Case: 23-1266 Document: 43 Filed: 04/24/2025 Pages: 23

In the

United States Court of Appeals

For the Seventh Circuit

No. 23-1266

LEON CARTER,

Petitioner-Appellant,

v.

LIZZIE TEGELS, Warden,

Respondent-Appellee.

Appeal from the United States District Court for the
Eastern District of Wisconsin.
No. 2:17-cv-01497-PP — **Pamela Pepper**, *Chief Judge.*

ARGUED JANUARY 29, 2025 — DECIDED APRIL 24, 2025

Before BRENNAN, SCUDDER, and ST. EVE, *Circuit Judges.*

BRENNAN, *Circuit Judge.* The State of Wisconsin charged Leon Carter with sexual assault, strangulation, and kidnapping. At trial, during deliberations, the jury sent a note with a question to the judge. But the bailiff answered the question without first relaying it to the judge. The jury found Carter guilty on all counts. When the parties learned of the bailiff's response, Carter moved for a mistrial, which was denied.

On direct appeal Carter's appellate counsel filed a no-merit brief that summarized the record, highlighted legal arguments, and explained why they lacked arguable merit. The brief discussed why any legal arguments stemming from the bailiff's action would have been frivolous. The Wisconsin Court of Appeals agreed and said so in a footnote in its opinion. The Wisconsin Supreme Court denied certiorari.

On federal habeas review, Carter asserts two violations. First, he submits the state appellate court denied him a meaningful appeal under *Anders v. California*, 386 U.S. 738 (1967). Second, he argues the state trial judge erred by not holding a hearing to investigate jury intrusion, contrary to *Remmer v. United States*, 347 U.S. 227 (1954). The district court rejected the former contention and did not consider the latter, so Carter appeals to this court.

We conclude that Carter's *Anders* claim fails. The Constitution does not promise a defendant the right to exhaustive analysis in the disposition of his claims. And Carter's *Remmer* claim cannot clear the high hurdle set by the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254. For these reasons, we affirm the district court.

I. Background

Around 1996, Ms. Smith (a pseudonym) and Carter began dating. According to the amended criminal complaint, during their years-long relationship, Carter saw Smith as "property" and "severely physically, sexually, and psychologically abused" her. For his acts, in 2011 Carter was charged with six crimes: three counts of second-degree sexual assault through the use of force; second-degree sexual assault causing injury

to a sex organ; kidnapping; and strangulation.[1] After a trial in 2012, a jury found him guilty on all counts.

After the jury returned its verdict, the judge raised an issue with the parties. Earlier that day, the jury had given a note to the bailiff to deliver to the judge which read: "What happens if we do not unanimously agree on one of the six counts?" Rather than giving the question to the judge to answer, the bailiff responded, "you need to just work and reach a unanimous verdict." Carter moved for a mistrial. The judge denied the motion, explaining that because she would have given the same instruction, the verdict retained its integrity.

Carter filed a notice of appeal challenging several issues from his trial. A few months later his appellate counsel concluded those arguments were frivolous, so he filed a no-merit report, also called an "*Anders* brief." *See* WIS. STAT. § 809.32. In the first 30 pages, the brief detailed the facts and proceedings in the case. It then discussed several legal issues and explained why each issue lacked merit. It also included an assessment of why arguments about the bailiff's communication with the jury lacked merit. Carter filed a brief in response to his counsel's no-merit report, as he may. *Id.* § 809.32(1)(e). The state appellate court then ordered counsel to file a supplemental report with additional analysis on two other issues. Appellate counsel filed a 14-page supplemental brief.

The Wisconsin Court of Appeals affirmed Carter's convictions. That court "independently reviewed the record, the no-merit report, the supplemental no-merit report, and Carter's

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[1] WIS. STAT. §§ 940.225(2)(a)–(b), 940.31(1)(b), 940.235(1).

response." It concluded "no issue of arguable merit could be pursued on appeal." (cleaned up).

In a footnote, the state appellate court stated it would not examine every issue in depth, including claims stemming from the bailiff's communication with the jury:

> This court will not attempt to address every issue that arose in this case. The thirty-nine page no-merit report and the twelve-page supplemental no-merit report provide an exhaustive summary of the numerous motions and rulings that occurred before and during trial. As noted, we agree with counsel's analysis and conclusion that none of the issues identified presents an issue of arguable merit.

State v. Carter, No. 2014AP1459–CRNM, 2015 WL 13173161, at *2 n.6 (Wis. Ct. App. Nov. 5, 2015).

Carter petitioned the Wisconsin Supreme Court for certiorari review in 2015. For the first time, he argued the Wisconsin Court of Appeals denied him a meaningful first appeal under *Anders*. He believed his appeal of the mistrial motion based on the bailiff's statement had merit. So, the state appellate court's contrary conclusion violated *Anders*. Both the Wisconsin Supreme Court and the Supreme Court of the United States denied review.

Carter then pursued federal habeas review. In his petition, he again claimed the Wisconsin Court of Appeals denied him an effective appeal under *Anders*. Carter's habeas brief

supporting his petition argued the state trial court violated *Remmer*.[2]

The district court denied habeas relief. *Carter v. Tegels*, No. 17-cv-1497, 2023 WL 129790, at *14 (E.D. Wis. Jan. 9, 2023). Applying AEDPA's deferential review, the district court held that the Wisconsin Court of Appeals did not violate Carter's right to an effective appeal. *Id.* at *12–14. That the state appellate court had read over 50 pages of briefing and reviewed a record spanning hundreds of pages led the district court to conclude that the Wisconsin Court of Appeals did not merely "rubber-stamp" the conclusions in the no-merit report. *Id.* at *14.

The district court did not analyze Carter's *Remmer* claim. It mentioned the case but only when reciting the parties' arguments in their briefs. *Id.* at *10–11. The court also declined to grant Carter a certificate of appealability, a prerequisite for an appeal. *Id.* at *14; 28 U.S.C. § 2253(c). But this court granted Carter's request for such a certificate on five issues: (1) whether the trial court violated *Remmer*; (2) whether the

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[2] Carter first argued a violation of *Remmer* in that brief, and the State responded to his contention. We assume without deciding that the claim relates back. *See Mayle v. Felix*, 545 U.S. 644, 664 (2005). Relation back was not argued below, so we have chosen not to address it. *See Wood v. Milyard*, 566 U.S. 463, 473 (2012) ("[C]ourts of appeals … have the authority—though not the obligation—to raise a forfeited timeliness defense on their own initiative.").

The State offered a defense to the *Remmer* claim in its opposition brief in the district court. Like relation back, we assume without deciding that Carter's *Remmer* claim was properly presented to that court. *See McGhee v. Watson*, 900 F.3d 849, 853 (7th Cir. 2018); *see also McDowell v. Lemke*, 737 F.3d 476, 481 (7th Cir. 2013).

Wisconsin Court of Appeals violated *Anders*; (3) whether the *Remmer* claim was properly presented to the district court; (4) whether the bailiff's statement was presumptively prejudicial under *Remmer*; and (5) whether the standard in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), was met.

II. Carter's *Anders* claim

A. Standard of review

Carter is a state prisoner, so we first decide whether a state court has resolved his *Anders* claim. If so, we review the claim with deference under AEDPA. 28 U.S.C. § 2254(d)(1). If not, we review the claim without AEDPA's deferential standard. *Cone v. Bell*, 556 U.S. 449, 472 (2009).

The Wisconsin Supreme Court denied certiorari on Carter's *Anders* claim. A certiorari denial is typically not an adjudication on the merits. *Brown v. Davenport*, 596 U.S. 118, 142 (2022). This is because the court's review is discretionary. *See* WIS. STAT. § 809.62(1r). Often, when faced with a certiorari denial from a state supreme court, the federal habeas court "look[s] through" to the "last related state-court decision that does provide a relevant rationale." *Wilson v. Sellers*, 584 U.S. 122, 125 (2018).

In Carter's certiorari petition to the Wisconsin Supreme Court, he argued for the first time that the Wisconsin Court of Appeals violated *Anders*. He could make that argument only after the state appellate court had issued its opinion. This means that when we "look through" the state supreme court's certiorari denial, there is nothing to see, as it was the state appellate court's ruling that allegedly denied him an effective appeal. So, we review Carter's *Anders* argument without AEDPA's deferential standard. We review the district court's

decision de novo. *Roalson v. Noble*, 116 F.4th 661, 665 (7th Cir. 2024).

AEDPA's deferential review may apply under similar circumstances. A state prisoner must raise each claim through "one complete round of state court review," meaning the prisoner argued the claim "at each level of state court review." *Mata v. Baker*, 74 F.4th 480, 488 (7th Cir. 2023) (quoting *Smith v. Gaetz*, 565 F.3d 346, 351–52 (7th Cir. 2009)). This is so state courts have a "fair opportunity" to resolve a state prisoner's claims. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

Yet Carter's argument that the state appellate court's decision violated *Anders* was not presented to that court. He did not raise the claim at each level in the state court system, so it was not exhausted. Carter could have conceivably exhausted his *Anders* claim a few ways. He could have filed a motion for reconsideration in the Wisconsin Court of Appeals. Or he could have completed a round of state postconviction litigation. A decision resulting from either of those paths that "adjudicated" Carter's claim "on the merits" would mean that AEDPA's deferential review would apply to his claim. 28 U.S.C. § 2254(d). That said, at oral argument before us, the State waived the exhaustion defense.[3] *See* 28 U.S.C. § 2254(b)(3). For these reasons, AEDPA's deferential review does not apply because Carter's *Anders* claim was not adjudicated "on the merits."

B. The merits of Carter's *Anders* claim

In *Anders*, an indigent defendant asked his appellate counsel to appeal his case. 386 U.S. at 739. Counsel, rather than

[3] Oral Argument at 15:10–15:50, 17:37–17:50.

filing a brief, wrote a letter to the court stating that he concluded the appeal had no merit. *Id.* at 739–40. The Supreme Court said more is required: Counsel must "conscientious[ly] examin[e]" the case and explain why the appeal is frivolous. *Id.* at 744. Judges have a duty, too. "After a full examination of all the proceedings," the court must "decide whether the case is wholly frivolous." *Id.*

Later, in *Pennsylvania v. Finley*, the Court explained that *Anders* is a prophylactic measure but is not "an independent constitutional command." 481 U.S. 551, 554–55 (1987). Then, *Smith v. Robbins* expounded more on *Anders*'s standard. 528 U.S. 259, 273–76 (2000). *Robbins* instructs that to comply with *Anders*, a state's procedure must "reasonably ensure[] that an indigent's appeal will be resolved in a way that is related to the merit of that appeal." *Id.* at 278–79. *Robbins* also teaches that one indication a state's no-merit procedure passes constitutional muster is if the state courts must "find the appeal … lacking in arguable issues, which is to say, frivolous." *Id.* at 280.

Carter argues to us that the Wisconsin Court of Appeals failed to follow *Anders*.[4] The state appellate court gave his *Remmer* claim short shrift, he contends, because it was resolved in a footnote. Carter also takes issue with that court's conclusion that his claims "lack[ed] arguable merit." Instead, he argues, *Anders* requires confirming that his claims are "frivolous."

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[4] Carter was appointed counsel in our court. We thank George Burnett, Esq. for his excellent advocacy and the Law Firm of Conway, Olejniczak & Jerry, S.C. for their diligent efforts on behalf of Carter.

We conclude that the Wisconsin Court of Appeals acted in accordance with *Anders*. It "independently reviewed" the record (hundreds of pages), the *Anders* brief, the supplemental brief, and Carter's response brief (together exceeding 50 pages). The state appellate court also cited *Anders*, recognizing its constitutional obligation. Though some of Carter's claims were resolved in a footnote, the Wisconsin Court of Appeals agreed with the analysis in the no-merit brief. It defies good sense to force state courts to echo the analysis from a no-merit brief when they find that analysis persuasive. Together, this establishes that Carter's appeal was "adequate and effective" and given serious consideration, satisfying *Anders*. The district court correctly concluded the same. *Carter*, 2023 WL 129790, at *12–14.

