24-6828 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Case No._____

ERIC W. STRONG,

Petitioner,

vs.

CHRIS BUESGEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

ON PETITION FOR A WRIT OF CERTIORARI TO THE FEDERAL COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. On a no-merit appeal conducted pursuant to *Anders v. Cal.,* does due process and equal protections require an indigent defendant be provided his attorney-client file, including his state court transcripts, in order for him or her to have a meaningfully respond to appellate counsel's no-merit report, and preserve all constitutional claims for federal review?

II. Once a habeas petition survives Rule 4 screening, is the district court required to have the state court transcripts prior to its adjudication of the petition?

III. Does 28 USC § 2254(e)(2) bar a federal court from holding an evidentiary hearing, or considering new evidence that was not before the state court, but which supports a habeas petitioner's constitutional claims where (1) the state corrective process was ineffective, or (2) where circumstances beyond the petitioner's control impeded him or her from developing the factual predicate of the claim at an earlier time?

IV. Does this Court's decision in *Williams v. Taylor,* or its subsequent decision in *Harrington v. Richter*, accurately reflect the standard for habeas relief?

V. Could jurists of reason debate whether or not the district court was correct in how it resolved the Petitioner's petition for a writ of habeas corpus?

LIST OF PARTIES AND RELATED CASES

All of the parties involved appear in the caption. The last reasoned decision of this case is reported at *Strong v. Buesgen*, 2023 WL 8018557

and is reproduced at Appendix B.

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Appendix A - Decision of the Federal Court of Appeals for the Seventh Circuit denying a certificate of appealability.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

The Petitioner prays this Court will issue a writ of certiorari.

OPINIONS BELOW

The decision of the Seventh Circuit Court of Appeals denying a certificate of appealability appears at Appendix A to the petition.

The reasoned opinion of the United States District Court for the Western District of Wisconsin denying the Petitioner's 28 U.S.C. § 2254 petition for habeas corpus appears at Appendix B to the petition and is found at *Strong v. Buesgen,* 2023 WL 8018557.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The date on which the Federal Court of Appeals for the Seventh Circuit declined to issue a certificate of appealability was on August 20th (a 30 day extension of time was granted.) A copy of that decision appears at Appendix A. The date this Court granted an extension of time was on 11-7-24, providing 30 extra days to file a petition for a writ of certiorari. For a deadline of 12-18-24.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. VI

"In all criminal prosecutions, the accused shall enjoy the right...to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

U.S. Const. Amend. XIV

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S.C.A. Const. Art. I § 9, cl. 2

"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254

28 U.S.C. § 2253

PROCEDURAL HISTORY OF THE CASE

The Petitioner was charged with a single count of sexual assault against K.B., alleged to have occurred between August 18th, 2010 and August 17, 2011, and the repeated sexual assault of N.B. alleged to have occurred between May 10th, 2010 and May 9th, 2013. It wasn't until the Petitioner had attempted to keep himself in the lives of his two daughters shortly after adoption proceedings were completed by J.B., (the foster mother of K.B. and N.B.) that he was charged; the timing clearly suspicious.

At trial, in spite of the risk of "coaching" by J.B., the court allowed J.B. to sit in the courtroom while her foster children testified against the Petitioner. (93:71-72). In the absence of any physical evidence, and problematic testimony, the jurors main concerns, expressed through their notes to the court, were questions as to why the Petitioner was not allowed on the property of his adoptive mother and why the children were put into foster care. (93:237-238). The trial court refused to inform the jury of this information, and the jury returned with a verdict of guilty on all counts.

The Petitioner appealed his convictions and his appellate attorney chose to file a no-merit report. The state court summarily disposed of his appeal based on the "hearsay affidavit" -- an affidavit which the Petitioner disputed the truth of -- of

appellate counsel. In the past, the Seventh Circuit had found such a summary disposition to be unreasonable. *See Blackmon v. Williams*, 823 F.3d 1088 (7th Cir. 2016). The Petitioner was denied all access to his case files during the no-merit proceeding, preventing him from alleging some of the specific factual detail relative to his ineffective assistance of counsel claims. Namely, the time-stamped portions of the complainants' recorded testimony that was inconsistent with their trial testimony, and to which, trial counsel did not use for impeachment purposes. The Petitioner was also impeded in contacting exculpatory witnesses so he could gather affidavits to support his claim that his trial counsel was ineffective in failing to investigate witnesses. The prison had a "no-cold call" policy at that time, making it impossible for him to develop the factual basis (affidavits) in support of his constitutional claim.

