IN THE
SUPREME COURT OF WISCONSIN

Case No. 15AP1092W

State ex rel. Tyrone Davis Smith,

Petitioner,

V.

Court of Appeals Appeal No. 2015AP001292 W
Circuit Court Case No. 2006CF006287

Court of Appeals, District I and/or
Justices Kessler, Brennan and Brash,

Respondent(s),

APPENDIX TO MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR ORIGINAL JURISDICTION

TYRONE DAVIS SMITH
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IN THE
SUPREME COURT OF WISCONSIN

Case No._____

State ex rel. Tyrone Davis Smith,

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

2015AP1092-W Tyrone Davis Smith v. Randall Hepp (L.C. # 2006CF6287)

Before Kessler, Brennan and Brash, JJ.

By opinion and order dated August 24, 2016, this court denied Tyrone Davis Smith's *pro se* petition for a writ of *habeas corpus*. Smith now moves the court to reconsider that decision. The court has reviewed Smith's motion in light of the prior submissions and the decision in this matter, and concludes that reconsideration is not warranted.

IT IS ORDERED that the motion for reconsideration is denied.

Diane M. Fremgen
Clerk of Court of Appeals

A101

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

2015AP1092-W Tyrone Davis Smith v. Randall Hepp (L.C. # 2006CF6287)

Before Kessler, Brennan and Brash, JJ.

Tyrone Davis Smith, *pro se*, petitions this court for a writ of *habeas corpus* pursuant to ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992). He claims appellate counsel abandoned him and refused to file a merits brief. We conclude the petition should be denied *ex parte*. *See* WIS. STAT. RULE 809.51(2) (2013-14); ***State ex rel. LeFebre v. Abrahamson***, 103 Wis. 2d 197, 202, 307 N.W.2d 186 (1981) (*per curiam*).

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Background

Smith was charged with first-degree sexual assault of a child. A jury convicted him and the circuit court sentenced him to ten years' initial confinement and five years' extended supervision. Postconviction/appellate counsel was appointed. Counsel determined "that there are no issues which warrant post-conviction review or appeal" and that there was "no viable basis for appeal[.]" Counsel informed Smith of this conclusion by letter and offered Smith three choices: to have a no-merit report filed with the Court of Appeals; to have counsel close the file without an appeal; or to proceed with an appeal without an attorney or with an attorney retained at Smith's expense.

Smith instructed counsel to file a motion to withdraw. Counsel did so, and the circuit court granted the motion to withdraw after ordering and receiving a response from Smith.[1] Smith then filed a *pro se* postconviction motion, which was denied. Smith appealed, still *pro se*, but this court affirmed. *See* ***State v. Smith***, No. 2008AP814-CR, unpublished slip op. (WI App Mar. 10, 2009). Smith was also unsuccessful at pursuing relief from the federal courts. He now petitions this court for a writ of *habeas corpus*, claiming counsel abandoned him by refusing to file a merits brief on what Smith believes are three meritorious issues.

Discussion

A defendant is guaranteed the effective assistance of counsel for a first appeal as of right. *See* ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 604-05, 516 N.W.2d 362 (1994). To establish

[1] Because counsel moved to withdraw before a notice of appeal was filed, the motion was filed in the circuit court. *See* WIS. STAT. RULE 809.30(4)(a) (2007-08).

a claim of ineffective assistance of appellate counsel, Smith must show his attorney's performance was deficient and that the deficient performance was prejudicial. *See* ***id.*** at 620; *see also* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A defendant is relieved of the burden to show prejudice if there is "'actual or constructive denial of the assistance counsel altogether.'" *See* ***United States v. Nagib***, 56 F.3d 798, 801 (7th Cir. 1995) (citation omitted). That is, "'[a]bandonment is a *per se* violation of the Sixth Amendment.'" *See* ***id.*** (citation omitted); *see also* ***State ex rel. Van Hout v. Endicott***, 2006 WI App 196, ¶14, 296 Wis. 2d 580, 724 N.W.2d 692 ("If counsel's deficient performance deprived [defendant] of a direct appeal, prejudice is presumed.").

