

No. ____-____

IN THE
SUPREME COURT OF THE UNITED STATES

GINGER M. BREITZMAN,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE WISCONSIN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

- I. Does the First Amendment permit the criminal prosecution of one family member for using profane language towards another family member inside the home?
- II. To satisfy the deficient performance prong of *Strickland v. Washington*, a defendant must establish that her attorney's representation "fell below an objective standard of reasonableness."

Under *Strickland's* deficient performance standard:

- (a) is a defense attorney's failure to raise a constitutional challenge adequate performance as long as the law on the constitutional challenged is "unsettled"?
- (b) is it a reasonable trial strategy to allow into evidence uncharged allegations of mistreatment made by the alleged victim against the defendant to show that the alleged victim exaggerates?

PARTIES IN THE COURT BELOW

Petitioner, Ms. Ginger M. Breitzman, and Respondent, the State of Wisconsin, were the only parties below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ginger M. Breitzman respectfully petitions for a writ of certiorari to review the judgment of the Wisconsin Supreme Court in *State v. Breitzman*, 2017 WI 100, 278 Wis. 2d 431, 904 N.W.2d 93.

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court, reported at 2017 WI 100, 278 Wis. 2d 431, 904 N.W.2d 93, is included as Appendix A. (App.101-49). The unreported opinion of the Wisconsin Court of Appeals is included as Appendix B. (App.150-62). The unreported post-conviction decisions and orders of the Milwaukee County Circuit Court are included as Appendices F-H. (App.171-206).

JURISDICTION

The Wisconsin Supreme Court filed its opinion on December 1, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This petition concerns the proper interpretation and application of the First and Sixth Amendments to the United States Constitution.

The First Amendment provides that:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST., AMEND. I.

The Sixth Amendment provides that:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. CONST., AMEND. VI.

STATEMENT OF THE CASE

A. The Charges and Trial

The State of Wisconsin charged Ms. Breitzman with the crime of disorderly conduct for using vulgar language toward her teenage son, J.K., inside their family home on December 4, 2012. (App.107-115). The State also charged Ms. Breitzman with four other criminal counts involving her alleged mistreatment of J.K.: two counts of child abuse (for slapping her son

on two occasions) and two counts of child neglect (for on one occasion not taking him to the doctor when he told her he was sick and on another occasion not opening the locked door to their home for a few hours after school one winter day). (App.107-110).¹ The State prosecuted the five charges in a single jury trial. (App.107-115).

Wisconsin's disorderly conduct statute provides that "[w]hoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance" is guilty of a misdemeanor. Wis. Stat. § 947.01(1).

The State charged Ms. Breitzman with disorderly conduct for engaging in "*profane* conduct, under circumstances in which such conduct tends to cause a disturbance." (App.107)(emphasis added). J.K. testified at trial that on the date in question, while inside their home, his mother became upset because he burned popcorn in the microwave and called him a "fuck face," "retard," and "piece of shit." (App.109-110).

¹ Count 1: Physical Abuse of a Child, Intentional Causation of Bodily Harm (Wis. Stat. § 948.03(2)(b)); Count 2: Physical Abuse of a Child, Intentional Causation of Bodily Harm (Wis. Stat. § 948.03(2)(b)); Count 3: Child Neglect, Resulting in Bodily Harm (Wis. Stat. § 948.21(1)(b))(the Wisconsin Supreme Court's decision has this offense incorrectly labeled as Wis. Stat. § 921.21(1)(b)); Count 4: Child Neglect, Misdemeanor (Wis. Stat. § 948.21(1)(a)); and Count 5: Disorderly Conduct (Wis. Stat. § 947.01(1)). (App.107-110).

J.K. stated that he asked his mother to stop calling him names and she threatened to kick him out of the house. (App.109-110). J.K. explained that prior to this exchange, he had been talking to a friend on the phone and that he hid his phone in his pocket when he heard his mother coming. (App.109-110). J.K. testified that he called his friend back later that night upset. (App.109-110).

Ms. Breitzman's attorney did not raise any First Amendment challenge to the disorderly conduct prosecution. *See* (App.115)(Wisconsin Supreme Court's summary of trial counsel's explanation as to why he did not raise a free speech challenge).

The State's case at trial rested primarily on J.K.'s testimony; beyond J.K., the State presented testimony of his friends, a neighbor, and a counselor, who recounted what J.K. allegedly told them about his mother's actions and changes they noticed in his behavior. (App.111). J.K.'s friends testified that they noticed a bruise on his face at one point. (App.111).