Further, the *Anders* brief submitted by appellate counsel summarized the facts and proceedings in the first 30 pages. This recitation "ensures that a trained legal eye has searched the record for arguable issues and assists the reviewing court in its own evaluation of the case." *Robbins*, 528 U.S. at 281. The Wisconsin Court of Appeals examined the brief's summary for arguable issues. So a "trained legal eye" examined the record and assisted the state appellate court's independent evaluation. *Id.*

As Carter sees it, the Fourteenth Amendment compels the state appellate court to write more than a footnote. But "federal courts have no authority to impose mandatory opinion-writing standards on state courts." *Johnson v. Williams*, 568 U.S. 289, 300 (2013). "The caseloads shouldered by many state appellate courts are very heavy, and the opinions issued by these courts must be read with that factor in mind." *Id.* (footnote omitted). *Harrington v. Richter* also tells us that state

courts need not append a statement of reasons to their decisions. 562 U.S. 86, 99 (2011). And Carter's request for detailed analysis is not sourced in the Constitution's text. If anything, federalism commands respecting how state courts decide their cases. *Id.* Our habeas review is qualified to "extreme malfunctions in the state criminal justice systems." *Id.* at 102–03 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in the judgment)). *Anders*, *Robbins*, and *Richter* read together foreclose Carter's claim.

Nor is the Wisconsin Court of Appeals limited to the magic word "frivolous," as Carter submits. True, a court cannot say a defendant's claim is "unlikely to prevail on appeal." *Robbins*, 528 U.S. at 279. But *Robbins* also tells courts it is permissible to determine that a claim is "lacking in arguable issues, which is to say, frivolous." *Id.* at 280. That is what the state appellate concluded here: "there is no issue of arguable merit that could be pursued on appeal."

Relatedly, Carter submits the Wisconsin Court of Appeals violated *Anders* because his *Remmer* claim has merit. *Anders* tells courts that, when presented with a no-merit brief, they must review the briefs and the record and independently conclude the claims are frivolous. *See McCoy v. Ct. of Appeals of Wis. Dist. 1*, 486 U.S. 429, 442 (1988). For a procedural challenge under *Anders*, a defendant should argue that the court neglected those duties. That is, such a claim must challenge the court's *procedures*.

Carter, however, disputes the state appellate court's *decision*. By arguing that his *Remmer* claim has merit, Carter disagrees with that court's contrary conclusion. That is not an *Anders* procedural challenge. If Carter believes the Wisconsin Court of Appeals wrongly resolved his *Remmer* claim, that

conclusion should be challenged under 28 U.S.C. § 2254(d)(1) as "contrary to, or involv[ing] an unreasonable application of, clearly established Federal law."

Carter also urges us to review his appellate counsel's *Anders* brief. To Carter, the state appellate court adopted the reasoning in that brief, so to assess that court's conclusion we must review the brief's legal analysis. But that does not follow. Carter's habeas brief asserted that the state appellate court fell short under *Anders*. Arguing that "the state appellate court violated *Anders*" is different from claiming "my attorney's brief violated *Anders*." As this court has held, "separate and independent" claims must be pleaded distinctly. *McGhee*, 900 F.3d at 853. Courts look to what is "*actually* raised." *Id.* Here, that was a violation by the state appellate court, not by his attorney.

The district court said as well that Carter "has not argued that [his appellate counsel] violated *Anders*." *Carter*, 2023 WL 129790, at *13. Earlier, the district court also told Carter he "must confine his future arguments to the question of whether the state court denied him his Fourteenth Amendment right to a meaningful appeal by accepting and adopting the no-merit brief," even though "the petitioner believes his appellate lawyer should have withdrawn—or perhaps not filed—the no-merit brief." *Carter v. Foster*, No. 17-cv-1497, 2019 WL 1326907, at *3 (E.D. Wis. Mar. 25, 2019). The certificate of appealability framed Carter's claim in the same way.[5]

[5] The certificate of appealability did not mention the no-merit brief. One issue it asked the parties to address was: "whether the state appellate court violated Carter's constitutional rights by concluding that his direct appeal presented no issue of arguable merit and summarily affirming ... ."

An ineffective assistance of counsel claim is another way for a defendant to challenge his attorney's no-merit report. *Robbins*, 528 U.S. at 283–84; *see also Morris v. Bartow*, 832 F.3d 705, 709–10 (7th Cir. 2016) (analyzing attorney's *Anders* brief for ineffective assistance of counsel). So, we do not evaluate his attorney's *Anders* brief. This remains true even though we construe his petition liberally because he is pro se. *McGhee*, 900 F.3d at 853.

In sum, the Wisconsin Court of Appeals followed *Anders* and *Robbins* when adjudicating Carter's claims.

III. Carter's *Remmer* claim

Carter next claims that after learning of the bailiff's communication with the jury, the state trial judge contravened *Remmer* by not presuming the bailiff's statement was prejudicial and by failing to conduct a post-verdict hearing.[6] If a state court has adjudicated the merits of this *Remmer* claim, AEDPA's deferential review applies. 28 U.S.C. § 2254(d). In its *Anders* review, the Wisconsin Court of Appeals concluded that Carter's *Remmer* claim lacked arguable merit. So, that claim was "adjudicated on the merits," meaning AEDPA's deferential review applies. *Id.*

We comment on one aspect of Carter's *Remmer* claim, but we conclude that AEDPA forecloses that claim.

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[6] Carter arguably procedurally defaulted his *Remmer* claim. A prisoner must argue all operative facts and legal principles to the state courts, *Nichols v. Wiersma*, 108 F.4th 545, 560 (7th Cir. 2024), but Carter did not mention *Remmer* to the state courts. Before us, though, the state waived its procedural default defense on this claim. *See* Oral Argument at 25:40–25:54.

A. *Remmer* as a constitutional holding

Title 28 U.S.C. § 2254(a) requires that a state prisoner be "in custody in violation of the Constitution or laws or treaties of the United States." Several Justices recently pointed out that it is not clear that *Remmer* establishes a constitutional right. *Shoop v. Cunningham*, 143 S. Ct. 37, 42 (2022) (Thomas, J., dissenting from denial of cert., joined by Alito and Gorsuch, JJ.) We take the time now to examine the question.

In *Remmer* an outsider tried to bribe a juror, and though the FBI investigated, the trial court failed to alert the defendant and hold a hearing. 347 U.S. at 228. *Remmer* held that some forms of "communication, contact, or tampering" with the jury are presumptively prejudicial. *Id.* at 229. If they occur, the judge must hold a hearing to require that the government show why the intrusion was harmless. *Id.* So, the Court remanded with directions to hold an evidentiary hearing. *Id.* at 230.

Remmer does not use the words "Constitution," "constitutional," or "due process." Neither did its follow-up case. *Remmer v. United States*, 350 U.S. 377 (1956). Nor did the only two cases that *Remmer* relies on for its rule. *Remmer*, 347 U.S. at 227 (first citing *Mattox v. United States*, 146 U.S. 140 (1892); and then citing *Wheaton v. United States*, 133 F.2d 522, 527 (8th Cir. 1943)). "One could just as naturally—perhaps more naturally—read *Remmer* as a case about new-trial motion practice under the Federal Rules of Criminal Procedure than as one about the requirements of constitutional due process." *Shoop*, 143 S. Ct. at 42 (Thomas, J., dissenting from denial of cert.). Or it could be an evidentiary rule. Before the Federal Rules of Evidence were enacted, courts often adopted common-law rules and fashioned

exceptions. *See, e.g., United States v. Benally*, 546 F.3d 1230, 1233 (10th Cir. 2008); *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1155 (D.C. Cir. 2006) (Sentelle, J., concurring). Per some of the Justices, a "rigorous § 2254(d)(1) analysis, therefore, likely would take no account of *Remmer* at all." *Shoop*, 143 S. Ct. at 42.

To be sure, the Court has come close to describing *Remmer* as a constitutional holding. In *Smith v. Phillips*, the Court said, "[d]ue process means ... a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that ordered in *Remmer* and held in this case." 455 U.S. 209, 217 (1982).

Still, *Phillips* is not about what due process requires; it is about what due process does not require. The Court in *Phillips* reasoned that a post-trial hearing to examine jury intrusions, like that described in *Remmer*, is an adequate remedy in federal court. *Id.* at 218. So, it is also an adequate remedy in state court because the Due Process Clause does not require more from state courts than federal courts. *Id. Phillips* did not hold that due process mandates *Remmer*'s holding on state courts, but rather that due process does not require state court hearings to exceed what is permissible in federal court, namely, a *Remmer* hearing. *Id; see also Shoop*, 143 S. Ct. at 42 n.5. (Thomas, J., dissenting from denial of cert.).

In *Dietz v. Bouldin*, the Court hinted that *Remmer* could be a constitutional holding: "the guarantee of an impartial jury ... is vital to the fair administration of justice. This Court's precedents implementing this guarantee have noted various external influences that can taint a juror. *E.g., Remmer v. United States* ... ." 579 U.S. 40, 48 (2016). Contextual clues in

United States v. Olano suggest the same. 507 U.S. 725, 738–39 (1993).[7] But in *Tanner v. United States*, the Court deemed *Remmer* an exception "to the common-law rule" which prohibits "admitting juror testimony to impeach a verdict." 483 U.S. 107, 117 (1987).

The Supreme Court usually speaks in a different manner when it recognizes a constitutional right. In *Anders*, the Court described the right as the "constitutional requirement of substantial equality and fair process." 386 U.S. at 744. Consider too how the Court characterized the right to an impartial jury: "It is well settled that the Sixth and Fourteenth Amendments guarantee a defendant on trial for his life the right to an impartial jury." *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988). And in *Strickland v. Washington*, it was "the constitutional requirement of effective assistance." 466 U.S. 668, 686 (1984).

The language in these cases stands in contrast to how the Supreme Court has described *Remmer*, as well as *Remmer* itself. The Court has not unequivocally held that *Remmer* is a constitutional holding, and *Remmer* offers no reason to suggest it is constitutionally compelled. AEDPA requires

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[7] But that section of *Olano* is dicta, as the Court said, "the issue here is whether the alternates' presence sufficed to establish remedial authority under Rule 52(b), not whether it violated the Sixth Amendment or Due Process Clause." *Id.* at 739.

The same is true with *Rushen v. Spain*, 464 U.S. 114 (1983) (per curiam). That case seemed to characterize *Remmer* as constitutional, but that occurred in dicta, as in *Rushen* the Court expressly said the trial error was not a constitutional holding. *Id.* at 117 n.2.

Recall, AEDPA mandates that federal courts consider only holdings. *Richter*, 562 U.S. at 100; *see also Shoop*, 143 S. Ct. at 42 n.5 (Thomas, J., dissenting from denial of cert.).

precision on this question; it is a prerequisite to habeas relief on all *Remmer* claims, after all.

When asked about this issue at oral argument, the State agreed *Remmer* could be seen as not constitutionally compelled, but the State did not take a firm position.[8] Our circuit has held that *Remmer* is constitutional. *See Hall v. Zenk*, 692 F.3d 793, 803 (7th Cir. 2012); *Oswald v. Bertrand*, 374 F.3d 475, 477–78 (7th Cir. 2004). But our court's law conflicts with that of another circuit on this question. *See Crease v. McKune*, 189 F.3d 1188, 1193 (10th Cir. 1999) ("We view the *Remmer* presumption as a rule of federal criminal procedure, rather than a rule of federal constitutional law."); *see also United States v. Briscoe*, No. 23-3109, 2025 WL 1013389, at *3 (10th Cir. Apr. 2, 2025). We see this as a question for resolution by the Supreme Court.

B. The merits of Carter's *Remmer* claim

Under the applicable standard of review, we are to consider whether the bailiff's communication with the jury was presumptively prejudicial under *Remmer*. We look to that case and precedent interpreting it from the Supreme Court and this court.

As established above, Carter's *Remmer* claim is governed by AEDPA's deferential review. To succeed, Carter must show that the Wisconsin Court of Appeals decision—that his *Remmer* claim lacks arguable merit—was "contrary to, or involved an unreasonable application of, clearly established

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[8] Oral Argument at 24:33–24:59 ("[*Remmer*] doesn't really articulate a constitutional claim. It articulates a best practice in a way … I don't want to say that the state of Wisconsin has a formal opinion on that at this point.").

Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

We start with what the applicable "Federal law" (here, *Remmer*) "clearly establish[es]." *Id.* If no Supreme Court case "squarely addresses the issue" there is no "clearly established" law that controls. *Wright v. Van Patten*, 552 U.S. 120, 125 (2008) (per curiam) (reversing this court). That means we cannot extend a Supreme Court case's rationale under the guise of applying existing law. *White v. Woodall*, 572 U.S. 415, 426 (2014). At bottom, "courts must reasonably apply the rules 'squarely established' by [the Supreme] Court's holdings to the facts of each case." *Id.* at 427 (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009)).

The Court has said, "[g]eneral legal principles can constitute clearly established law." *Andrew v. White*, 145 S. Ct. 75, 82 (2025) (per curiam). Recall in *Remmer* that the juror was offered a bribe, resulting in an FBI investigation. 347 U.S. at 228. The Court concluded that the district court should have conducted a hearing because "tampering directly or indirectly[]with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial." *Id.* at 229. But "obvious" is not a generally applicable legal principle.

The only other window into the Court's reasoning in *Remmer* is that a hearing is required "on information *such as was received in this case*." *Id.* at 229–30 (emphasis added). This language suggests we should compare our case's facts with *Remmer*'s. *See Whitehead v. Cowan*, 263 F.3d 708, 722–25 (7th Cir. 2001) (contrasting *Remmer*'s facts); *see also Hall*, 692 F.3d at 804. So, in keeping with these rules, we consider whether Carter's case presents an analogy to the facts in *Remmer* but without

requiring "an identical fact pattern." *Woodall*, 572 U.S. at 427 (quoting *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007)).

Courts have gone to great lengths to craft an applicable rule for when *Remmer*'s presumption of prejudice applies. *See Hall*, 692 F.3d at 803 ("[T]here has been much debate" on "when the *Remmer* presumption ought to be employed."). To extract a general rule from *Remmer* would frame its holding at a "high level of generality," something the Court has proscribed. *Nevada v. Jackson*, 569 U.S. 505, 512 (2013). But at the same time, "an identical fact pattern" is not required "before a legal rule must be applied." *Woodall*, 572 U.S. at 426.

Complicating our work is that the Supreme Court has not decided a *Remmer* "presumption of prejudice" case since that decision in 1954. Left with just *Remmer*'s terse reasoning and the Court's habeas cases, lawful *Remmer* claims under AEDPA appear to succeed only with facts similar to those in *Remmer*. As has been observed, "as to the Supreme Court's own precedents, the facts of *Remmer* itself remain the only source of guidance as to the showing necessary to mandate a *Remmer* hearing." *Cunningham v. Shoop*, 23 F.4th 636, 681 (6th Cir. 2022) (Kethledge, J., concurring in the judgment in part and dissenting in part), *cert. denied*, 143 S. Ct. 37 (2022).

With these strictures, we evaluate the merits of Carter's *Remmer* claim, considering the nature of the alleged violation, Supreme Court precedent, and our court's law.

First, the bailiff's response to the jury—a procedural instruction—did not introduce new evidence or suggest forbidden inferences. As the state trial judge observed, if the question had been presented to her before the bailiff answered the jury, the judge would have given the same

instruction. And unlike the bribe and FBI investigation in *Remmer*, the communication likely did not engender a feeling that the bailiff was "looking over" the juror's "shoulder," nor was it "bound to impress the juror ... unduly." *Remmer*, 347 U.S. at 229. Further, two critical facts for the Court in *Remmer* were the attempted bribery and an FBI investigation. *Id.* at 228. Nothing like that occurred here. "'[I]f a habeas court must extend a rationale before it can apply to the facts at hand,' then by definition the rationale was not 'clearly established at the time of the state-court decision.'" *Woodall*, 572 U.S. at 426 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004)). The bailiff's communication with the jury here is not the kind of intrusion that *Remmer* "clearly established" is presumptively prejudicial.

Second, we consider Supreme Court precedent interpreting *Remmer*. While *Smith v. Phillips* comes to mind, the Court in *Williams v. Taylor* emphasized that "clearly established" under AEDPA refers only to holdings. 529 U.S. 362, 412 (2000). In *Phillips*, the state trial court held a hearing, so the Court was not asked to decide whether the jury intrusion there required a hearing. 455 U.S. at 213. So, to apply *Phillips* would be to rely on what the Court has forbidden—something outside a case's "governing legal principle." *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003). For context, at times this court has applied the facts of *Phillips*, but at other times has not. *Compare Hall*, 692 F.3d at 804 (contrasting the facts in *Phillips*), *with Whitehead*, 263 F.3d at 722–23, 725 (citing *Phillips* but not comparing its facts). In any event, in *Phillips*, "the potential bias of a juror was wholly unrelated to the *Phillips* trial itself, but rather involved a relationship between a juror and the prosecutor's office." *Hall*, 692 U.S. at 804. Here, the intrusion, a question from the jury about the unanimity requirement, related to the trial itself. So even

if *Phillips* could be applied, its "squarely established" holding does not extend to the facts at hand. *Woodall*, 572 U.S. at 427.

Third, we turn to our circuit's precedent. But the Supreme Court has delineated what can be considered. Cases decided on direct appeal cannot be applied. *Glebe v. Frost*, 574 U.S. 21, 24 (2014) (per curiam). Nor can we apply pre-AEDPA cases. *Parker v. Matthews*, 567 U.S. 37, 49 (2012) (per curiam). We may look only "to circuit precedent to ascertain whether it has already held that the particular point in issue is clearly established by Supreme Court precedent." *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013) (per curiam). Said differently: if this court has held that a general principle is "clearly established" by the Supreme Court, we can consider it. But even then, the Court has encouraged circuits to look critically at such precedent if it "bears scant resemblance" to the rule laid down by the Court. *Parker*, 567 U.S. at 49.

Given these requirements, this court's principal case is *Hall*, 692 F.3d at 804. There, a jury was empaneled for Hall's murder trial. *Id.* at 796. A juror's son was incarcerated at the same facility as the defendant. *Id.* During the trial, that juror "overheard his wife tell another family member that their son and several other members of the cell block no longer believed Hall to be innocent." *Id.* The jury found the defendant guilty, and the judge denied Hall's motion to depose all members of the jury. *Id.* At a later evidentiary hearing about the jury intrusion, the state court did not apply *Remmer*'s presumption of prejudice. *Id.* at 796–97. On federal habeas review, the defendant alleged the judge's refusal to do so violated *Remmer*. *Id.* at 797.

Hall set a rule for our circuit. "[W]hat seems to be 'clearly established' is that federal constitutional law maintains a

presumption of prejudice in at least some intrusion cases." *Id.* at 803 (quoting 28 U.S.C. § 2254(d)(1)). If the jury intrusion "had a great impact on an average juror's deliberation," then the contact is presumptively prejudicial, and a hearing is necessary. *Id.* at 804.[9] *Hall*'s rule sets what *Remmer* clearly establishes.

We then ask whether the Wisconsin Court of Appeals unreasonably applied *Hall*'s rule to Carter's case under 28 U.S.C. § 2254(d)(1). *See Andrew*, 145 S. Ct. at 83. That application must have been so erroneous that "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents." *Nevada*, 569 U.S. at 508–09 (quoting *Richter*, 562 U.S. at 102). "If this standard is difficult to meet, that is because it was meant to be." *Richter*, 562 U.S. at 102.

We conclude that a fairminded jurist could agree that the bailiff's response to the jury did not have a "great impact on an average juror's deliberation." The state trial court transcript relays that the bailiff gave a procedural instruction and

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[9] Another case merits brief discussion. This court held in *Wisehart v. Davis* that *Remmer* "clearly establishes" that "the extraneous communication to the juror must be *of a character* that creates a reasonable suspicion that further inquiry is necessary to determine whether the defendant was deprived of his right to an impartial jury." 408 F.3d 321, 326 (7th Cir. 2005) (emphasis added).

Wisehart did not define the phrase "of a character." It could mean an intrusion that "contaminate[s] the jury's deliberations." *Id.* The Supreme Court has directed the circuits to raise their eyebrows at caselaw that derives a "highly generalized standard" that "bear[s] scant resemblance" to the Court's precedent. *Parker*, 567 U.S. at 49. Following the Court's direction, the phrase "of a character" is too general to apply here.

did not try to convince or command how the jury should vote. Indeed, the state trial judge said she would have given the same instruction. Nothing in the bailiff's communication likely prejudiced the defendant, unlike the extrinsic communications about the defendant's innocence that the juror overheard in *Hall*. And "[t]he more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Id.* at 101 (quoting *Yarborough*, 541 U.S. at 664). *Hall*'s "great impact" rule is broad, so we give the Wisconsin Court of Appeals extra deference in its application of *Remmer* to Carter's case.

Remmer has been applied by our court in other cases post-AEDPA. *See, e.g.*, *Brown v. Finnan*, 598 F.3d 416, 423–24 (7th Cir. 2010); *Moore v. Knight*, 368 F.3d 936, 943 (7th Cir. 2004); *Oswald*, 374 F.3d at 477–78; *Whitehead*, 263 F.3d at 722–25. But we may not use our caselaw to "refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that th[e] Court has not announced." *Marshall*, 569 U.S. at 64. Nor may we "canvass circuit decisions to determine whether a particular rule of law is so widely accepted among the Federal Circuits that it would, if presented to [the Supreme] Court, be accepted as correct." *Id.* Last, the certificate of appealability suggested the parties look to *United States ex rel. Tobe v. Bensinger*, 492 F.2d 232, 238–39 (7th Cir. 1974). *Tobe* precedes AEDPA, and the Supreme Court has admonished courts for applying pre-AEDPA circuit precedent. *Parker*, 567 U.S. at 49.

Carter counters that the effect of the bailiff's answer on the jury is unknown because the state trial judge never questioned the jurors. That may be. But *Remmer* has been interpreted to require federal courts considering habeas relief to

make a threshold decision whether the defendant has shown he was prejudiced by an intrusion upon the jury without knowing the true impact. Courts often engage in such threshold reasoning, such as on evidentiary questions. *See* FED. R. EVID. 104(a).

In sum, Carter's *Remmer* claim cannot overcome AEDPA's exacting limitations.[10] *Remmer* does not clearly establish that the bailiff's communication with the jury here was presumptively prejudicial. Nor was the Wisconsin Court of Appeals unreasonable in applying *Hall*'s rule.

IV. Conclusion

The Wisconsin Court of Appeals ensured Carter's appeal was "resolved in a way that is related to the merit of that appeal" by reviewing the extensive record, reading three briefs, and independently concluding his claim lacked arguable merit. *Robbins*, 528 U.S. at 278–79. So his *Anders* claim fails. Carter's *Remmer* claim also fails to clear the stringent requirements of AEDPA. For these reasons, we AFFIRM.

[10] Questions (1), (2), and (4) of the certificate of appealability are resolved here. We assume without deciding question (3), and we need not reach question (5) because we resolve the *Remmer* claim under AEDPA.

Case: 23-1266 Document: 52 Filed: 05/22/2025 Pages: 1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

May 22, 2025

Before

MICHAEL B. BRENNAN, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 23-1266

LEON CARTER,
Petitioner-Appellant,

v.

LIZZIE TEGELS, Warden,
Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 2:17-cv-01497-PP

Pamela Pepper,
Chief Judge.

ORDER

On consideration of the petition for rehearing and for rehearing en banc filed by Petitioner-Appellant on May 7, 2025, no judge in active service has requested a vote on the petition for rehearing en banc, and the judges on the original panel have voted to deny rehearing.

Accordingly, the petition for rehearing is DENIED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

LEON CARTER,

Plaintiff,

v. Case No. 17-cv-1497-pp

LIZZIE TEGELS,[1]

Defendant.