The Petitioner timely petitioned the Wisconsin Supreme Court for review. The district court denied the Petitioner's ineffective assistance of counsel claims without having trial transcripts, and without conducting an evidentiary hearing. It concluded that the Petitioner was unable to establish prejudice because he couldn't prove that it was "physically impossible" for him to have committed the crimes, and that but-for trial counsel's deficient performance, the Petitioner would have been "exonerated." The Court of Appeals for the Seventh Circuit denied the

Petitioner's request for a certificate of appealability. He now seeks a Writ of Certiorari in this Court.

FACTS OF THE CASE RELEVANT TO THE ISSUES PRESENTED

The Petitioner is currently in prison by virtue of a state court judgment out of the Barron County Circuit Court in the State of Wisconsin resulting from a jury's guilty verdict. In this case, there was no physical evidence, and the jury's verdict was completely contingent upon their assessment of the credibility of the prosecution witnesses. Here, trial counsel entirely failed to subject the prosecution's case to meaningful adversarial testing. Not a single witness was called by counsel to testify favorably on behalf of the Petitioner; despite the availability of those witnesses. One favorable witness that counsel failed to speak with was a psychologist specializing in child abuse. This expert was available, and if called, would testify that the Petitioner had "supervised visits" from September 2011 onward -- the same period of time in which some of the sexual assaults were alleged to have taken place, making it unlikely that he would be with the complainants alone. The expert would have further testified that as a result of his own investigation, he never had any concerns that sexual abuse had taken place.

Another witness trial counsel neither investigated, nor called, was the biological mother of the complainants. She told the Petitioner in passing, that she

would have testified favorably for him if she was subpoenaed. Specifically, this witness was named by K.B. as an eye witness to the sexual assault, and thus, she would have impeached K.B.'s testimony by stating that no sexual assault took place, and, that the shower that K.B. had named as the place of the assault, was only 4' x 4' and could not contain more than one person at a time. (Dkt 24-6, Pg. 21/22).

Without any trial transcripts, the district court concluded that the Petitioner wasn't deprived of effective assistance of counsel because he couldn't prove that the evidence counsel failed to present would have made it "physically impossible" for him to have committed the crimes and that he would have been "exonerated" but-for counsel's deficient performance. See *Strong v. Buesgen*, 2023 WL 8018557 (*citing Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770 (2011)). It further reasoned that the affidavit evidence it had received was not reviewable because of this Court's holding in *Cullen v. Pinholster*, 563 U.S. 170 (2011).

REASONS THIS COURT SHOULD GRANT CERTIORARI REVIEW

I. THE PRINCIPLES OF EQUITY AND FUNDAMENTAL FAIRNESS REQUIRE A DEFENDANT HAVE A MEANINGFUL OPPORTUNITY TO BE HEARD ON HIS CONSTITUTIONAL CLAIMS, ESPECIALLY WHERE HIS APPELLATE ATTORNEY CHOOSES NOT TO FILE AN ADVOCACY APPEAL.

This case illustrates the fundamental unfairness to an individual attempting to diligently assert his federal rights when he does not have access to his trial transcripts. This Court should revisit its heavily dissented plurality opinion in *U. S. v. MacCollom,* 426 U.S. 317 (1976), where its opinion reflects that neither due process, nor equal protection establish a right of indigents to have a free transcripts for a habeas corpus proceeding. *Id.,* at 324. This Court's reasoning was founded on the presumption that an "indigents defendant [had] an adequate opportunity to present his claims fairly in the context of the state's appellate process" prior to seeking a writ of habeas corpus in federal court. *Id.,* at 328 (quoting *Ross v. Moffitt,* 417 U.S. 600 (1974)). It did not take into consider how states, like Wisconsin, would conduct no-merit appeals pursuant to *Anders v. Cal.,* 386 U.S. 738 (1967), and fail to provide transcripts to indigent defendants so they could