Ms. Breitzman's general defense was that J.K. was a rebellious teenager: as to the child abuse charges, she testified that J.K. was lying about her slapping him on the two charged occasions; as to the neglect charges, she testified that he was not sick for a week and that she was asleep on the winter day where the door was locked and there were multiple nearby businesses where he could have gone to wait; she did not deny

swearing at her son when he burned the popcorn. (App.112-113). The defense called two of Ms. Breitzman's friends who testified that J.K. had become defiant. (App.112).

Beyond testimony related to the charges, J.K. also testified that his mother had not gotten him glasses or treatment for his lazy eye since second grade; that she had not taken him to the dentist since he was five; that she called him names regularly; that she put a lock on the refrigerator at home; and that she did not fill out the paperwork for him to receive free lunches at school. (App.110-11). Defense counsel did not object to any of this testimony. *See* (App.140-44)(Wisconsin Supreme Court's evaluation of counsel's failure to object to this testimony).

Additionally, on cross-examination, J.K. testified to a separate, uncharged allegation of Ms. Breitzman slapping him in the car over a disagreement about a song. (App.110-11). Instead of objecting, defense counsel asked J.K. follow-up questions about this uncharged slapping. (App.110-11)(*see, e.g.* "And so it was her attempt to slap you, she was hitting you with the back of her hand at that time?"). The State also called a detective who testified that Ms. Breitzman admitted to calling her son names and slapping her son. (App.111-12).²

² The criminal complaint listed the additional allegations of bad acts including the uncharged alleged slapping in the car. *See* (App.138).

The jury found Ms. Breitzman guilty on all charges. (App.115).

B. Post-Conviction and Wisconsin Court of Appeals Proceedings

Ms. Breitzman filed a post-conviction motion.³ She sought judgments of acquittal on the two child neglect convictions and the disorderly conduct conviction on grounds of insufficient evidence. (App.115). She also argued that she was denied the effective assistance of counsel as her attorney (1) failed to move for dismissal of the disorderly conduct charge on free speech grounds, (2) failed to object to the admission of improper character evidence about her alleged uncharged mistreatment of J.K., and (3) argued a theory

³ Under Wisconsin's system of appellate review, issues not preserved/litigated pre-conviction must first be raised in a post-conviction motion to the circuit (trial) court prior to being litigated in the Wisconsin Court of Appeals. Wis. Stat. § 809.30(2)(h); *State v. Walker*, 2006 WI 82, ¶ 24, 292 Wis. 2d 326, 716 N.W.2d 498.

With the exception of challenges to the facial constitutionality of a statute, even constitutional challenges will be deemed forfeited if not first raised in the circuit court. *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727 (“[i]ssues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal”); *see also State v. Trochinski*, 2002 WI 56, ¶ 34, n.15, 253 Wis. 2d 38, 644 N.W.2d 891 (explaining that facial challenges to the constitutionality of a statute go to the subject matter jurisdiction of the court and cannot be waived). Wisconsin has a very limited plain error doctrine. *See, e.g., State v. Jorgensen*, 2008 WI 60, ¶ 21, 310 Wis. 2d 138, 754 N.W.2d 77 (explaining that “[c]ourt should use the plain error doctrine sparingly”). Therefore, non-facial constitutional post-conviction challenges must generally be litigated through the lens of ineffective assistance of counsel.

of defense in opening statement that was inconsistent with her testimony. (App.115).⁴

At an evidentiary hearing held in the trial court⁵, trial counsel for Ms. Breitzman testified that he considered moving to dismiss the disorderly conduct charge on free speech grounds, but decided against it because it was “too shallow and there wasn’t enough guts to it.” (App.115).

As to his failure to object to the admission of other acts character evidence concerning Ms. Breitzman’s treatment of J.K., trial counsel testified that “the plan for the defense” was that J.K.’s “expression of these things...would go to such an extended or aggravated or aggrandized extent that he would lose credibility, and then she would take the stand and show what really happened, that she cared for her son, that these were difficult times of rebellion.” (App.116-17).

Ms. Breitzman testified at the hearing that she had explained to her attorney that she did not strike her son on the two charged occasions but did strike him in the uncharged incident in the car. (App.117-18).

⁴ Ms. Breitzman does not seek this Court’s review of the Wisconsin Supreme Court’s rejection of her argument that her attorney was ineffective for arguing a defense theory in opening statement that contradicted her testimony.