ORDER DISMISSING *HABEAS* PETITION (DKT. NO. 1), DISMISSING CASE AND DECLINING TO ISSUE A CERTIFICATE OF APPEALABILITY

On October 30, 2017, the petitioner, who is incarcerated at Jackson Correctional Institution and is representing himself, filed a petition for writ of *habeas corpus* under 28 U.S.C. §2254 challenging his 2013 conviction in Milwaukee County Circuit Court on four counts of second-degree sexual assault, one count of kidnapping and one count of strangulation and suffocation. Dkt. No. 1; see also State v. Carter, Milwaukee County Case No. 11CF003689 (available at https://wcca.wicourts.gov).

On March 25, 2019, the court adopted Magistrate Judge William Duffin's report and recommendation and denied the respondent's motion to dismiss the petition. Dkt. No. 22. The petitioner filed a brief in support of the petition on

[1] Under Rule 2 of the Rules Governing Habeas Cases, "[i]f the petitioner is currently in custody under a state-court judgment, the petition must name as respondent the state officer who has custody." The petitioner is incarcerated at Jackson Correctional Institution; this order reflects Warden Lizzie Tegels as the respondent.

August 30, 2019. Dkt. No. 29. About five weeks later, the respondent filed an opposition brief. Dkt. No. 30. On December 13, 2019, the petitioner filed a reply. Dkt. No. 33.

The court will deny the petition and dismiss the case.

I. Background

A. State Case

1. *Pre-trial Proceedings*

An amended criminal complaint charged the petitioner with six felonies, ranging from second-degree sexual assault to kidnapping and strangulation. Dkt. No. 24-6 at 2. The charges involved the same victim—a woman referred to as Smith (a pseudonym)—with whom the petitioner had had a relationship for over ten years. Id. The complaint accused the petitioner of severe physical, sexual and psychological abuse, suggesting he treated Smith as 'property.'" Id. The petitioner previously had pled guilty to battering and intimidating Smith in 2002 and 2004. Id.

At a pre-trial motion hearing on March 9, 2012, the petitioner stated that he was prepared to argue a Shiffra[2] motion that he previously had filed with the court. Dkt. No. 24-2 at 5.[3] He also discussed a discovery motion in which he sought police reports to prove that the alleged victim had made prior false

[2] State v. Shiffra, 175 Wis. 2d 600 (1993), "a case where the Wisconsin Court of Appeals . . . establish[ed] procedures for an *in camera* review of a complainant's confidential records." Rizzo v. Smith, 528 F.3d 501, 506 (7th Cir. 2008).

[3] This portion of the procedural history is adapted from the first no-merit report filed by the petitioner's appellate counsel, Attorney Dennis Schertz.

accusations against a police officer. Id. The State opposed the Shiffra motion. Id.

During a July 20, 2012 pretrial motion hearing, the prosecutor asked whether the petitioner "would be renewing [his] Shiffra motion, which, [the prosecutor] stated, the court had previously denied." Id. at 6. Regarding the petitioner's subpoena for police records, the court questioned the relevance of the alleged events from 2003 to the alleged events "in the present case in 2010." Id. at 6. The petitioner responded that the records would show Smith's prior false allegations of sexual assault, and "might also contain information relating to the victim's mental health . . . which was the subject of [his] Shiffra motion." Id. When asked "why his request was not just a 'fishing expedition,'" defense counsel cited his client's affidavits and the attachments to it. Id. at 7. The court adjourned the trial date. Id.

At another hearing on August 6, 2012, the court "expressed its continuing concern that the subpoena was just a fishing expedition, but [] stated that it would review the documents *in camera* . . . at the next court appearance." Id. "At that next hearing on September 17, 2012," the court "noted some additional issues relating to the defense's Shiffra motion." Id. at 8-9.

At a motion hearing on November 8, 2012, the court again discussed the petitioner's request for Ms. Smith's mental health records, reiterating that it alleged "issues that Ms. [Smith] may have had in 2003 or 2002." Dkt. No. 24-11 at 17. The court denied the petitioner's motion to reconsider the ruling on

the petitioner's Shiffra motion, stating that it had "made [its] ruling" and "[would not be] redoing that." Id. Again, the court questioned the relevance of Ms. Smith's alleged mental health issues from seven or eight years prior to incidents that had occurred in 2010. Id. After the petitioner's trial counsel, Julius Andriusis, stated that he "[didn't] know if [Ms. Smith's] condition worsened up or bettered up or what happened with her since that time," id., the court continued:

> THE COURT: But as I recall, when I dealt with the Shiffra motion, there was really no basis. It was in my view a fishing expedition based on nothing other than some bald—bold assertions from your client. There was no—it didn't meet the legal criteria of Shiffra. I am not revisiting that issue, so let's deal with these 2000 and 2003 claims. The issue is remoteness in time. In 2002 I wasn't even a judge. Now I've been a judge for 9 years. That's a long time frame. Seven or eight years is a very long time frame. Having a mental health issue in 2003 does not . . . necessarily mean[] that you are faking something or lying . . . about allegations 8 years later.
>
> ATTORNEY ANDRIUSIS: Well, as I can say, maybe it's a fishing expedition as this Court called my original motion that I filed, but these reports I guess support my fishing expedition and it was one police report attached that were—
>
> THE COURT: Well, actually, no, they don't, counsel. That's my point. Because someone had an issue in 2002 does not mean they are having the same issue in 2010. Some mental health issues. . . [are] . . . situational. That doesn't mean the same thing is occurring 8 years later.

Id. at 18-19. The prosecutor reasoned that under Shiffra, the petitioner's motion did not cite sufficiently "specific information that would lead the [c]ourt to believe that there are some mental health records . . . that contain information that would likely be material to [the petitioner's] defense." Id. at 19.

The court continued:

> THE COURT: . . . Beyond everything I've already said, there has to be specificity . . . If someone is being treated for depression and they are taking Prozac, . . . that in most cases has nothing to do with anything because it doesn't affect that person's ability to relay events to the police, it doesn't appreciate or affect that person's ability to . . . understand reality, to function day to day, to work, to have a job, to give a police officer a police report. If you had evidence of someone having . . . a psychotic disorder or being detached from reality or hearing voices, that might be a different situation. Here if there's anything, it's mild assertions and limited indications of mental health issues 7 or 8 years before the alleged multiple offenses by [the petitioner].

Id. at 19-20. The court concluded:

> [A]t this point I'm not allowing anything to be discussed about Ms. [Smith] and her situation with the police officer in 2002 or 2003. It's remote in time. It's likely not to add anything to this trial. If there's a discussion during the case, during the victim or alleged victim's testimony of mental health issues if she's on her medication in 2010 when these crimes allegedly occurred, it might come out.

Id. at 21. The court clarified that its ruling was "not a blanket bar," and that if it became relevant, "there may be some discussion at the trial of the victim or alleged victim's mental health issues." Id. at 21-22. It reiterated, however, that whether "8 years prior to this incident, Ms. [Smith] was being treated for depression and sleep problems" was "not relevant to what she was doing in 2010 and whether or not [the petitioner] committed multiple felonies against her." Id. at 22.

On December 11, 2012—a week before the petitioner's trial—the circuit court held a final pretrial conference. Dkt. No. 24-12. The State informed the court that it was ready for trial after its investigator made travel arrangements in order to comport with the petitioner's speedy trial demand. Id. at 2-4. The court then turned to the petitioner, who stated that while he "wish[ed] to be

ready to proceed," he was concerned about whether certain witnesses would appear. Id. at 4. The court advised the petitioner that because of his speedy trial demands and because "[t]he State just went through extraordinary steps," the case was going to trial next week. Id. After the petitioner repeated his concern about witnesses, the court stated that it would not adjourn the trial, stressing again the petitioner's speedy trial demands, the age of the case and the interest of fairness. Id. at 5. Attorney Andriusis then asked the court to make a record:

> ATTORNEY ANDRIUSIS: . . . just a few more things I would like to place on the record. I met with client yesterday, we discussed the case . . . I would like to make record of the case, Judge. So client expressed some dissatisfaction with me, maybe I have to let you go. So this was read to me and—
>
> THE COURT: We can address that right now. Your client doesn't make that call, I do. You are not being released from your duties in this case. This case is a year and a half old, you're the second attorney on this case, it is proceeding to trial on Monday.

Id. at 4-6.

2. *Trial in Milwaukee County Circuit Court*

The petitioner's theory of defense was that he did not hold Smith against her will and that she was lying. Dkt. No. 24-6 at 2. To support that defense, the petitioner unsuccessfully attempted to introduce Smith's "past mental health treatment and a prior allegation against a police detective that resulted in an internal affairs report." Id. The jury found the petitioner guilty on all counts, and the court sentenced him to a total of sixty-three years of initial confinement and twenty-three years of extended supervision, including: four consecutive terms of fifteen years of initial confinement and five years of

extended supervision; one consecutive term of three years of initial confinement and three years of extended supervision; and one concurrent term of fifteen years of initial confinement and five years of extended supervision. Id. at 3.

After the court addressed the post-verdict motions, dkt. no. 24-21 at 86-87, it made a record of an exchange between the jury and a courtroom deputy:

> THE COURT: I do also want to note for the record that we did receive the following handwritten question over the lunch hour. It says: What happens if we do not unanimously agree on one of the six counts, and it is signed by the foreperson. I think Deputy Terrell responded in my absence that you need to just work and reach unanimous verdict, is that correct, Deputy?
>
> COURT OFFICER: It was actually me, Deputy Kashishias.
>
> THE COURT: I would note that's not my standard practice. I would not have responded to this without assembling you. The reality is we probably all would have come up with saying the same thing and in fact that's the jury instruction, but I did want to put that on the record. I don't think that it changes the integrity of the verdicts that were received.

Id. at 87-88. The petitioner moved for a mistrial, arguing that Deputy Kashishias's response to the jury's question interfered with the jury's deliberations. Id. at 88. The court denied the motion, reasoning that because (1) the language of the jury instructions stated that "the jury has to reach together to reach unanimous verdict," and (2) the court and the parties likely would have provided the same response, Deputy Kashishias's communication with the jury did not prejudice the petitioner. Id. at 87-89.

3. *Attorney Schertz's First No-Merit Report (Dkt. No. 24-2)*

The petitioner filed a notice of appeal on June 25, 2014. See Carter, Case No. 11CF003689 (available at https://wcca.wicourts.gov). In October 2014, Attorney Schertz filed a no-merit report finding no appealable issues. Dkt. No. 24-2 at 3, 43. Attorney Schertz's report considered whether the petitioner's sentence was excessive, id. at 35, "whether [the petitioner] received a fair trial at which there was sufficient evidence for a finding of guilt," id. at 36, and whether the petitioner received the effective assistance of counsel, id. at 43.

Attorney Schertz found "nothing in the record to support a claim that the court's sentence was excessive under the circumstances." Id. at 36. He reasoned that "[the petitioner] [could not] show an unreasonable or unjustifiable basis for the sentence he received," id. at 35, "[t]he court stated the factors upon which it relied in passing sentence," id. at 36, "[t]here [was] no indication that it gave too much weight to any one factor," id. at 36, "[t]here [was] no evidence that the court relied on irrelevant or immaterial factors," id. at 36, and "the court was well within the possible sentence allowed by law," id. at 36.

Attorney Schertz concluded that the petitioner "received a fair trial at which there was sufficient evidence for a finding of guilt," reasoning that (1) "there was more than sufficient evidence for the jury to have reached the verdicts it did," id. at 36; (2) the court properly granted the State's other acts motion, id. at 37; (3) the court properly denied the petitioner's Shiffra motion, id.; (4) the court properly found that the petitioner's speedy trial waiver was

freely, voluntarily and intelligently given, id.; (5) the court properly denied the petitioner's request "to introduce evidence of a prior domestic violence case involving the victim," id. at 38; (6) the court properly denied the petitioner's request to introduce evidence of what he "claimed was a prior false allegation of sexual assault by the victim against a police officer," id. at 38; (7) the court properly denied the petitioner's requests for his attorney to withdraw the week the trial was supposed to begin, id. at 38-39; (8) the court properly excused a tardy juror on the fourth day of trial, id. at 39; (9) the court properly denied a hypothetical mistrial motion based on a Department of Corrections agent's testimony in which the agent erroneously referred to the petitioner as a sex offender, id. at 39-40; (10) the court properly denied the petitioner's request to elicit testimony regarding "the victim's reputation for untruthfulness," id. at 40; (11) Attorney Andriusis's performance did not violate the petitioner's right to a fair trial, id. at 40-41; (12) the court properly instructed the jury on other acts evidence, id. at 41; (13) the court correctly denied a motion for a mistrial alleging that the court showed "excessive compassion for the alleged victim," id. at 41; (14) the court correctly denied the petitioner's post-verdict motions, id. at 41-42; (15) the court properly excused a "juror with a doctor's appointment as the last alternate," id. at 42; (16) the court properly denied the petitioner's motion for a new trial based on Deputy Kashishias's communication with the jury, id. at 42-43; and (17) the petitioner did not receive ineffective assistance of counsel, id. at 43.