meaningfully respond to appellate counsel's no-merit report. Nor did this Court foresee that states, like Wisconsin, would arbitrarily procedurally bar collateral challenges to judgments of convictions that were made after a no-merit appeals. See *Page v. Frank,* 343 F.3d 901 (7th Cir. 2003) (finding **Wisconsin's application of procedural bars to fail the "independent and adequate state ground" test). Additionally, this Court's decision in U. S. v. MacCollom,** does not account **for a federal district court's finding of non-frivolity where a habeas petition survives Rule 4 screening; an issue also presented for this Court's review. AEDPA has created so many barriers to the vindication of** constitutional rights in federal court that the importance of fundamental fairness, and due process, need to be enforced so a habeas petitioner without an adequate remedy in state court can obtain relief in federal court. **U. S. v. MacCollom, 426 U.S. 317 (1976) is inconsistent with Griffin v. Illinois, 351 U.S. 12 (1958), Smith v. Bennett, 365 U.S. 708 (1961), and Gardner v. California, 393 U.S. 367 (1969). This Court should abrogate MacCollum, and extend due process and equal protections to include transcript availability for indigent defendants on a no-merit appeal prior to the no-merit decision.**

The Federal Circuit Courts are split with regards to the necessity of a complete state court record in a habeas proceeding -- namely, the state court trial transcripts, as explained further below. And there is no holding from this

Court as to whether a criminal defendant has a right to access his trial transcripts during a non-advocacy appeal conducted pursuant to *Anders v. Cal.* Many states, like Wisconsin, are plagued by a shortage of attorneys, and delays in the criminal appellate process. Due to the time consuming nature of both vigorous transcript review, and investigation into facts outside of the record, state appointed attorneys have resorted to filing no-merit appeals pursuant to *Anders v. Cal.* rather than spend the time to uncover issues of arguable merit. But an ineffective assistance of counsel claim, as this Court has acknowledged, often "depend[s] on evidence outside the trial record." *Trevino v. Thaler,* 569 U.S. 413, 133 S.Ct. 1911 (2013). (*quoting Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309 (2012)). The state appellate court's review of the "cold record" pursuant to *Anders v. Cal.*, is not an adequate substitute for effective assistance of counsel on appeal. *Pension v. Ohio*, 488 U.S. 75, at 351, 109 S.Ct. 346 (1988).

Wisconsin's no-merit procedure is ineffective. It punishes defendants who respond to appellate counsel's no merit report in an attempt to assert a denial of a constitutional right by later procedurally barring them from raising any constitutional claims in a collateral challenge. *See Page v. Frank*, 343 F.3d 901 (7th Cir. 2003); See also *State v. Tillman,* 281 Wis.2d 157, 696 N.W.2d 574 (Ct. App. 2005). The procedural bar goes further and incorporates a strict pleading standard in which the federal mandate of liberal construction is disregarded

Any defendant attempting to "fairly present" "cause" to excuse any purported default, has procedurally defaulted "cause" for failing to meet this uncertain pleading standard. See *Whyte v. Winkleski,* 34 F.4th 617 (7th Cir. 2022) (citing *State v. Romero-Georgana*, 360 Wis.2d 522, 849 N.W.2d 668, 678 (2014)). The importance of a defendant having his attorney client-file, and transcripts on a no-merit appeal is manifest.

Here, the Defendant's appellate counsel filed a no-merit report without ever providing the Petitioner with trial transcripts in order that he could meaningfully respond to the no-merit report. *See Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585 (1958) (finding transcripts are a necessary prerequisite to a meaningful appeal and must be afforded to indigents). Nor did the Defendant have any resources to conduct his own investigation and obtain the factual detail of witnesses who would have testified favorably for him. *See Harris v. Nelson*, 394 U.S. 286, 89 S.Ct. 1082 (1969) (finding habeas petitioners are "usually handicapped in developing the evidence needed to support in necessary detail the facts alleged in his petition"). The Petitioner did his very best to point the state appellate court to the facts already in the record that supported his constitutional claims, but the state appellate court faulted him for his inaccuracies. *State v. Strong*, 2020 WL 13348159 (Ct. App. 2020). at *3. Moreover, it erroneously concluded that a letter supporting his claim

of ineffective assistance of counsel wasn't part of the record. (App.D). Additionally, and similar to *Anders,* the Wisconsin Court of Appeals "failed . . . to say whether it was frivolous or not, but, after consideration, simply found the petition to be 'without merit,'" 386 U.S. 743. *Anders* requires courts to declare the pursuit of each claim raised to be "wholly frivolous." Here, the state appellate court failed to do so. *Id.*, at 744 ("the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous."). Fairminded jurists could therefore debate whether or not the district court was correct in concluding that the Wisconsin Court of Appeals reasonably applied *Anders*.