⁵ In Wisconsin, an evidentiary hearing affording trial counsel the opportunity to explain his actions or inactions is a prerequisite to a finding of ineffective assistance of counsel. *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

The post-conviction court granted Ms. Breitzman's motion to vacate one of the child neglect charges (Count 3) on sufficiency grounds, but denied the remainder of her claims. (App.119-20). The Wisconsin Court of Appeals affirmed the post-conviction court's denial of the remainder of her claims. (App.120-21,150-62).

C. The Wisconsin Supreme Court's Decision

The Wisconsin Supreme Court granted Ms. Breitzman's petition for review of her claims of ineffective assistance of counsel, including counsel's failure to seek dismissal of the disorderly conduct charge as a violation of the First Amendment. Ms. Breitzman did not seek review of her challenges to the sufficiency of the evidence.⁶ (App.104-05).

Following briefing and oral argument, the Wisconsin Supreme Court issued a unanimous opinion affirming the Court of Appeals' decision. (App.101-49).

First, although the court acknowledged that the case "touches on an interesting issue of free speech law," the court did not decide whether the disorderly conduct charge violated Ms. Breitzman's First Amendment protections; instead, the court concluded that counsel's failure to challenge the disorderly conduct prosecution was not deficient "because whether

⁶ Consistent with its criteria for discretionary review, the Wisconsin Supreme Court "ordinarily does not review questions concerning the sufficiency of the evidence." *State v. Minued*, 141 Wis. 2d 325, 328, 415 N.W.2d 515 (1987).

profane conduct that tends to cause or provoke a disturbance is protected as free speech is unsettled law.” (App.104-106).

The court discussed relevant case law from both this Court and Wisconsin and concluded that the “body of case law does not promulgate a clear standard as to whether a charge under Wis. Stat. § 947.01, based on profane conduct that tends to cause or provoke a disturbance, violates the constitutional right to free speech.” (App.124-134). “[T]rial counsel was not ineffective for not moving to dismiss the disorderly conduct charge, because doing so would have required that there be a resolution of an unsettled question of law.” (App.130-31).

As to counsel’s failure to object to the admission of prejudicial other acts character evidence, the court concluded that counsel did not perform deficiently because his decision to allow this into evidence was part of a “reasonable trial strategy.” (App.140).

In a concurrence, Justice Shirley Abrahamson expressed concern that the “‘unsettled law’ doctrine guiding the determination of ineffective assistance of counsel is not sufficiently protective of a defendant’s constitutional and statutory rights to effective counsel.” (App.148-49). Justice Abrahamson indicated that the “bench and bar should be working for a better standard for determining the adequacy of representation.” (App.149).

REASONS FOR GRANTING REVIEW

I. This Court Should Accept Review to Hold that the First Amendment Does Not Permit the Criminal Prosecution of One Family Member For Using Profane Language Towards Another Family Member Inside the Home.

The State of Wisconsin charged and convicted Ms. Breitzman of a crime for calling her son rude names inside their family home. As this Court has recently accepted review of cases addressing free speech protections in other contexts⁷, this Court should accept review here to make clear that the First Amendment does not permit the government to reach inside the home to criminalize language used in disagreements among family members.

The First Amendment to the United States Constitution holds that “Congress shall make no law...abridging the freedom of speech”. U.S. CONST. AMEND. I.

The Wisconsin Supreme Court has recognized that Wisconsin’s disorderly conduct statute cannot criminalize speech protected by the First Amendment. *State v. Douglas D.*, 2001 WI 47, ¶ 21, 243 Wis. 2d 204, 626 N.W.2d 725 (“the statute’s sanctions cannot be applied directly to speech protected by the First Amendment”); *see also State v. A.S.*, 2001 WI 48, ¶ 16, 243 Wis. 2d 173, 626 N.W.2d 712 (speech may only be prosecuted under the

⁷ See, e.g. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015), cert. granted, 85 U.S. L.W. 3593, 85 U.S.L.W 3600 (U.S. June 26, 2017) (No.16-111); *Minnesota Majority v. Mansky*, 849 F.3d 749 (8th Cir. 2017), cert. granted, 86 U.S.L.W. 3236, 86 U.S.L.W. 3238 (U.S. Nov. 13, 2017)(No.16-1435).

disorderly conduct statute if it “is one of the limited categories of speech that fall outside the protections of the First Amendment”).