In December 2014, the petitioner filed a response to Attorney Schertz's no-merit report. Dkt. No. 24-5. The petitioner argued that the no-merit report violated "Wis. Stat. Rule 809.32" and the United States Supreme Court's decision in McCoy v. Court of Appeals of Wis. because Attorney Schertz relied on "unexplained assumptions and [conclusory] allegations" to explain why he found the various issues meritless. Id. at 2 (citing McCoy, 486 U.S. 429, 440, 442-44 (1988)). The petitioner asserted that "it [did] not appear that Attorney [] Schertz resolved all doubts and ambiguous legal questions" in the petitioner's favor. Id.

4. *Supplemental No-Merit Report (Dkt. No. 24-4)*

On July 13, 2015, after it "independently reviewed the record, the no-merit report, and [the petitioner's] response as mandated by Anders [v. California, 386 U.S. 738 (1967)]," the Wisconsin Court of Appeals ordered Attorney Schertz to file a supplemental no-merit report. Dkt. No. 24-3 at 1-2. The court ordered further analysis of the other acts issue, directing Attorney Schertz "to cite 'the principle cases and statutes and the facts in the record that support the conclusion that the [issue] is meritless.'" Id. at 2 (quoting McCoy, 486 U.S. at 440). The court asked Attorney Schertz to "specifically address, with references to the record and authority:" (1) what other acts the trial court found admissible at trial; (2) whether the circuit court's lack of an on-the-record analysis of prejudice raised an "issue of arguable merit;" (3) whether the admission of the other acts evidence unduly prejudiced the petitioner; (4) whether all of the other acts introduced at the trial were

encompassed by the circuit court's other acts ruling; and (5) "whether trial counsel provided ineffective assistance by not objecting to the admission of certain other acts evidence during trial." Id. at 2.

The court also ordered Attorney Schertz to conduct additional analysis of the Department of Corrections agent's testimony. Id. "In addition to citing applicable case law and facts in the record," the court directed Attorney Schertz "to specifically address: (1) whether there would be potential merit to assert that trial counsel provided ineffective assistance by not objecting sooner and/or moving for a mistrial; and (2) whether there would be any arguable merit to challenge the trial court's analysis that it would not have granted a mistrial even if [the petitioner] had formally moved for it." Id. at 2-3.

Two and a half months later, Attorney Schertz filed his supplemental no-merit report. Dkt. No. 24-4. Focusing on the Wisconsin Supreme Court's 1998 decision in State v. Sullivan, 216 Wis. 2d 768, 772-73 (Wis. 1998),[4] Attorney Schertz discussed case law governing the admissibility of other acts evidence in Wisconsin. Id. at 2-10 (citing Sullivan, 216 Wis. at 772-73; State v. Kaster, 148 Wis. 2d 789, 797 (Wis. Ct. App. 1989); State v. Hunt, 263 Wis. 2d 1 (2003); State v. Bettinger, 100 Wis. 2d 691, 697 (1981); State v. Clemons, 164 Wis. 2d 506, 514-16 (Wis. Ct. App. 1991); Holmes v. State, 76 Wis. 2d 259, 273 (1977);

[4] A Wisconsin trial court considering an "other acts" motion applies a three-part analysis: "first, whether the proposed evidence falls within one of the exceptions of Wis. Stat. § 904.02(2); second, whether the evidence is relevant; and third, whether the probative value of the proffered evidence is substantially outweighed by the danger of unfair prejudice to the defendant." Dkt. No. 24-4 at 2-3 (citing Sullivan, 216 Wis. 2d at 772-73).

Bailey v. State, 65 Wis. 2d 331, 347 (Wis. 1974); State v. Jensen, 331 Wis. 2d 440, 480 (Wis. Ct. App. 2011); State v. Jones, 151 Wis. 2d 488, 493 (Wis. Ct. App. 1989); State v. Davidson, 236 Wis. 2d 537, 575 (Wis. 2000)).

Attorney Schertz concluded that (1) a claim for a new trial based on the circuit court's decision to grant the other acts motion would have been meritless, id. at 5-6; (2) the trial court's other acts ruling "[i]n theory . . . included everything referenced in those [seventy-three] pages of exhibits attached to the State's motion," id. at 6; (3) the trial court did not unfairly prejudice the petitioner by failing conduct an on-the-record Sullivan analysis, id. at 6-7; (4) the trial court did not unduly prejudice the petitioner when it admitted the other acts evidence, id. at 7-8; (5) the court did not unfairly prejudice the petitioner by admitting other acts evidence not covered by the court's other acts ruling, id. at 8-10; (6) trial counsel was not ineffective for failing to object to the complaining witness's testimony, id. at 10; (7) "the only potential ground for a new trial motion based upon the DOC agent's unexpected (and unprompted) testimony would be a claim that defense counsel was ineffective for either not moving for a mistrial following this testimony," or for not accepting the court's offer for a curative instruction, id. at 12; and (8) a claim that defense counsel was ineffective either for failing to move for a mistrial based upon the Department of Corrections agent's testimony, or for failing to accept the court's offer for a curative instruction, would be meritless because the agent's answers to the prosecutor's questions following the sidebar

made it clear that the petitioner was not being supervised as a sex offender, id. at 13.

5. *Wisconsin Court of Appeals Decision (Dkt. No. 24-6)*

The Wisconsin Court of Appeals summarily affirmed the petitioner's conviction on November 5, 2015. Dkt. No. 24-6 at 2. Noting its independent review of the trial record, the no-merit and supplemental no-merit reports, and the petitioner's response "as mandated by Anders," the court found "no issue of arguable merit that could be pursued on appeal." Id. at 1-2 (citing Anders, 386 U.S. 738). The court explained that while it agreed with Attorney Schertz's "description and analysis, [it would] briefly discuss several of the identified issues." Id. The court referenced a footnote, which explained:

> This court will not attempt to address every issue that arose in this case. The thirty-nine page no-merit report and the twelve-page supplemental report provide an exhaustive summary of the numerous motions and rulings that occurred before and during trial. As noted, we agree with counsel's analysis and conclusion that none of the issues identified presents an issue of arguable merit.

Id. The court reviewed the trial court's decision to admit the State's other acts evidence, the trial court's decision not to declare a mistrial after a Department of Corrections agent referred to the petitioner as a sex offender, the performance of the petitioner's trial counsel and the alleged excessiveness of the sentence. Id. at 5-7. On each issue, the court agreed with Attorney Schertz and found no arguable merit to pursue an appeal or motion. See id. at 5, 6, 7-8.

Regarding the State's other acts motion, the Court of Appeals found that the trial court "engaged in the requisite analysis under [Sullivan]," and that

"[a]lthough the trial court did not explicitly discuss whether the probative value of the proffered evidence outweighed the risk of unfair prejudice, an appellate court 'independently review[s] the evidence to determine if it supports the trial court's decision to admit the other crimes evidence.'" Id. at 5 (citing Sullivan, 216 Wis. 2d at 772-73; State v. Shillcutt, 116 Wis. 2d 227, 236 (Wis. Ct. App. 1983)). The Court of Appeals concluded that after reviewing the record, there was "no arguable merit to assert that the trial court's decision was unsupported by the record." Id. It found that "the trial court . . . explicitly addressed all three prongs of the Sullivan test, and [] gave the appropriate cautionary instructions." Id.

The court next considered the testimony of the Department of Corrections agent:

> On direct examination, as the agent was explaining that [the petitioner] was on her caseload and that she is a sex offender specialist, the agent added that [the petitioner] "has a prior sexual assault, but he was actually on [supervision] for two counts of battery." Later, the agent referred to [the petitioner] and the other men she supervised as "sex offenders." Trial counsel sought a sidebar conference, after which the State clarified with the witness that the Department may put people under sex offender supervision "even if they were not in that instance convicted of a sex offense." The State further clarified that [the petitioner] was on supervision for batteries. Later, outside the jury's presence, trial counsel told the trial court that he thought the State had "cleaned up" the problem and that there was no need for a mistrial. The trial court recognized that trial counsel was not seeking a mistrial, but it nonetheless considered whether one should be granted and concluded that a mistrial was not warranted because the jury had already heard "a lot of evidence of sexual assault by [the petitioner] against [Smith], some charged and some as prior bad acts" and it was unlikely that the reference to sex offender supervision "would rise to the level of any kind of prejudice that would warrant a mistrial." Before the case was submitted to the jury, trial counsel told the trial court that he did not want to have a curative instruction.

Id. at 5-6. The court agreed with Attorney Schertz that "a motion or appeal based on the witness's statements, the trial court's handling of the issue, or trial counsel's decision not to seek a curative instruction concerning this issue" would have been meritless. Id. at 6.

As to trial counsel's performance, the Court of Appeals agreed with Attorney Schertz, finding nothing "that would rise to the level of ineffective assistance." Id. "Finally, [the court] turn[ed] to sentencing," and concluded that "there would be no arguable basis to assert that the trial court erroneously exercised its sentencing discretion, or that the sentences were excessive." Id. at 6-7 (citing State v. Gallion, 270 Wis. 2d 535, 549 (Wis. 2004); Ocanas v. State, 70 Wis. 2d 179, 185 (Wis. 1975)). "[T]he trial court," according to the Court of Appeals, "applied the standard sentencing factors and explained their application in accordance with the framework set forth in *Gallion* and its progeny." Id. at 7. It noted that the trial court "discussed the severity of the abuse Smith suffered," "discussed [the petitioner's] criminal history" and "concluded that in order to prevent [the petitioner][5] from victimizing Smith or others again, it needed to impose a sentence that would 'not allow [the petitioner] to see the light outside of a prison.'" Id. "[The court's] review of the sentencing transcript [led] it to conclude that there would be no merit to challenging the trial court's compliance with *Gallion*." Id.

[5] The Court of Appeals' decision actually names 'Smith,' not the petitioner. This court understands that to be an error, and that the court intended to refer to the petitioner.

The court similarly found that "there would be no merit to assert that the sentence was excessive" under Ocanas. Id. It reasoned that "[w]hile the sixty-three-year term of initial confinement is significant and is, in all likelihood, a life sentence, . . . [the petitioner] was convicted of six serious felonies" and "was facing over two hundred years of imprisonment." Id. at 7-8. The court found the sentence imposed "well within the maximum sentence and [] discern[ed] no erroneous exercise of discretion." Id. at 8 (citing State v. Scaccio, 240 Wis. 2d 95, 108 (Wis. Ct. App. 2000)).

6. *Petition for Review in the Wisconsin Supreme Court*

The petitioner filed a petition for review in the Wisconsin Supreme Court on December 7, 2015. Dkt. No. 24-7; see also Carter, Case No. 14AP001459 (available at https://wscca.wicourts.gov). He argued that the Court of Appeals had violated his right to a meaningful appeal and his right to the effective assistance of appellate counsel when it accepted Attorney Schertz's no-merit report. Id. at 5.

The petitioner alleged that (1) the trial court had violated his due process rights when it denied his Shiffra motion; (2) the trial court had violated his right to present a defense when it denied his request to introduce evidence to impeach a witness; (3) the trial court had "violated [his] Sixth Amendment right to effective assistance of counsel when it failed to inquire into . . . [his] implicit request for new trial counsel;" (4) "[he] was denied his Sixth Amendment right to counsel and the right to be present when the bailiff had ex parte communications which prejudicially affected his right to a fair trial;" (5) the

trial court violated his right to present a defense when it denied a motion to introduce "false allegations of sexual contact;" (6) "trial counsel provided ineffective assistance of counsel;" and (7) the Court of Appeals erred when it determined that the trial court correctly had admitted other acts evidence. Id. at 5-6.