The Petitioner was constructively denied any meaningful opportunity to develop the factual predicate for his constitutional claims in state court. And as explained further below, this Court's decision in *Cullen v. Pinholster* contributed to that denial. This Court should grant certiorari and decide whether due process requires transcripts be provided to an indigent whose appellate counsel proceeds on the state's direct appeal process in accordance with *Anders v. Cal.,* in order that he may meaningfully raise any constitutional claims and preserve those claims for federal habeas review.

II. THE CIRCUITS ARE DIVIDED AS TO THE NECESSITY AND EXTENT OF RULE 5 COMPLIANCE, AND TO WHETHER DISTRICT COURTS ARE PERMITTED TO ADJUDICATE A HABEAS PETITION WITHOUT HAVING THE STATE COURT TRANSCRIPTS.

After the state supreme court denied his *pro se* petition for review, the Petitioner pursued federal habeas corpus relief pursuant to 28 USC § 2254, and the petition survived Rule 4 screening. The Respondent, however, refused to provide "any" trial transcripts to the federal district court in accordance with Rule 5 of the Rules governing 2254 proceedings. *Strong v. Buesgen*, 2023 WL 2156735. The district court denied the Petitioner's attempts to compel production of the trial transcripts, and ultimately, it adjudicated the habeas petition without ever having reviewed them.

The Federal Courts of Appeals are divided as to whether this is permissible. And none of them have squarely addressed the issue on constitutional grounds. The Seventh and Ninth Circuit depart from the majority. The Seventh holds "the review of a state court transcript is occasionally necessary in habeas cases, it is certainly not required and is, in fact, quite rare." *Simental v. Matrisciano*, 363 F.3d 607, 612 (7th Cir. 2004). The Ninth, noting that "[n]o decision of the United States Supreme Court ... addresses the issue...," *Austad v. Risley*, 761 F.2d 1348 (9th Cir. 1985), shifts the burden to the Petitioner to establish indigency before the State is required

to produce the transcripts; reasoning also that the district court is "able to make an informed decision without plowing through the full state transcript." *Id.*, at 1354. The Eighth Circuit arrived at an opposite conclusion. It held that trial transcripts are necessary to a habeas proceeding, and it ordered the United States to pay for them so the Petitioner could factually support his vaguely alleged ineffective assistance of counsel claims. *Thompson v. Housewright*, 741 F.2d 213 (8th Cir. 1984). The Fourth, Fifth, Sixth, and Eleventh agree; they hold that the Respondent must comply with Rule 5, and a district court cannot decide a habeas petition without having the state court trial transcripts. *See Thompson v. Greene*, 427 F.3d 263 (4th Cir.2005), *Sixta v. Thaler*, 615 F.3d 569 (5th 2010); *Griffin v. Rogers*, 308 F.3d 647 (6th Cir. 2002); *Rodriguez v Florida,* 748 F.3d 1073 (11th Cir. 2014). This Court should cure the split and clarify, whether it is permissible for a district court to adjudicate a habeas petition that had survived Rule 4 screening without having transcripts.

"Since our system is an adversary one, a petitioner carries the burden of convincing the appellate court that the hearing before the lower court was either inadequate or that the legal conclusions from the facts deduced were erroneous. A transcript is therefore the obvious starting point for those who try to make out a case for a second hearing." *Gardner v. California*, 393 U.S. 367, 89 S.Ct. 580, 21 L.Ed.2d 601 (1969), at 582. And because the burden to produce the transcripts

shifts to the habeas petitioner seeking a certificate of appealability from the federal court of appeals, if the district court does not force the Respondent to comply with Rule 5 and produce the transcripts, the indigent habeas petitioner is doomed. Fed.R.App.P. 10(b)(2).

III. ARBITRARY STATE PROCEDURAL RULES, AND EXTERNAL IMPEDIMENTS THAT PREVENTED A HABEAS PETITIONER FROM DEVELOPING THE FACTUAL PREDICATE FOR HIS OR HER CONSTITUTIONAL CLAIM SHOULD NOT BAR A FEDERAL COURT FROM CONDUCTING AN EVIDENTIARY HEARING, OR CONSIDERING NEW EVIDENCE THAT WAS PREVIOUSLY UNAVAILABLE.