This Court has explained that only a few “well-defined and narrowly limited classes of speech” of “historic and traditional categories” are unprotected by the First Amendment—including “obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.” 559 U.S. at 468-469 (internal citations omitted); *United States v. Stevens*, 559 U.S. 460, 468-69 (2010)(internal citations omitted).

These narrow exceptions apply only where the speech’s “very utterance inflict[s] injury or tend[s] to incite an immediate breach of the peace.” *See, e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *Cohen v. California*, 403 U.S. 15, 16-17 (1971)(“[t]he defendant did not engage in, nor threaten to engage in, nor did anyone as the result of his conduct in fact commit or threaten to commit any act of violence”); *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1942).

In the 2010 *Stevens* decision, this Court rejected a test where the determination of whether a category of speech enjoys First Amendment protection would depend on a “categorical balancing of the value of the speech against its societal cost.” 559 U.S. at 470. More recently, this Court reaffirmed the “bedrock First Amendment principle” that “[s]peech may not

be banned on the ground that it expresses ideas that offend.” *Matal v. Tam*, 528 U.S. ___, 137 S.Ct. 1744, 1751 (2017).

This Court has not before addressed the application of these First Amendment principles to the criminal prosecution of profane language used inside a family home. Review is important because, though family disputes regularly occur, a significant difference exists between the government prosecuting domestic *behavior* that tends to cause or provoke a disturbance and the government prosecuting *word choice* in a familial disagreement.

After the Wisconsin Court of Appeals issued its decision affirming the lower court’s rejection of Ms. Breitzman’s First Amendment argument, Professor Eugene Volokh expressed concern about the ramifications of this case on his blog on the Washington Post:

This case involved some quite minor provocation (the son burned some popcorn), and a response that seems like an overreaction—the defendant called her son a “retard,” a “fuck face” and a “piece of shit.” But the logic of the case applies more broadly than that, including to situations where the profane speech is less personally insulting and is a response to more serious misbehavior on the teenager’s part, so long as a jury concludes that the profanity “unreasonably offends the sense of decency or propriety of the community.” Nor does there seem to be a requirement that the speech be likely to cause a physical fight.⁸

The Wisconsin Supreme Court did not rectify these problems, as it side-stepped the First Amendment issue. This Court should grant review to

⁸ Eugene Volokh, *Admonishing your 14-year-old son using ‘profane’ speech may be a crime*, VOLOKH CONSPIRACY, THE WASHINGTON POST, Aug. 17, 2016, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/17/admonishing-your-14-year-old-son-using-profane-speech-may-be-a-crime/?utm_term=.691ea801febf (last accessed Feb. 27, 2018).

hold that the First Amendment does not permit the criminal prosecution of one family member's use of swear words towards another family member inside the family home.

II. This Court Should Accept Review to Provide Clarity on the Application of *Strickland*'s Deficient Performance Prong to (A) an Attorney's Failure to Raise an "Unsettled" Constitutional Challenge and (B) an Attorney's Trial Strategy That Involves the Admission of Prejudicial Character Evidence Against His Client.

The United States Constitution guarantees the effective assistance of counsel. U.S. CONST. amends. VI & XIV.

To prove ineffective assistance of counsel, a defendant must establish that (1) counsel performed deficiently and (2) that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668 (1984). To prove deficient performance, a defendant must show that his attorney's representation fell below an "objective standard of reasonableness." *Id.* at 688.

This Court in *Strickland* declined to set forth specific guidelines to evaluate counsel's performance but stressed that counsel has a duty to "advocate the defendant's cause" and "bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.* at 688.

This Court also emphasized that reviewing courts must make every effort to "eliminate the distorting effects of hindsight" and must "indulge a

strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. At the same time, this Court explained that the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

A. This Court Should Provide Clarity on the Application of *Strickland's* Deficient Performance Prong to an Attorney's Failure to Raise an "Unsettled" Constitutional Challenge.

The Wisconsin Supreme Court held that Ms. Breitzman's attorney's failure to challenge the prosecution of her speech inside her private home was not deficient performance under *Strickland* because the state of the law was "unsettled" on whether such a prosecution violates free speech protections. (App.124-34).

This is not the first time that the Wisconsin Supreme Court has held that an attorney did not perform deficiently by failing to raise a challenge of "unsettled" law. *See, e.g. State v. Lemberger*, 2017 WI 39, 374 Wis. 2d 617, 893 N.W.2d 232; *State v. Maloney*, 2005 WI 74, 281 Wis. 2d 583, 698 N.W.2d 583. But the court's decision here represents a dramatic expansion of its view of what law should be considered "unsettled."