On May 5, 2016, the Wisconsin Supreme Court denied review. Dkt. No. 24-9.

B. Federal *Habeas* Petition (Dkt. No. 1)

The petitioner filed his federal *habeas* petition on October 30, 2017, arguing that the Wisconsin Court of Appeals had violated his Sixth Amendment right to effective assistance of appellate counsel and his Fourteenth Amendment right to a meaningful appeal when it accepted Attorney Schertz's no-merit report. Dkt. No. 1 at 1, 6. On November 17, 2017, Magistrate Judge William Duffin screened the petition under Rule 4 of the Rules Governing Section 2254 Cases. Dkt. No. 9. Judge Duffin explained his understanding of the petitioner's claims:

> [The petitioner] alleges a violation of his sixth amendment right to effective assistance of counsel on his first appeal as of right and his fourteenth amendment right to a meaningful appeal when the Wisconsin Court of Appeals accepted an inadequate no merit report. [The petitioner's] claims were exhausted before the state court in Wis. Appeal No. 2014AP001459. The United States Supreme Court denied [the petitioner's] petition for a writ of certiorari on November 28, 2016. Therefore, the respondent shall answer the petition.

Id. at 2.

On January 4, 2018, the respondent filed a motion to dismiss the petition, dkt. no. 13, arguing that because the petitioner did not exhaust his

ineffective assistance claim, his petition was mixed, dkt. no. 14 at 1, 5. According to the respondent, Wisconsin law requires a defendant to raise an ineffective assistance of appellate counsel claim through a *habeas* petition in the Wisconsin Court of Appeals. Id. at 4 (citing State v. Knight, 168 Wis. 2d 509, 512-13 (Wis. 1992)). The respondent asserted that the petitioner had challenged his appellate attorney's performance through a *certiorari* petition to the Wisconsin Supreme Court rather through a *habeas* petition in the Wisconsin Court of Appeals. Id. at 5. Ultimately, the respondent said, the petitioner never fairly presented that claim to the Wisconsin courts. Id. (citing Knight, 168 Wis. 2d at 512-13).

The petitioner responded that his petition was not mixed; he contended that he fairly had presented his "claim that he was deprived of 'his sixth amendment right to the effective assistance of counsel on his first appeal as of right and his fourteenth amendment right to a meaningful appeal when the Wisconsin Court of Appeals accepted an inadequate no-merit report' to both the Wisconsin Court of Appeals . . . and the Wisconsin Supreme Court." Dkt. No. 15 at 4 (citation and emphasis omitted). He asserted that he had "provided the court of appeals with a 'fair opportunity' to address his challenge . . . to 'appellate counsel's [] no-merit report,'" and that he "then went on to exhaust his challenge first made in his response to appellate counsel's [] no-merit report/brief . . . to the Wisconsin Supreme Court." Id. at 5. The petitioner asserted that his petition had "alleged [no] independent claim of the ineffective assistance of appellate counsel," and that his petition for review in the

Wisconsin Supreme Court had challenged only "the Wisconsin Court of Appeals failure to properly follow the no-merit procedures required by *Anders v. California*, 386 U.S. 738 (1967), as codified in Wis. Stat. [§]809.32." Id. at 5-6. He stressed that "a claim alleging that [an appellate court's] failure to follow the no-merit procedures required by *Anders* . . . [and] Wis. Stat. [§]809.32 deprived a petitioner's right to the effective assistance of appellate counsel is legally distinct from an independent claim alleging the ineffective assistance of appellate counsel under a *Strickland* analysis." Id.

In reply, the respondent noted that the petitioner "improperly combines his claims in an attempt at skirting his exhaustion defect." Dkt. No. 17 at 1. "Although he attempts to recharacterize it in his response," the respondent argued, "[the petitioner's] primary basis for habeas relief is an unexhausted Sixth Amendment ineffective assistance claim." Id. at 2. "[T]he essence of [the petitioner's] federal habeas claim," the respondent concluded, "is the constitutionally inadequate analysis performed by his appellate counsel," "[a]nd that claim was never presented to the Wisconsin Court of Appeals as a constitutional claim." Id. at 3.

On June 11, 2018, this court referred the case to Judge Duffin for a report and recommendation. Dkt. No. 18. Judge Duffin clarified that when he initially had screened the petition, he had understood it as alleging both a denial of the petitioner's Fourteenth Amendment right to a meaningful appeal, and a denial of his Sixth Amendment right to the effective assistance of counsel. Dkt. No. 19 at 3. Judge Duffin concluded that the petitioner had not

exhausted his ineffective assistance of counsel claim because he never had presented it to the Wisconsin Court of Appeals. Id. at 3. Judge Duffin concluded that the petitioner had argued only that his appellate counsel's no-merit brief did not meet the requirements of Wis. Stat. §809.32. Id. at 3-5. Judge Duffin recommended that this court grant the motion to dismiss unless the petitioner moved to withdraw his ineffective assistance claim or asked the court to stay the federal *habeas* proceedings and hold his petition in abeyance while he returned to the Wisconsin Court of Appeals to properly exhaust the ineffective assistance claim. Id. at 7. In January of 2019, the petitioner filed a motion to withdraw his ineffective assistance of appellate counsel claim. Dkt. No. 21.

Noting that neither party had objected to Judge Duffin's report and recommendation, this court reviewed it for clear error, found none and adopted the report and recommendation on March 25, 2019. Dkt. No. 22 at 6. The court agreed that the petition asserted separate claims under the Fourteenth and Sixth Amendments, that the petitioner never had exhausted the Sixth Amendment claim and that this had resulted in a mixed petition. Id. at 6-7. The court also agreed with Judge Duffin's recommendation that the court give the petitioner the option to either dismiss the unexhausted claim or to ask the court to stay the case so that he could return to state court to exhaust the unexhausted claim. Id. at 7. The court allowed the petitioner to withdraw his unexhausted claim and denied the motion to dismiss. Id. The court ordered the petitioner, however, to "confine his future arguments to the question of

whether the state court denied him his Fourteenth Amendment right to a meaningful appeal by accepting and adopting the no-merit brief." Id.

About two months later, the respondent answered the petition under Rule 5 of the Rules Governing Section 2254 Cases; the respondent asserted "that the [Wisconsin Court of Appeals] did not deny [the petitioner] his Fourteenth Amendment right to a meaningful appeal by accepting and adopting the no-merit brief" and that "any constitutional violation was harmless error." Dkt. No. 24 at 3-4.

C. Petitioner's Brief in Support (Dkt. No. 29)

In his brief in support of the petition, the petitioner asserts that the Wisconsin Court of Appeals violated Anders, 386 U.S. 738—and his Fourteenth Amendment right to a meaningful appeal—when it agreed with the conclusions in Attorney Schertz's no-merit reports that (1) there was no merit to a claim based on Deputy Kashishias's response to the jury's question, (2) there was no merit to a claim based on the trial court's denial of the petitioner's Shiffra motion and (3) the trial court was within its discretion in denying the petitioner's request for the withdrawal of his attorney. Dkt. No. 29 at 8, 16, 24. The petitioner contends that each of these issues had arguable merit. Id. at 9, 16, 26. He alleges that the Wisconsin Court of Appeals unreasonably applied Anders when it stated in a footnote that it "[would] not attempt to address every issue in the case;" he reasons that when it "simply agree[d] with counsel's analysis and conclusion," the Wisconsin Court of Appeals failed to "conduct a 'full examination of all the proceedings to decide whether the case [was] wholly

frivolous.'" Id. at 9 (citing Anders, 386 U.S. at 744-45). He asserts that under Anders, the Wisconsin Court of Appeals "had an obligation to afford [the petitioner] the assistance of counsel" to argue each of his claims. Id. at 16 (citing Anders, 386 U.S. at 744); see also id. at 26, 33.

The petitioner argues that the Milwaukee County Circuit Court erred throughout his trial. He maintains that the court (1) violated Rushen v. Spain, 464 U.S. 114 (1983) when it failed to conduct a hearing to determine whether Deputy Kashishias's communication with the jury was harmless, id. at 11; (2) violated Remmer v. United States, 347 U.S. 227 (1954) when it failed to find that communication presumptively prejudicial, id. at 11; (3) violated Owens v. Duckworth, 727 F.2d 643 (7th Cir. 1984) when it declined to place the burden on the government to establish that contact between Deputy Kashishias and the jury was harmless, id. at 11-12; (4) violated Wisconsin law by failing to find Deputy Kashishias's communication with the jury to be prejudicial as a matter of law, id. at 13-14 (citing State v. Gibas, 199 Wis. 2d 525 (Wis. Ct. App. 1996)); (5) unreasonably applied Pennsylvania v. Ritchie, 480 U.S. 39 (1987) when it denied the petitioner's Shiffra motion and found that it had "no basis [and] . . . that it was a fishing expedition based upon non-specific, bald assertions by the defense," id. at 23-24; (6) violated his Sixth Amendment right to counsel of his own choice, id. at 31 (citing U.S. v. Gonzalez-Lopez, 548 U.S. 140, 144-46 (2006)); (7) failed to explore whether there was a complete communicational breakdown between [the petitioner] and trial counsel," id. at 27-28 (citing State v. McDowell, 272 Wis. 2d 488 (Wis. 2004)); (8) failed to

"retrospective[ly] inquir[e]" into the petitioner's "implicit request for substitute counsel," id. at 31; (9) failed to develop a sufficient record as to why the petitioner fired his own attorney, id. at 29, 33 (citing State v. Lomax, 146 Wis. 2d 356 (Wis. 1988)); (10) unreasonably determined that the petitioner was "playing games" when he fired his attorney, id. at 29-30; and (11) "unreasonably determined that [the petitioner's] request for substitute counsel was merely a ploy for [the petitioner] to attempt to stall out the process of proceeding to trial." Id. at 30.

D. Respondent's Brief in Opposition (Dkt. No. 30)

Stressing that the petition "is limited to one claim—that the Wisconsin Court of Appeals' decision accepting the no-merit report violated his due process right to a meaningful appeal," the respondent argues that the court should deny relief because the Wisconsin Court of Appeals' decision was not contrary to federal law. Dkt. No. 30 at 8. According to the respondent, Anders creates no "independent constitutional command" and does not constitutionally prescribe a specific procedure for the Wisconsin Court of Appeals. Id. (citing Smith v. Robbins, 528 U.S. 259, 273 (2000)). The respondent argues that Anders pertains to an appellate attorney's conduct, not the conduct of the appellate court. Id. (citing Robbins, 528 U.S. at 273). In any event, the respondent says, "the Wisconsin Court of Appeals reviewed the entire record and submissions and independently concluded that [the petitioner] had no meritorious issues on which to base an appeal." Id. at 9.

The respondent asserts that the Wisconsin Court of Appeals did not unreasonably apply clearly established federal law when it adopted the no-merit report's conclusion that the petitioner's "jury tampering claim" would have been meritless. Id. at 9, 10. Beyond Anders, the respondent argues, "the only United States Supreme Court case law [the petitioner] cites in support of a mistrial is [Spain, 464 U.S. 114] and [Remmer, 347 U.S. 227]," and the respondent asserts that the Wisconsin Court of Appeals' decision violated neither case. Id. at 11. According to the respondent, Spain clarifies that (1) *ex parte* communications between a judge and a juror can be harmless, id.; (2) "the Constitution 'does not require a new trial every time a juror has been placed in a potentially compromising situation . . . [because] it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote,'" id. (citing Spain, 464 U.S. at 119); (3) "[w]hen an *ex parte* communication relates to some aspect of the trial, the trial judge generally should disclose the communication to counsel for all parties," id. (citing Spain, 464 U.S. at 119); and (4) "it is only where the court fails to disclose the contact that a post-trial hearing is used to determine prejudice," id. (citing Spain, 464 U.S. at 119). The respondent stresses that in the petitioner's case, "the trial judge told the parties about [Deputy Kashishias's] contact with the jury" and "explained that the contact was made harmless by the fact that [Deputy Kashishias] answered the juror's question just as the court would have." Id. at 12.