This Court recently granted Danny Rivers' petition for a writ of certiorari to the Fifth Circuit. See *Rivers v. Lumpkin,* 99 F.4th 216 (5th Cir. 2024); *RIVERS, DANNY R. v. LUMPKIN, DIR. TX DCJ,* 2024 WL 4997858. Rivers, like Strong, did not possess his case file related to his criminal conviction, as was thus unable to discover, or factually support his constitutional challenges to his criminal conviction. And like Strong, Rivers attempted to present affidavit evidence in his habeas proceeding that was unavailable to him during state court proceedings. *Rivers v. Lumpkin,* 2022 WL 1517027 (5th Cir. 2022). The Fifth Circuit held that the district court was barred from considering that evidence. *Id.* This was the same

conclusion reached in Strong's habeas proceeding. *See Strong v. Buesgen,* 2023 WL 8018557 (*Cullen v. Pinholster,* 563 U.S. 170 (2011)). After the district court denied Rivers' petition, but before the Fifth Circuit had adjudicated the appeal, he moved the district court to consider claims that could not have been discovered based on Rivers' appellate attorney's failure to provide him with the "attorney-client file," which undoubtedly included trial transcripts. The Fifth Circuit held that Rule 60(b) did not allow for such consideration, and Rivers' attempt was to be construed as an unauthorized successive habeas petition. *Rivers v. Lumpkin,* 99 F.4th 216 (5th Cir. 2024). It would appear that the lack of a clear congressional directive in F.R.A.P. Rule 12.1 "requiring" the district court to decide whether or not it would grant a Rule 60(b) motion, or at least, whether the motion was substantial enough to warrant a hearing, it was created the conundrum that this Court is set to address. Silence from the district court on the merits of the motion renders a Rule 60(b) motion unavailable to every habeas petitioner who appeals a district court's denial.

Although procedurally, Strong's case and Rivers' case diff in some respects, the factual and legal nature of the cases are substantially similar. Both Petitioners seek an answer from this Court regarding the scope of equitable exceptions to the general bar on federal evidentiary hearings, as well as the bar to the consideration

of new evidence that was not before the state court, but which supports the constitutional claims presented in the habeas petition.

Here, the Petitioner met a fatal hurdle because of this Court's decision in *Cullen v. Pinholster*, 563 U.S. 170 (2011). This holding prevented the federal district court from considering affidavit evidence that the Petitioner had acquired after the external impediments to his ability to meaningfully respond to appellate counsel's no-merit report were removed. Unfortunately, this was after the state appellate court had already accepted counsel's no-merit report. *See Strong v. Buesgen*, 2023 WL 8018557 ("I may not consider Strong's new factual allegations when reviewing the court of appeals' prejudice analysis."). *Cullen v. Pinholster* neither accounts for the equitable concerns, nor fundamental fairness. It leaves federal rights virtually unenforceable in a habeas proceeding arising out of a state court's acceptance of a no-merit appeal pursuant to *Anders,* and does not allow for any "cause, and prejudice" exceptions relative to factual matters. This holding "cannot be squared with the real practice of decisional law." *Williams v. Taylor, supra*, at 377. The reality of the external impediments prisoners face on their endeavor to vindicate their federal rights is not appreciated in *Cullen v. Pinholster.*

In Wisconsin, when a criminal defendant challenges his judgment of conviction, and appellate counsel determines that an appeal would be frivolous, an *Anders* brief is submitted to the Wisconsin Court of Appeals. But the Wisconsin

Court of Appeals is not a "fact-finding" court. *State v. Knight,* 168 Wis.2d 509, 484 N.W.2d 540 (1992) ("[T]he appellate court is not an initial fact finder."); *Wurtz v. Fleischman*, 97 Wis.2d 100, at 108, 293 N.W.2d 155 (1980) ("The court of appeals apparently thought that it was appropriate to make its own findings...the only appropriate course for the court is to remand the cause to the trial court for the necessary findings."). Thus, if the state-appellate court accepts counsel's "no-merit report" pursuant to Wisconsin's codified *Anders* procedure under Wis.Stat. § 809.32, and does not remand to the circuit court under Wis.Stat. § 809.32(g), then there is no actual "factual" determination made by the state court to which a challenge under § 2254(d)(2) could apply. This Court's decision in *Cullen v. Pinholster* does not account for this scenario. This Court should grant certiorari review and at minimum, announce an equitable exception to its decision in *Pinholster* to allow a federal court to reach unpreserve facts in support of the habeas petitioner's claims where the petitioner's state appeal was conducted pursuant to *Anders*. Indeed, in the Petitioner's circumstances, the "factual predicate [for the claim] [] could not have been previously discovered through the exercise of due diligence." 28 USC § 2254(2)(ii).

