recall any of the contents of the conversation, stating, "I don't know the specifics of that conversation." R. 136, 99:13-17. Jolly asserted that Matthew "never wanted to testify," but could not recall why Matthew did not want to testify. R. 136, 99:11-12. He could not even remember how long the conversation with Matthew about the decision to testify lasted, stating, "I have no idea." R. 136, 99:22-25.

> Q Mr. Jolly, when Matthew expressed that he did not want to testify at trial, did you -- did you challenge that conclusion in any way, ask him to consider that the -- you might advise him to testify depending on how the trial went?
>
> A I don't specifically remember what we -- I do remember talking about the issue, that the only way his story is coming in is if he testifies. I don't remember specific details. R. 136, 110:11-19.

Accordingly, Jolly offered no meaningful advice to Matthew about the decision to testify at trial, or could not recall what he actually advised.

No criminal defendant should have to make the decision to testify or not testify on his own, without advice from experienced defense counsel. Defense counsel, by neglecting to provide such advice, simply failed to function as counsel. Failing to function as counsel is ineffective.

This Court could (and should) hold that refusing to provide advice about the whether or not to testify is *per se* ineffective assistance of counsel justifying a new trial. However, this case involves much more than a simple failure to ensure that Matthew made an informed decision about whether to testify. That is because when it finally came time for

Matthew to make his decision, it was too late. By that time, counsel's failure to develop any meaningful defense to the charges other than through cross-examination meant that Matthew would have to consider his right to testify in the context of having no other source of information that might have shed doubt on the accusations against him. If anything, this lack of any meaningful, proactive defense would have made it all the more important for him *in fact to testify* in his own defense.

C. Trial counsel's failure even to consider, let alone develop potential trial witnesses, based on an admittedly erroneous understanding of the law, further prejudiced Matthew's defense.

Trial counsel failed to develop any character evidence that would have supported Matthew's trial testimony. The failure even to consider developing good character evidence arose from a misunderstanding that evidence of a pertinent character trait of the accused would not be admissible at trial. There appear to have been no serious attempts to develop witnesses who could testify to Matthew's good character, or to pursue a witness with personal knowledge of at least one of the incidents ACB alleged.

State v. Thiel provides guidance on the importance of evidence bearing on credibility in a like this, where the State's case depends almost entirely on the credibility of one single accuser. 2003 WI 111, 264 Wis. 2d 571, 665 N.W.2d 305. Of particular note is the *Thiel* court's concern that trial counsel had failed to *proactively* develop the defense case, and instead took a *reactive* approach that was not objectively reasonable under the circumstances. *Id.*, ¶ 50. Matthew's case is no different. It was unreasonable for trial counsel to undertake jury trial without preparing a single witness – not even the defendant – for trial. The reactive approach to trial was clearly inappropriate for Matthew's defense.

Thiel was charged with having sexual contact with a patient and was convicted at trial. *Id.*, ¶ 16. As in Matthew's case much of the State's evidence against Thiel at trial "was strong," but evidence of Thiel's guilt was not beyond dispute. The *Thiel* court was "concerned about underestimating the importance of cumulative credibility evidence in a case that depends so heavily on the credibility of the complainant." *Id.*, ¶ 79. As in *Thiel,* credibility was the issue upon which a reasonable doubt turned in Matthew's case. As in *Thiel*, there was no physical evidence of the alleged sexual assaults, nor did any of the State's witnesses who testified present evidence regarding their observation, direct or indirect, of the alleged assaultive encounters. *See id*., ¶¶ 8, 13. As in *Thiel,* unreasonable errors that prevented Matthew's trial counsel from presenting compelling evidence – Matthew's testimony, testimony of character witnesses[1] – meant that the jury never learned any of this evidence, which might have caused it to question ACB's accusations.

The *Thiel* court concluded trial counsel was constitutionally inadequate because counsel failed to understand section 972.11(3), thinking it prevented the State from presenting the complainant's medical and personal records. *Thiel,* ¶ 1. Thus, Thiel's trial counsel made a serious error in misunderstanding the Rules of Evidence, as happened here. Brabazon did not know that he could (and should) have presented compelling evidence of Matthew's good character at trial. R. 136 73:9-12.

[1] While Matthew could have presented several character witnesses, their testimony would not have been cumulative, as in order to be cumulative, the evidence has to be presented in support of a fact that is already established. S*tate v. Prineas*, 2012 WI App 2, ¶27, 338 Wis. 2d 362, 809 N.W.2d 68.

The *Thiel* court faulted trial counsel's failure to perform any independent inquiry into the State's case and failure to attempt to interview several primary witnesses. *Id*., ¶ 39. Because the alleged victim's credibility was "paramount," failing to follow up on leads as to defense witnesses was unreasonable. *See id.*, ¶ 50. These factors shook the *Thiel* court's confidence in the result of the trial. These factors likewise shake our confidence in the result of Matthew's trial. However, the Circuit Court found that it was Matthew's fault that his lawyer did not develop and witnesses: "The court finds the most significant reason there were not witnesses developed for trial testimony is because of lack of information from the defendant himself." R. 143, p. 9.

This Court should find that trial counsels' failure to perform a reasonable investigation in Matthew's case constitutes deficient performance on its face. Under the *Strickland* standard, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. 668, 691.