The respondent agrees that Remmer directs a presumption of prejudice on a finding of certain communications "with a juror during a trial about the matter pending before the jury." Id. (citing Remmer, 347 U.S. at 229). The respondent stresses, however, that the presumption "is overcome upon a showing that the juror contact was harmless." Id. (citing Remmer, 347 U.S. at 229). The respondent asserts that in the petitioner's case, the trial court "disclosed to both parties that [Deputy Kashishias] answered the jury's question," "explained that the deputy's answer was the same thing the court would have said, and found that the jury contact was harmless." Id. The respondent says that "under no-merit review," the Wisconsin Court of Appeals independently reviewed all potential issues and adopted the finding that the jury tampering claim was meritless. Id.

The respondent notes that although the Wisconsin Court of Appeals "did not expressly discuss" the Shiffra issue, it (1) "identified it as one of the numerous issues [the petitioner] raised," and (2) "reviewed the record and all submissions," including "[t]he no-merit report thoroughly discuss[ing] the issue," and (3) independently concluded that all of those issues were meritless. Id. at 14. The respondent argues that the Wisconsin Court of Appeals' decision did not violate Ritchie, contending that (1) rather than requiring the petitioner to make a particularized showing, the trial court reasonably rejected the petitioner's motion "because he did not make a plausible showing of how the records were both 'material and favorable to his defense,'" and (2) the Wisconsin Court of Appeals "did not expressly apply Ritchie because it agreed

with the no-merit report" that the issue was meritless. Id. at 15-16 (citing Moseley v. Kemper, 860 F.3d 1020, 1023-24).

Regarding the petitioner's claim "that the trial court violated his Sixth Amendment right to counsel of choice by not allowing him to fire his attorney a week before trial," the respondent argues that the petitioner "neglects to show how the state court's decision conflicts with federal law." Id. at 17. The respondent notes that "[n]either [the petitioner], nor his trial attorney, ever made a formal request for new trial counsel." Id. Asserting that "trial counsel never provided the court with a legitimate reason for withdrawal," the respondent concludes that "the trial court was well within its discretion to deny such a request." Id. The respondent says that the petitioner "was not constitutionally entitled to counsel of choice." Id. at 18 (citing United States v. Gonzalez-Lopez, 548 U.S. 140, 151 (2006); United States v. Bender, 539 F.3d 449, 454-55 (7th Cir. 2008)). The respondent clarifies that "to the extent that [the petitioner] alleges that communication with his attorney broke down as a result of neglect or ineptitude by counsel, [the petitioner] would have had to present, support, and exhaust a claim of ineffective assistance of counsel." Id. (citing United States v. Wallace, 753 F.3d 671, 675 (7th Cir. 2014).

E. Petitioner's Reply Brief (Dkt. No. 33)

The petitioner insists that Anders requires an appellate court to "fully examine all of the proceedings, to decide whether the case is wholly frivolous." Dkt. No. 33 at 2 (citing Anders, 386 U.S. at 744-45). Relying on Douglas v. People of State of Cal., 372 U.S. 353, 354 (1963), the petitioner asserts that his

appeal was merely "a meaningless ritual" and that the Wisconsin Court of Appeals denied his right to appellate counsel. Id. at 3-4. He states that

> [c]ontrary to the respondent's argument, [the petitioner] is not reframing the claim, he is alleging that the [Wisconsin Court of Appeals'] determination that his appeal is wholly frivolous is unreasonable under *Anders*, which violates his right to a meaningful appeal. That there exists arguable meritorious claims that [the petitioner] discusses to prove that the [Wisconsin Court of Appeals] violated *Anders* and in turn violated his fourteenth amendment right to a meaningful appeal shows [their] interrelatedness to each other, not a reframing.

Id. at 4. Finally, the petitioner asserts that the trial court violated his constitutional right to *substitute* his appointed counsel, not his right to counsel of choice. Id. at 11-15.

II. Analysis

A. Standard

Under the Antiterrorism and Effective Death Penalty Act of 1996 a federal court may grant *habeas* relief only if the state court decision was "either (1) 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,' or (2) 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" Miller v. Smith, 765 F.3d 754, 759-60 (7th Cir. 2014) (quoting 28 U.S.C. §2254(d)(1), (2)). A federal *habeas* court reviews the decision of the last state court to rule on the merits of the petitioner's claim. Charlton v. Davis, 439 F.3d 369, 374 (7th Cir. 2006).

"'[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court

decision applied clearly established federal law erroneously or incorrectly.'" Renico v. Lett, 559 U.S. 766, 773 (2010) (quoting Williams v. Taylor, 529 U.S. 362, 410 (2000)). "The 'unreasonable application' clause requires the state court decision to be *more* than incorrect or erroneous. The state court's application of clearly established law must be objectively unreasonable." Lockyer v. Andrade, 538 U.S. 63, 71 (2003) (emphasis added). In other words, §2254(d)(1) allows a court to grant *habeas* relief only where it determines that the state court applied federal law in an "objectively unreasonable" way. Renico, 559 U.S. at 773. "The standard under §2254(d) is 'difficult to meet' and 'highly deferential.'" Saxon v. Lashbrook, 873 F.3d 982, 987 (7th Cir. 2017) (quoting Cullen v. Pinholster, 563 U.S. 170, 181 (2011)).

B. Analysis

Under the Sixth Amendment, a criminal defendant has a right to appellate counsel on direct appeal. Douglas, 372 U.S. at 357. On appeal, however, a criminal defendant no longer enjoys the presumption of innocence. McCoy, 486 U.S. at 436. "An indigent defendant's counsel on appeal 'cannot serve the client's interest without asserting specific grounds for reversal.'" Id. at 436. "For this reason, counsel is ethically prohibited from prosecuting a frivolous appeal." Id.

In Anders, the United States Supreme Court described an acceptable procedure for reconciling an attorney's ethical obligation not to pursue a frivolous appeal and a defendant's right to appellate counsel. Anders, 386 U.S. at 744. In the first sentence of its decision, the Anders court noted its focus on

the actions of appellate counsel. Id. at 739 ("We are here concerned with the extent of the duty of a court-appointed appellate counsel to prosecute a first appeal from a criminal conviction, after that attorney has conscientiously determined that there is no merit to the indigent's appeal"). The Court explained that "if counsel finds [the] case . . . wholly frivolous, after a conscientious examination of it, [the attorney] should so advise the court and request permission to withdraw." Id. at 744. Such a request must be "accompanied by a brief referring to anything in the record that might arguably support the appeal." Id. The court then must provide the defendant with the attorney's no-merit brief and time to respond to it. Id. The court then fully examines the proceedings and decides whether the case is "wholly frivolous." Id.

But the acceptable procedure the Court described in Anders is not the only possible procedure a state court might use, and is not mandatory. Smith v. Robbins, 528 U.S. 259, 265 (2000). "[T]he Constitution itself does not compel the *Anders* procedure." Id. at 273. "[T]he *Anders* procedure is not 'an independent constitutional command,' but rather is just 'a prophylactic framework' that [the United States Supreme Court] established to vindicate the constitutional right to appellate counsel announced in *Douglas*." Id. (quoting Pennsylvania v. Finley, 481 U.S. 551, 555 (1987)). "[The Court] did not say that [the] *Anders* procedure was the *only* prophylactic framework that could adequately vindicate this right; instead, by making clear that the Constitution itself does not compel the *Anders* procedure, [the Court] suggested otherwise."

Id. The court stated that Anders merely outlined "an *acceptable* procedure," and "the States are free to adopt different procedures so long as those procedures adequately safeguard a defendant's right to appellate counsel." Id. at 265 (emphasis added).

The court first notes that in its March 25, 2019 order, this court "agree[d] with Judge Duffin that the petitioner presented both a Fourteenth Amendment claim and a Sixth Amendment claim, that he had not exhausted the Sixth Amendment claim and that this resulted in a 'mixed' petition." Dkt. No. 22 at 6-7. The court "allow[ed] the petitioner to withdraw his unexhausted Sixth Amendment ineffective assistance of appellate counsel claim," and cautioned the petitioner to "confine his future arguments to the question of whether the state court denied him his Fourteenth Amendment right to a meaningful appeal by accepting and adopting the no-merit brief." Id. at 7. The petitioner cannot now circumvent that order by raising ineffective assistance of counsel claims—that the trial court did not explore whether there was a breakdown of communication with his counsel, that the trial court erred in failing to allow him to substitute counsel, etc.—under the guise of claiming that the Wisconsin courts denied his right to a meaningful appeal under the Fourteenth Amendment when it adopted Attorney Schertz's no-merit reports. The court will not address those arguments because the petitioner did not exhaust his Sixth Amendment claim.

As for the petitioner's Fourteenth Amendment claim, Anders does not create a Fourteenth Amendment right for the state court to use a particular

process in reviewing a defendant's case to determine whether an appeal would be frivolous. It requires only that appellate counsel do more than simply advise the appeals court that the petitioner has no meritorious claims, by referencing anything in the record that could support an appeal. The petitioner has not argued that *Attorney Schertz* violated Anders, and there would be no support for such an argument in the record. Schertz referenced numerous issues that could conceivably have supported an appeal, and discussed some of those issues in more depth when asked by the court to do so. He did not simply report to the court that the petitioner had no meritorious issues and ask to withdraw.

As for the appellate court's obligation once it received the no-merit reports, the appellate court is required to determine whether an appeal would be frivolous. In a footnote of its decision adopting Attorney Schertz's no-merit reports and affirming the petitioner's convictions, the Wisconsin Court of Appeals stated:

> This court will not attempt to address every issue that arose in this case. The thirty-nine page no-merit report and the twelve-page supplemental report provide an exhaustive summary of the numerous motions and rulings that occurred before and during trial. As noted, we agree with counsel's analysis and conclusion that none of the issues identified presents an issue of arguable merit.

Dkt. No. 24-6 at 4. Based on this footnote, the petitioner concludes that the Wisconsin Court of Appeals failed to conduct "a full examination of all the proceedings, to decide whether the case is 'wholly frivolous'" as the United States Supreme Court used that phrase in Anders. Dkt. No. 29 at 9. This

argument assumes first that the acceptable procedure described in Anders is mandated by the Constitution; as the court has explained, it is not.

Even if it were, Anders does not hold that a "full examination of the proceedings" requires the appellate court to address every potential issue raised by appellate counsel, or that it conduct its own independent review of every possible appellate issue. The Wisconsin Court of Appeals did not, as the petitioner implies, simply rubber-stamp Attorney Schertz's conclusions. After reviewing the original no-merit report, it asked Attorney Schertz to more specifically address particular issues—despite the fact that the original report was extensive, detailed and *thirty-nine pages* in length. Schertz's supplemental report was another eleven pages. After reading both reports and explicitly stating that it had "independently reviewed the record"—arguably the "full examination of the proceedings" mentioned in Anders—the court concluded that there was no issue of arguable merit to pursue on appeal.

It is possible that the petitioner means to argue that the Court of Appeals did not follow Wisconsin's no-merit procedure; in opposing the no-merit brief, he referenced Wis. Stat. §809.32, which prescribes Wisconsin's no-merit procedure. If the Court of Appeals *did* violate Wis. Stat. §809.32,[6] that would not be a sufficient basis for this federal court to grant *habeas* relief. A federal

[6] Wis. Stat. §809.32(3) states, "In the event that the court of appeals determines that further appellate proceedings would be frivolous and without any arguable merit, the court of appeals shall affirm the judgment of conviction or final adjudication and the denial of any postconviction or postdisposition motion and relieve the attorney of further responsibility in the case." It does not require the appellate court to independently address every possible appellate issue or even to mention each issued raised in the no-merit brief.

court may grant *habeas* relief only when it finds that the state-court decision was contrary to, or involved an unreasonable application of, *federal* law as determined by the U.S. Supreme Court—not for violations of or unreasonable applications of state law. See, *e.g.*, Crawford v. Littlejohn, 963 F.3d 681, 683 (2020) ("errors of state law do not support collateral relief in federal court") (citing Estelle v. McGuire, 502 U.S. 62 (1991)).

The court will deny relief.