IV. HABEAS RELIEF MUST BE AVAILABLE EVEN WHERE FAIRMINDED JURISTS COULD DISAGREE AS TO WHETHER RELIEF IS APPROPRIATE IN A GIVEN CASE.

This Court's decision in *Harrington v. Richter,* 562 U.S. 86 (2011) has likewise created a dead-end for the Petitioner. This case has set the bar so high for habeas relief, that the prejudice prong of *Strickland* has been interpreted to require a habeas Petitioner to show that he would have been "exonerated" before a federal court can issue a writ of habeas corpus -- as illustrated in this case. *See Strong v. Buesgen*, 2023 WL 8018557, at *8. The often quoted portion in *Richter* that reads: "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision," is exactly the standard this Court rejected in *Williams v. Taylor*, 529 U.S. 362 (2000). On a writ of certiorari to the Fourth Circuit, this Court noted, "[a]s the Fourth Circuit would have it, a state-court judgment is "unreasonable" in the face of federal law only if all reasonable jurists would agree that the state court was unreasonable." This Court stated it was "convinced that that interpretation of the amendment is incorrect." *Id.,* at 377. Rejecting the Fourth's interpretation, (the same standard set out in *Richter*), this Court noted "[i]t is most unlikely that Congress would deliberately impose such a requirement of unanimity on federal judges." *Williams v. Taylor, supra,* at 378. The grounds decided in *Richter* were

tailored to the impermissible expansion of a defendant's Sixth Amendment right on federal habeas review, whereas the grounds decided in *Williams v. Taylor* were tailored to whether AEDPA was impermissibly expanded. *See Harrington v. Richter*, 2010 WL 1919618; *See also Williams v. Taylor*, 1999 WL 459574.

The insurmountable standard of jurist unanimity announced in *Richter,* is incongruous with the issuance of a certificate of appealability. § 2253(2) reads "A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right." This Court has interpreted this statute to mean a certificate of appealability should issue if "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner...." *Miller–El v. Cockrell*, 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). But according to *Richter*, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as "fairminded jurists could disagree" on the correctness of that decision." It can not logically follow, therefore, that a certificate of appealability should ever issue under the test of *Richter.* The grant of a certificate of appealability would translate into "'reasonable jurists could debate whether' ... 'fair-minded jurists could disagree' on whether habeas relief is warranted." This doesn't make sense. Under *Richter,* when a district court denies a petition for habeas corpus, it is concluding that the state court's decision is at most, debatable.

And because "debatable" contemplates the idea of "disagreement between jurists," the issuance of a certificate of appealability is rendered moot by the standard set forth in *Richter* -- habeas relief is still precluded so long as "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner...." *Slack v. McDaniel*, 529 U.S. 473 (2000), at 484. Only if the error is beyond disagreement can a district court grant habeas relief under *Richter*. This is a legal fiction and does not align with real world practice. The Federal Courts of Appeals have overturned district courts even where the district courts had declined to issue a certificate of appealability. *Eg. Escamilla v. Stephens*, 749 F.3d 380 (5th Cir. 2014). This "beyond fairminded disagreement" standard effectively labels the district court that declined to issue a certificate of appealability as "unfairminded."And the same goes for any dissenting appellate judge on an order by the majority granting habeas relief. *Eg. Soffar v. Dretke*, 368 F.3d 441 (5th Cir. 2004). Indeed, *Richter* cannot stand because "reasonable lawyers and lawgivers regularly disagree with one another." *Williams v. Taylor*, 529 U.S. 362 (2000), at 378. This Court should grant certiorari, overrule *Richter,* and reaffirm its holding in *Williams v. Taylor.*

V. THE PETITIONER MADE A SUBSTANTIAL SHOWING THAT HE WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, AND THAT THE DISTRICT SHOULD HAVE BEEN RESOLVED IN A DIFFERENT MANNER.

As the Petitioner has repeatedly asserted throughout his efforts to challenge his unconstitutional conviction, his case bears significant resemblance to *State v. Honig*, 366 Wis.2d 681, 874 N.W.2d 589, 2016 WI App 10. There, the Wisconsin Court of Appeals reversed the defendant's conviction. But in the Petitioner's case, the state appellate court unreasonably found that there were no issues of arguable merit to an advocacy appeal despite having been alerted that trial counsel failed to use the recorded testimony of the complainants that was inconsistent with their trial testimony.