Compare this case, for example, with its prior decision in *State v. Lemberger*, 2017 WI 39, 374 Wis. 2d 617, 893 N.W.2d 232. There, the defendant argued that his attorney should have objected at his drunk-driving trial to the State commenting on his refusal to take a breathalyzer test. The Wisconsin Supreme Court rejected this argument because Wisconsin case law at the time held that there was no constitutional problem with the comments; the court explained that at “absolute best,” whether the existing case law was problematic was an “unsettled legal question.” *Id.*, ¶¶ 3, 33. Thus, counsel was not ineffective for not arguing that “controlling law” was wrong and should be overturned. *Id.*, ¶33.

Here, on the other hand, the State of Wisconsin charged Ms. Breitzman for her choice of language inside her home. The law at the time (and now) *presumed* that such a prosecution is unconstitutional unless the State could prove otherwise. *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 660 (2004); *Douglas D.*, 243 Wis. 2d 204, ¶25. The First Amendment’s protection against the prosecution of speech in all but the narrowest of categories is a bedrock principle of our government and free society. It is not novel. It is not “unsettled.”

The Wisconsin Supreme Court’s decision takes the dangerous turn of equating “unsettled” with (a) no precise case on point and/or (b) open to argument in both directions. *See* (App.124-34). While *Strickland*’s deficient

performance prong already imposes a challenging burden on a defendant to prove that her attorney performed deficiently, the Wisconsin Supreme Court's interpretation and application of *Strickland* has now created an even more challenging subjective standard that jeopardizes the Sixth Amendment right to the effective assistance of counsel.

A defense attorney's core responsibility is to ensure that his client's constitutional rights are upheld, and case law recognizing constitutional violations is often fact-specific. *See Polk County v. Dodson*, 454 U.S. 445, 452 (1981) ("a defense attorney has a duty to advance all colorable claims and defenses"); *Illinois v. Krull*, 480 U.S. 340, 365 (1987) (Marshall, J., dissenting) (explaining in analyzing a Fourth Amendment challenge that "[t]he judicial role is particularized, fact specific"). Expecting a reasonable defense attorney to bring a constitutional challenge only when there is a precise case on point or when the law is exclusively in favor of the defense sets a far lower bar for attorneys than the "objective standard of reasonableness" this Court set forth in *Strickland* and undermines the adversarial process.

As this case demonstrates, this standard is also problematic because it creates the self-perpetuating problem of high courts concluding that an area of constitutional law is "unsettled" without "settling" it. When the State of Wisconsin next charges one of its citizens with a crime for swearing

in a private home, will a reasonable Wisconsin defense attorney be expected to know to bring a First Amendment challenge?

Importantly, Wisconsin is not alone in holding that an attorney's failure to raise a particular challenge—including constitutional challenges—will not be deficient performance if the law on that challenge is “unsettled.” *See, e.g. New v. United States*, 652 F.3d 949 (8th Cir. 2011)(counsel was not deficient for failing to file a motion to suppress on an “unsettled” area of law where defendant could not identify “any controlling legal authority that directly supported his Fourth Amendment argument, or any controlling authority that ‘clearly portend[s]’ that such an argument would have been successful”)(quoted source omitted); *United States v. Glover*, 875 F.3d 625 (D.C. Cir. 2017) (counsel was not deficient for failing to file a motion to suppress where the question of standing on the particular claim was a “challenge of uncertain merit based on unsettled law”); *Burton v. Thaler*, 863 F. Supp. 2d 639 (Tex. Crim. App. 2012)(rejecting a habeas ineffective assistance challenge of attorney's failure to raise *Miranda* objection because law at the time was “conceptually amorphous and unsettled at the time”)(quoted source omitted); *Olsen v. State*, 852 N.W.2d 372 (N.D. 2014)(failure of counsel to raise challenge under state statutes not deficient because the law was “not settled” and noting that “where the theory of law

is untested or unsettled, counsel cannot be faulted for failing to raise every possible defense”)(quoted source omitted).