III. Certificate of Appealability

Under Rule 11(a) of the Rules Governing Section 2254 Cases, the court must consider whether to issue a certificate of appealability. A court may issue a certificate of appealability only if the applicant makes a substantial showing of the denial of a constitutional right. See 28 U.S.C. §2253(c)(2). The standard for making a "substantial showing" is whether "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484 (2000) (internal quotations omitted). The court declines to issue a certificate of appealability, because reasonable jurists could not debate that the petition does not warrant *habeas* relief under 28 U.S.C. §2254(d).

IV. Conclusion

The court **DISMISSES** the petition for writ of *habeas corpus*. Dkt. No. 1.

The court **ORDERS** the case is **DISMISSED**. The clerk will issue judgment accordingly.

The court **DECLINES** to issue a certificate of appealability.

This order and the judgment to follow are final. A dissatisfied party may appeal this court's decision to the Court of Appeals for the Seventh Circuit by filing in this court a notice of appeal within 30 days of the entry of judgment. See Federal Rules of Appellate Procedure 3, 4. This court may extend this deadline if a party timely requests an extension and shows good cause or excusable neglect for not being able to meet the 30-day deadline. See Fed. R. App. P. 4(a)(5)(A).

Under limited circumstances, a party may ask this court to alter or amend its judgment under Federal Rule of Civil Procedure 59(e) or ask for relief from judgment under Federal Rule of Civil Procedure 60(b). Any motion under Fed. R. Civ. P. 59(e) must be filed within 28 days of the entry of judgment. The court cannot extend this deadline. See Fed. R. Civ P. 6(b)(2). Any motion under Fed. R. Civ. P. 60(b) must be filed within a reasonable time, generally no more than one year after the entry of the judgment. The court cannot extend this deadline. See Fed. R. Civ. P. 6(b)(2).

The court expects parties to closely review all applicable rules and determine, what, if any, further action is appropriate in a case.

Dated in Milwaukee, Wisconsin this 9th day of January, 2023.

BY THE COURT:

HON. PAMELA PEPPER
United States District Judge

OFFICE OF THE CLERK
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November 5, 2015

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You are hereby notified that the Court has entered the following order:

2014AP1459-CRNM State of Wisconsin v. Leon G. Carter
(L.C. #2011CF3689)

Before Curley, P.J., Kessler and Brennan, JJ.

Leon G. Carter appeals from convictions for six felonies, including second-degree sexual assault, kidnapping, and strangulation. Carter's postconviction/appellate counsel, Dennis Schertz, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2013-14).[1] Carter filed a response, and Schertz filed a supplemental no-merit report in response to an order from this court. We have independently reviewed the

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

record, the no-merit report, the supplemental no-merit report, and Carter's response as mandated by ***Anders***. We conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm.

The amended criminal complaint charged Carter with six felonies, including four counts of second-degree sexual assault (mouth to penis, penis to vagina, hand to breast, and finger to anus), kidnapping, and strangulation. All six counts involved the same victim, a woman named Smith,[2] with whom Carter was romantically involved for over ten years. The complaint stated that Carter "has severely physically, sexually and psychologically abused [Smith] for over ten years and treats her as his 'property.'" The complaint indicated that Carter had been criminally charged with sexually assaulting Smith in 2002 and 2004, and that he ultimately pled guilty to battering and intimidating Smith in those cases. Carter served time in prison for those convictions. In June 2010, shortly after his most recent release from prison, Carter reunited with Smith and they went to the transitional living center where he was living. Smith later told police that she was held there against her will over a period of two months, during which she was beaten and sexually assaulted.

From the outset of the case, Carter's defense was that he did not hold Smith against her will and that she was lying about being abused. To demonstrate that Smith was incredible, Carter sought information about Smith's past mental health treatment and a prior allegation against a police detective that resulted in an internal affairs report. Ultimately, the trial court ruled that information about those incidents could not be admitted at trial. In addition to ruling

[2] The name Smith is a pseudonym that we will use in this opinion to protect the victim's identity.

on motions related to Smith's mental health history and the internal affairs report, the trial court granted the State's motion to admit evidence of Smith's prior abuse allegations against Carter, including those that resulted in criminal convictions.

The case was tried to a jury over five days and included extensive testimony from Smith. Carter chose not to testify. Carter was ultimately found guilty of all six counts and sentenced to a total of sixty-three years of initial confinement and twenty-three years of extended supervision, including: four consecutive terms of fifteen years of initial confinement and five years of extended supervision; one consecutive term of three years of initial confinement and three years of extended supervision; and one concurrent term of fifteen years of initial confinement and five years of extended supervision.[3]

Postconviction/appellate counsel filed a lengthy no-merit report that summarizes the testimony presented and the myriad motions and issues the trial court decided, including: (1) denial of Carter's ***Shiffra***[4] motion to introduce Smith's mental health records; (2) granting of the State's motion to introduce other acts evidence concerning Carter's prior assaults of Smith; (3) denial of Carter's motion to introduce evidence that Smith did not appear to testify at the trial of another man alleged to have battered her; (4) deciding to dismiss one juror who failed to show up for the fourth day of trial and a second juror who had a previously scheduled doctor's appointment that would have interfered with jury deliberations; (5) deciding not to declare a

[3] The jury found Carter guilty of three counts of second-degree sexual assault with use of force, one count of second-degree sexual assault causing injury to a sex organ, one count of strangulation and suffocation, and one count of kidnapping, contrary to WIS. STAT. §§ 940.225(2)(a), 940.225(2)(b), 940.235(1), and 940.31(1)(b) (2010-11).

[4] *See* ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993), *abrogated by* ***State v. Green***, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298.

mistrial when a State's witness referred to Carter as a sex offender; (6) denial of Carter's motion to introduce character evidence that Smith is untruthful; (7) denial of Carter's motion for a mistrial based on allegations that the trial court showed too much sympathy to Smith; (8) rejecting Carter's suggestion that new trial counsel may need to be appointed; and (9) denial of Carter's motion for a mistrial based on the fact that a bailiff answered the jury's question concerning the need for a unanimous verdict. The no-merit report concluded there would be no arguable merit to assert that Carter did not receive a fair trial, that he was denied the effective assistance of trial counsel, or that the sentence was excessive. This court directed postconviction/appellate counsel to provide additional analysis of two issues: the State's other acts motion and the State's witness's suggestion that Carter was a sex offender. We have carefully reviewed the record, the no-merit report, and the supplemental no-merit report, as well as Carter's response.[5] This court agrees with postconviction/appellate counsel's thorough description and analysis of the potential issues identified in the no-merit report and supplemental no-merit report, and we independently conclude that pursuing those issues would lack arguable merit. In addition to agreeing with postconviction/appellate counsel's description and analysis, we will briefly discuss several of the identified issues.[6]

[5] Carter's response does not raise specific issues. He explains that he lacks legal training and has had to rely on postconviction/appellate counsel's analysis of his case. He also complains that the no-merit report "relied on unexplained assumptions and allegations that were conclusory." This court concluded that additional analysis of two key issues would be helpful, and we directed counsel to more fully develop those issues. Counsel's additional analysis convinces us that there would be no merit to pursuing a motion or appeal based on those or other previously identified issues.

[6] This court will not attempt to address every issue that arose in this case. The thirty-nine page no-merit report and the twelve-page supplemental no-merit report provide an exhaustive summary of the numerous motions and rulings that occurred before and during trial. As noted, we agree with counsel's analysis and conclusion that none of the issues identified presents an issue of arguable merit.

We begin with the State's other acts motion. The State sought to admit evidence of Carter's prior abuse of Smith, in part to demonstrate the context of the offenses. *See* ***State v. Hunt***, 2003 WI 81, ¶58, 263 Wis. 2d 1, 666 N.W.2d 771 (explaining that other acts evidence can be admitted "to show the context of the crime and to provide a complete explanation of the case," such as explaining abuse that took place in a home and the authority and control that an abuser exercised over his or her victims). The trial court engaged in the requisite analysis under ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). Although the trial court did not explicitly discuss whether the danger of unfair prejudice was outweighed by the probative value of the proffered evidence, an appellate court will "independently review the evidence to determine if it supports the trial court's decision to admit the other crimes evidence." *See* ***State v. Shillcutt***, 116 Wis. 2d 227, 236, 341 N.W.2d 716 (Ct. App. 1983). Having reviewed the record, we conclude that there would be no arguable merit to assert that the trial court's decision was unsupported by the record. Further, the trial court that actually tried the case reviewed the prior judge's ruling and explicitly addressed all three prongs of the ***Sullivan*** test, and it also gave the appropriate cautionary instructions.[7] We agree with postconviction/appellate counsel that there is no arguable basis to pursue an appeal based on the trial court's decision to allow the admission of other acts evidence.

Next, we consider the testimony of a Department of Corrections agent who was called by the State. On direct examination, as the agent was explaining that Carter was on her caseload and that she is a sex offender specialist, the agent added that Carter "has a prior sexual assault,

[7] The Honorable David Borowski decided the pretrial motions and the Honorable Ellen R. Brostrom presided over the jury trial and sentenced Carter.

but he was actually on [supervision] for two counts of battery." Later, the agent referred to Carter and the other men she supervised as "sex offenders." Trial counsel sought a sidebar conference, after which the State clarified with the witness that the Department may put people under sex offender supervision "even if they were not in that instance convicted of a sex offense." The State further clarified that Carter was on supervision for batteries. Later, outside the jury's presence, trial counsel told the trial court that he thought the State had "cleaned up" the problem and that there was no need for a mistrial. The trial court recognized that trial counsel was not seeking a mistrial, but it nonetheless considered whether one should be granted and concluded that a mistrial was not warranted because the jury had already heard "a lot of evidence of sexual assault by Mr. Carter against [Smith], some charged and some as prior bad acts" and it was unlikely that the reference to sex offender supervision "would rise to the level of any kind of prejudice that would warrant a mistrial." Before the case was submitted to the jury, trial counsel told the trial court that he did not want to have a curative instruction. We agree with postconviction/appellate counsel that there is no arguable basis to pursue a motion or appeal based on the witness's statements, the trial court's handling of the issue, or trial counsel's decision not to seek a curative instruction concerning this issue.

This court has also considered trial counsel's performance prior to and at the trial. We concur with postconviction/appellate counsel's assessment that Smith was a particularly challenging witness to control, as she was extremely emotional and frequently volunteered information beyond that called for by particular questions. We have not identified any trial counsel actions or inactions that would rise to the level of ineffective assistance of counsel.

Finally, we turn to the sentencing. We conclude that there would be no arguable basis to assert that the trial court erroneously exercised its sentencing discretion, *see* ***State v. Gallion***,

2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197, or that the sentences were excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

At sentencing, the trial court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and it must determine which objective or objectives are of greatest importance, ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the trial court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider several subfactors. ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the trial court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

In this case, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. The trial court discussed the severity of the abuse Smith suffered. It also discussed Carter's criminal history, which included a conviction for first-degree sexual assault of a child, prior convictions involving Smith, revocations of supervision, and witness intimidation. The trial court concluded that in order to prevent Smith from victimizing Smith or others again, it needed to impose a sentence that would "not allow Mr. Carter to see the light outside of a prison."

Our review of the sentencing transcript leads us to conclude that there would be no merit to challenging the trial court's compliance with ***Gallion***. Further, there would be no merit to assert that the sentence was excessive. *See* ***Ocanas***, 70 Wis. 2d at 185. While the sixty-three-year term of initial confinement is significant and is, in all likelihood, a life sentence, this court

recognizes that Carter was convicted of six serious felonies. He was facing over two hundred years of imprisonment. The sentence imposed was well within the maximum sentence and we discern no erroneous exercise of discretion. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable.").

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Dennis Schertz is relieved of further representation of Carter in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

May 05, 2016

371 Wis.2d 610, 2016 WI 81
This disposition of a Petition for Review is referenced in the North Western Reporter.
Supreme Court of Wisconsin.

State
v.
Carter

NO. 2014AP1459-CRNM
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Opinion

Disposition: Petition for Review Denied.

Disposition: 05/05/2016.

(ROGGENSACK, C.J., did not participate)

All Citations

371 Wis.2d 610, 2016 WI 81, 887 N.W.2d 894 (Table)

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