However, "the right to appellate representation does not include a right to present frivolous arguments to the court[.]" ***Smith v. Robbins***, 528 U.S. 259, 272 (2000). Indeed, "an attorney is 'under an ethical obligation to refuse to prosecute a frivolous appeal[.]'" *See* ***id.*** (citation omitted). The conflict between those maxims and the defendant's right to appellate counsel are the reason for the no-merit process. *See* ***Flores***, 183 Wis. 2d at 605. The no-merit option "gives the criminal defendant the option to compel counsel to document why counsel is of the opinion that the appeal would have no merit." *See* ***id.*** at 605-06. The defendant then has a chance to respond, and this court will determine whether there is any merit to an appeal. *See* ***id.*** at 606. Counsel's letter to Smith explained this basic process.

However, if the defendant does not want counsel to file a no-merit report once counsel has concluded that appellate proceedings would lack merit,

> the defendant has three choices: fire counsel and proceed pro se, fire counsel and hire private counsel if financially feasible, or direct that the file be closed. But a defendant cannot simply insist that appointed counsel pursue an advocacy appeal under WIS. STAT. RULE 809.30 despite counsel's view that such an appeal

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> would lack arguable merit. ***Jones v. Barnes***, 463 U.S. 745, 751-53, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983) (counsel must exercise professional judgment in the manner in which he or she represents the defendant). And, a defendant cannot alternatively insist on different appointed counsel who will write a brief the way the defendant wants it written. Finally, a defendant cannot forbid appointed counsel from filing a no-merit report and then claim that counsel has abandoned him or her when counsel moves to withdraw from the representation.[2]

Van Hout, 296 Wis. 2d 580, ¶37. Thus, based on Smith's own allegations, appellate counsel did not abandon him.

This is not a case where the defendant expressed a desire to appeal and counsel failed to pursue any appeal at all. *See* ***Flores***, 183 Wis. 2d at 615-16 (failure to perfect appeal or file a no-merit report when defendant has expressed desire to appeal constitutes ineffective assistance). Instead, Smith and his attorney disagreed over whether there was merit to an appeal, and counsel presented Smith with his available options in light of that dispute: have a no-merit appeal, close the file, or ask counsel to withdraw so Smith could proceed *pro se* or with retained counsel.

Then, "a letter was received by counsel from Smith, informing counsel that if counsel was making the ultimate decision not file a no-merit report, not to do so, but move for a withdrawal from case so it will allow Smith to act pro se." That is, Smith elected one of his three options, and counsel acted according to that choice. "Where a defendant has specifically directed counsel not to file a no-merit report after being advised of his or her options, counsel is not free to ignore the defendant's direction." ***Van Hout***, 296 Wis. 2d 580, ¶23.

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[2] Contrary to Smith's misquotation, ***State ex rel. Van Hout v. Endicott***, 2006 WI App 196, ¶37, 296 Wis. 2d 580, 724 N.W.2d 692, most assuredly *does not* permit a defendant to "forbid appointed counsel from filing no-merit report and then claim counsel has abandoned him or her when counsel moves to withdraw from representation."

If Smith believed there was merit where counsel found none, his option was to have counsel file a no-merit report, respond, and have this court determine whether there was merit. Instead, Smith elected to have counsel withdraw so Smith could proceed on his own. Counsel complied with Smith's election. This is neither deficient performance nor abandonment. Further, this determination is dispositive; we need not reach the merits of the issues Smith wishes were raised in his prior *pro se* appeal.

Upon the foregoing, therefore,

IT IS ORDERED that the petition for a writ of *habeas corpus* is denied *ex parte*. No costs to either party.

Diane M. Fremgen
Clerk of Court of Appeals

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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

No. 15AP1092

State ex rel. Tyrone Davis Smith
(also known as Abdulla Wakeel Nassir),

Petitioner,

V. L.C. #2006CF6287

Randall Hepp, Warden of
Fox Lake Correctional Institution,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS
Under §782.01(1), Wis.Stat.