The decision not to develop character evidence was prejudicial, as it meant that the jury had no meaningful framework for assessing Matthew's character. Where—as here—a complainant's credibility is paramount to the case, trial counsel's failure to delve further into the circumstances of the charges and information relating to credibility is objectively unreasonable. *See Thiel*, 2003 WI 111, ¶ 46. Trial counsel's lack of any strategic reason for failure to develop available witnesses is particularly clear in this case, where counsel acknowledges that the decision not to do so was not based on any strategy – it was based on counsel's mistake of law and limited efforts to investigate the defense's sole named witness. It is objectively unreasonable not to conduct any independent investigation when

credibility is the crux of the case. *See id.*, ¶ 28 This Court reversed Thiel's conviction and ordered a new trial. *Id.*, ¶ 4. This Court should do the same in Matthew's case.

In cases where the complainant's credibility is dispositive, failure to call a single corroborating witness alone can constitute ground for reversal. *See State v. Jenkins,* 2014 WI 59, ¶¶ 41-47, 355 Wis. 2d 180, 848 N.W.2d 786 (finding counsel ineffective for failing to call a corroborating witness where counsel could not recall having spoken to the witness); *see also Toliver v. Pollard,* 688 F.3rd 853, 862 ("[I]n a 'swearing match between two sides, counsel's failure to call two useful, corroborating witnesses, despite [potential bias as a result of] the family relationship, constitutes deficient performance."); *see also Goodman v. Bertrand,* 467 F.3d 1022, 1030 (7th Cir. 2006) (the testimony of witnesses who would corroborate the defendant's account was a "crucial aspect of [the] defense").

In *Jenkins*, this Court reversed a conviction based on defense counsel's failure to call a single key witness. *Jenkins* demonstrates just how damaging this oversight can be in a trial where the complainant's uncorroborated testimony forms the crux of the State's case. That case involved a "credibility contest" in which both witnesses had inconsistencies in their statements, the State's witness had a criminal record and the defense witness did not, the entire basis of the State's case rested on the complainant's testimony, and no physical or other evidence directly tied the defendant to the crime. *See id.*, ¶ 59.

Three other Wisconsin cases found prejudicial, deficient performance where counsel failed to investigate, subpoena and call a witness: *Washington v. Smith,* 219 F.3d 620 (7th Cir. 2000); *State v. White,* 2004 WI App 78, 271 Wis.2d 742, 680 N.W.2d 362; and *Goodman v. Bertrand,* 467 F.3d 1022 (7th Cir. 2006).

The decision not to develop character witnesses, which were clearly available based upon the letters in support submitted at sentencing, can never be reasonable when the decision was based on a mistaken view of evidentiary law. Trial counsel's mistaken belief that the defense could not present character evidence fundamentally deprived Mathew of an effective defense.

D. Trial counsel's errors amplified ACB's testimony by leaving it essentially uncontroverted by evidence other than the bare minimum of cross-examination by counsel.

Strickland specifically recognizes that some errors will have a pervasive effect and others will have an "isolated, trivial effect." 466 U.S. at 695–96, 104 S.Ct. 2052. Of particular importance in this case, *Strickland* acknowledges that errors by defense counsel are more likely to have a pervasive effect if the state's case is otherwise based on limited evidence. *See id*. at 695, 104 S.Ct. 2052. A "verdict or conclusion" based on weak evidence is more likely to be affected by the error than a decision based on overwhelming evidence. *Strickland*, 466 U.S. at 695–96, 104 S.Ct. 2052.

Matthew's trial did not involve overwhelming evidence of guilt. The State presented no physical evidence. ACB delayed her accusation by many years, had recently had contact with Matthew in which she did not show any discomfort or animosity toward him. Moreover, ACB reported her accusations only after there had been a falling out between Matthew and Melinda, and therefore had a potential motive to lie or to exaggerate. No witnesses corroborated ACB's accusation, and defense counsel simply failed to advise and prepare Matthew, who could have directly contradicted ACB's version of events. Had trial counsel developed character witnesses to support Matthew's testimony, adequately

prepared Matthew to testify, and properly advised him about the risks and potential benefits of testifying in his own defense, the jury trial would have looked very different. Matthew's testimony at the postconviction hearing was not inherently incredible, and nothing about his testimony suggested that there was any significant risk in having him testify, particularly given the severe consequences at stake for Matthew at jury trial. While relying on the testimony of the accused and character witnesses may not amount to an overwhelming defense, it would at least be a reasonable defense. Trial counsel's ineffective assistance by failing to present any meaningful defense, in light of numerous unexplored avenues for doing so, prejudiced Matthew's defense alone warrants a new trial.

Matthew's testimony at the postconviction motion hearing shows that he was capable of providing credible and reliable testimony. Because he was not prepared to testify at trial, was never advised about the tactical wisdom of exercising the right to testify, and had no independent basis making his own determinations, for which most reasonable people would rely upon experienced counsel, the jury never heard from Matthew. The jury also never heard from the many character witnesses who would have been able to support Matthew's defense by bolstering his credibility, or even by presenting a fuller picture of who Matthew is as a person had he declined to testify at trial even after being properly prepared and advised about exercising the right to testify. These errors alone cast doubt on the reliability of the trial proceedings in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted this 28th day of October, 2024,

Mark P. Maciolek
State Bar Number: 1054208
750 Windsor Street #206
Sun Prairie, WI 53590
Phone: (608) 403-3252
Attorney for Petitioner Matthew Myke