Like the Petitioner, Honig was also charged with an incenstual sexual assault of 2 different complainants, around the same age. *Id.* ¶2. One of those complainants, Y.H., gave a very graphic and detailed allegation that Honig had sexually assaulted her. *Id.* ¶3. This complainant, just like K.B. in the Petitioner's case (State Court Record: 93:142), had named her mother as having personal knowledge of the assault. *Id.* ¶9. Honig however, was more fortunate than the Petitioner. His trial counsel at least had the complainant's mother testify on his behalf and explain to the jury how the details underlying the allegations couldn't be

true. *Id.* ¶10. Whereas the Petitioner didn't have a single witness testify on his behalf, despite their availability. The mother of the complainants' in the Petitioner's case was never subpoenaed, nor did she testify. She informed the Petitioner she would have testified favorably for the Petitioner had she been subpoenaed. (Pet.Br. 5,13, 20, 21). Trial counsel, however, never conducted any investigation. Likewise, the Petitioner's biological mother, a person who could have informed the jury that the locations identified for the sexual assaults weren't accessible and underminded the credibility of the complainants' accusations, was also never called by the Petitioner's trial attorney. (Pet.Br. 17-19). Similarly, Honig's counsel's failure to both call exculpatory witness, and impeach the complainant with inconsistent video testimony, were 2 crucial factors the Wisconsin Court of Appeals considered in determining that he was denied his Sixth Amendment right to effective assistance of counsel. *Id.* ¶¶ 26, 40. Why should the Petitioner's case be any different? It simply wouldn't make sense that Honig, who received deficient representation that was still more effective than the assistance the Petitioner received, would have his conviction reversed on ineffective assistance of counsel grounds but the Petitioner would not. The cases are equally weak; there is no physical evidence, and no witnesses who testified that they saw the sexual assaults occur. *Id.* ¶33. The Petitioner's counsel Lester Liptak performed substantially

worse than Honig's counsel. Liptak didn't call a single witness to testify on the Petitioner's behalf.

The Petitioner's son CB, and daughters KB, and NB were all forensically interviewed and the interviews were recorded (CARE CENTER DVDS). KB and NB were the complainants of sexual assault. The location of the sexual assault was alleged by KB to have been in a single person 4'x4' shower (R:26); she claimed 4 people were somehow in it simultaneously. (R:93:150). KB's video statement was inconsistent with trial testimony and the other forensic interviews. Complainant K.B.'s video statement is as follows:

20:00: A: Dad told me to suck on his private in the shower.

20:46: Q: Who was in the shower with you?

21:00: A: NB and CB were in the shower with us.

22:12: Q: Did you tell mom? (Michelle).

22:16: A: She said don't ever go in the shower with him again.

22:30: Q: Did dad ever tell N.B. or C.B. to do the same thing?

22:35: A: Yeah, he had them do the same thing.

(K.B.'s video-recorded statement)

Trial counsel could have impeached K.B.'s trial testimony with this recorded testimony, where she changed her story and said only K.B. and Strong were present in the shower. And followed up with this portion of C.B.'s video statement establish fabrication.

22:40: Q: Any touching during the shower?

22:43: A: No

(C.B.'s recorded video statement)

Moreover, K.B.'s testimony was also impeachable with NB's video statement which would have further negated the credibility of K.B.'s sexual assault allegations. N.B.'s forensic interview excludes her presence from K.B.'s story.

29:15: Q: Did you ever shower with your dad?

29:20: A: Not that I know of.

29:25: Q: Do you think if you took a shower with your mom and dad you would remember?

29:30: A: Yes

(N.B.'s recorded video statement)

Even if counsel had impeached K.B.'s trial testimony somewhat without using this evidence, is it still objectively unreasonable not to introduce recorded testimony of other witnesses which directly contradict K.B.'s version of events, especially where the Petitioner has only been charged with a single event relative to complainant K.B.. Introducing the above impeaching recorded statements wouldn't have been cumulative, and any reasonable attorney under prevailing norms would have chosen to utilize them. "Evidence that provides corroborating support to one side's sole witness on a central and hotly contested factual issue cannot reasonably be described as cumulative." *Mosley v. Atchison*, 689 F.3d 838,

848 (7th Cir. 2007) (citations omitted). Failure to impeach the complainants' with prior recorded testimony that is inconsistent with their trial testimony is exactly what the Wisconsin Court of Appeals' found to amount to a denial of the Sixth Amendment right to effective assistance of counsel in *State v. Honig,* 366 Wis.2d 681, 874 N.W.2d 589, 2016 WI App 10.