Other jurisdictions, however, have cautioned against and rejected gauging whether counsel’s performance was deficient on whether the law was “unsettled.” For example, the Supreme Court of Oregon has explicitly rejected the idea that a “reasonable attorney *never* has a duty to argue unsettled questions of law” under *Strickland*: “[i]t is the ‘reasonable professional skill and judgment’ standard, and not generalized and imprecise rules of thumb such as ‘unsettled questions of law,’ that determines whether counsel rendered adequate assistance.” *Burdge v. Palmateer*, 112 P. 3d 320, 325 (Or. 2005)(emphasis in original); *see also Millam v. State*, 745 N.W.2d 719 (Iowa 2008)(explaining that under *Strickland*, the court does “not expect counsel to anticipate changes in the law, and counsel will not be found ineffective for a lack of clairvoyance,” but “in situations where the merit of a particular issue is not clear from Iowa law, the test is whether a normally competent attorney would have concluded that the question...was not worth raising”)(quoted source and internal quotations omitted).

Given the critical and at times delicate balance between *Strickland*’s emphasis on avoiding hindsight and the fundamental Sixth Amendment right to effective counsel, this Court should accept review to clarify whether

and if so, when, counsel's failure to raise an "unsettled" question of constitutional law falls below an "objective standard of reasonableness."

B. This Court Should Provide Clarity on the Application of *Strickland's* Deficient Performance Prong to an Attorney's Trial Strategy That Involves the Admission of Improper Prejudicial Character Evidence Against His Client.

As with an evaluation of counsel's failure to litigate a constitutional challenge, drawing the line between second-guessing an attorney's reasonable trial strategy and rubber-stamping an unreasonable trial strategy is not precise, but is critical to upholding the Sixth Amendment's guarantee of the effective assistance of counsel. This case also presents an excellent vehicle to provide guidance to lower courts on where and how to draw that line.

Ms. Breitzman's attorney, responsible for ensuring a "reliable adversarial testing process" with a client charged with child abuse and neglect, welcomed into evidence a flood of other acts evidence telling the jury through allegations outside of the charges that she was the type of mother likely to commit the charged behavior. *See* (App.140-144).

With certain limited exceptions, character evidence is inadmissible in criminal trials to prove that the person acted in conformity therewith. *See* Wis. Stat. § 904.04(2)(a) (articulating a similar rule to Fed. R. Evid. 404). As the Wisconsin Supreme Court has explained, this general rule of exclusion

is in part because of the “overstrong tendency to believe the defendant is guilty of the charge merely because he is a person likely to do such acts.” *Whitty v. State*, 34 Wis. 2d 278, 292, 149 N.W.2d 557 (1967).

Despite the dangers in the admission of such character evidence, all of the Wisconsin courts reviewing trial counsel’s actions concluded that his performance was not deficient because it was part of a “reasonable trial strategy.”(App.120-21,140,160,190-97). That strategy was to allow the jury to hear all of J.K.’s allegations against his mother in hopes that the jury would see that he was exaggerating and lying. (App.116-17).

But is such a strategy reasonable where, as here, counsel presented no direct evidence to establish that the alleged victim was indeed exaggerating or lying about the other allegations? Is it reasonable for a defense attorney to allow the jury to hear of an otherwise inadmissible *uncharged* allegation of assault to try and prove that the alleged victim is lying about the *charged* allegations of assault?

Imagine if, in a trial for two counts of violent sexual assault, the defense attorney (knowing that his client will testify that he did not sexually assault the woman on either of the charged occasions), introduces evidence of a time where his client *did* violently sexually assault the woman. What is a jury more likely to conclude: that because he did assault

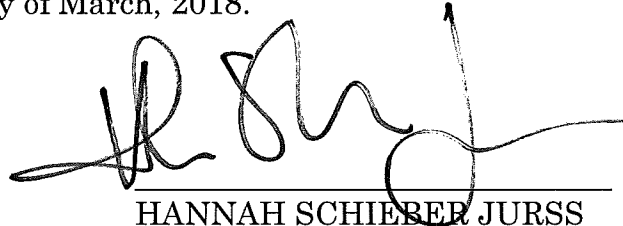
her once she lied about two other assaults for revenge, or that because he did assault her once, he likely assaulted her the other two times?

To ensure that the Sixth Amendment right to the effective assistance of counsel and *Strickland*'s standards are upheld and enforced, this Court should accept review to provide guidance to lower courts on how to determine what is and is not a "reasonable" trial strategy.

CONCLUSION

For these reasons, Ms. Ginger Breitzman respectfully requests that this Court grant her petition for certiorari.

Dated this 1st day of March, 2018.

A handwritten signature in black ink, appearing to read 'Hannah Schieber Jurss', written over a horizontal line.

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