Indeed, the Petitioner had sufficiently alleged that his trial counsel's deficient performance was prejudicial. There is a reasonable probability that at least one juror would have had reasonable doubt but-for that deficient performance. Prejudice "has consistently been defined as requiring only a showing of a reasonable probability that at least one juror would possess a reasonable doubt. *See, e.g., Buck v. Davis*, —— U.S. ——, 137 S. Ct. 759, 776, 197 L.Ed.2d 1 (2017) (*Strickland* requires a showing of "a reasonable probability that ... at least one juror would have harbored a reasonable doubt."); *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt."); *Thomas v. Clements*, 789 F.3d 760, 773 (7th Cir. 2015) (The question under *Strickland* is whether the omitted testimony would have been "sufficient to raise a reasonable doubt and therefore show prejudice."). Thus, a defendant need not prove his actual innocence, but need only establish reasonable doubt in the mind of at least one juror in order to change the outcome of

Strong's bedroom and that on other occasions Strong touched N.B.'s private parts and put his fingers inside of her." *Strong v. Buesgen*, 2023 WL 8018557, at *8 (emphasis added). This is not the proper prejudice standard under *Strickland*, and it assumes that a jury would still find N.B. credible as to her other sexual assault allegations where she was caught lying, which of course, is the complete opposite of how one would expect a jury to react after they've concluded the complainant had lied about one of them. N.B.'s credibility was not "established by existing evidence." *Washington v. Smith*, 219 F.3d 620, 634 (7th Cir. 2000). The jury's assessment of N.B. and K.B.'s "credibility was crucial to the prosecution's case" and the affidavit is corroborating of the impeachment of the complainants on cross-examination. *Sussman v. Jenkins*, 636 F.3d 329 (7th Cir. 2011) The district court also unreasonably determined prejudice as to Strong's trial counsel's failure to impeach the other complainant, K.B., with her previous inconsistent testimony. It found no prejudice "[b]ecause the jury already had multiple reasons to question K.B.'s credibility without the video evidence. . . ." This again, is incongruous with *Strickland.*

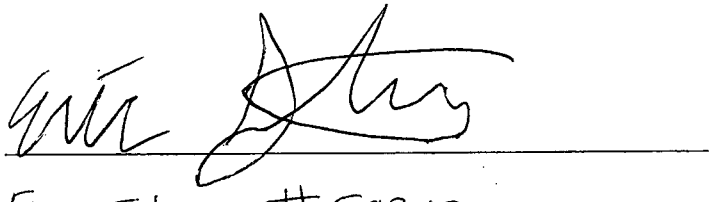
Any reasonable defense attorney who adamantly believes he can win a child sexual case involving 2 complainants without finding a need to investigate or call a single witness to testify on his client's behalf, and without impeaching the complainants with their previously recorded inconsistent statements, is ineffective

in the context of the Sixth Amendment. There was no physical evidence and credibility was the central issue. The most basic investigation would have revealed exculpatory components to support the defense. Every juror is going to want to know why the defendant is being accused of two sexual assaults, and without a motive, or rebuttal evidence of fabrication, a lawyer can not reasonably expect to obtain a verdict other than guilty. Both the district court and the Seventh Circuit should have issued a certificate of appealability. This Court should grant certiorari review and remand to the Seventh Circuit to grant a certificate of appealability; considering this issue, and any other issue presented, if it so determines.

CONCLUSION

In sum, the Petitioner has been deprived of all procedural safeguards to enforce his constitutional rights, and likewise, has been precluded from challenging the legality of his imprisonment by a writ of habeas corpus. He isn't the only one, and this Court should carefully review the issues to ensure that all individuals, including indigents like the Petitioner, have a equal and fair chance to challenge the legality of their imprisonment. Let it not "be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired." *Bowen v. Johnston*, 306 U.S. 19, 59 S.Ct. 442 (1939). This Court should grant this petition for a writ of certiorari.

Dated this 10th day of December, 2024



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