NOW COMES, the above-said petitioner, Tyrone Davis Smith (a.k.a. Abdulla Wakeel Nassir) ("Smith"), pro se, moving this court as follows:

INTRODUCTION

The State of Wisconsin affords a convicted person the right to effective counsel on direct appeal. **State v. Evans**, 2004 WI, ¶30, 273 Wis.2d 192, 682 N.W.2d 784; **State v. Peterson**, 2008 WI App 140, ¶11, 314 Wis.2d 192, 757 N.W.2d 834; **State ex rel. Flores v. State**, 183 Wis.2d 587, 604, 516 N.W. 2d 362 (1994) quoted by **State ex rel Kyles v. Pollard**, 2014 WI 38, ¶23, 354 Wis.2d 626, 847 N.W.2d 805. See also **Douglas v. California**, 372 U.S. 353 (1963); **Evitts v. Lucey**, 469 U.S. 387 (1985). If a defendant instructs appellate counsel to file a direct appeal postconviction motion (under

§809.30, Wis.Stat.) where there exist at least one possible strong nonfrivolous constitutional claim, but appellate counsel ultimately decides that he or she will not and advises defendant that counsel will be filing a no-merit report, to prohibit the counsel from filing a no-merit report, defendant should allow counsel to proceed in filing a motion to withdraw from the representation of the appeal and then make an arguable claim that appellate counsel abandoned him or her (i.e., defendant) for opting out counsel's responsibility by willingly withdrawing from representation of defendant's substantial rights. **Van Hout v. Endicott**, 2006 WI App 196, 296 wis.2d 580, 724 N.W.2d 692; **State v. Starks**, 2013 WI 16, P59, 314 Wis.2d 274, 833 N.W.2d 146, 163. When an appellate counsel opts out of his or her responsibility of finding at least one possible strong nonfrivolous constitutional claim, and to present that claim within a merits brief, his or her action or inaction is deemed to be deficient, prejudicing the defendant's appeal as a matter of right. **Smith v. Robbins**, 528 U.S. 259, 285 (2000); **United States v. Nagib**, 56 F.3d 798, 801 (7th cir. 1995).

The Supreme Court of Wisconsin "acknowledges that the remedy for denial of effective assistance of counsel is to restore the defendant to the position he or she would have occupied byt for counsel's ineffectivenss." **State v. Quackenbush**, 2005 WI App 2, ¶17, 278 Wis.2d 611, 692 N.W.2d 340 F.3d (2004) (citing **Betts v. Litscher**, 241 F.3d 594, 597 (7th Cir. 2001) ("defendant is entitled to fresh appeal without demonstrating that the initial appeal was nonfrivolous") **Pension v. Ohio**, 488 U.S. 75, 85-89 (1988). See also **Roe v. Flores-Ortega**, 528 U.S. 470, 483 (2000); **Castellanos v. United States**, 26 F.3d 717 (7th Cir. 1994); **State ex rel. Seibert v. Macht**, 2001 WI 67, P32, 812. See also **State ex rel. v. Hepp**, 2008 WI App 146, ¶27, 314 Wis.2d 112, 758

N.W.2d 806 (held that a defendant seeking reinstatement of his direct appeal rights may assert claims that no-merit counsel provided ineffective assistance of counsel in both postconviction and appellate context in a habeas petition in the court of appeals.)

In Kyles, the state contended that the knight petition was procedurally barred. It asserted that because Kyles already had pursued remedies in the circuit court and the court of appeals, he was unable to raise his ineffective assistance of counsel claims again. The Supreme Court of Wisconsin was unpersuaded by the state's contention and asserted that "one principle reason why defendants are entitled to counsel on direct appeal is so they will not make the kind of procedural errors that unrepresented defendants tend to commit." **Betts**, 241 F.3d at 596. It (said it) is incongruous to state the right to counsel and then preclude the defendant from raising a claim because of errors made due to absence of counsel. **Page v. Frank**, 343 F.3d 901, 909 (7th Cir. 2003); see also **Coleman v. Thompson**, 501 U.S. 722, 754, 111 S.Ct. 2546 (citation omitted) (1991) ("if the procedural [error] is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the [error] be imported to the State.") See **Kyles**, 2014 WI 38 at PP55-56.

In instance case, appellate counsel abandoned Smith by moving the court to withdraw from representation because he believed there were no meritorous issues for appeal; a letter was received by counsel from Smith, informing counsel that if counsel was making the ultimate decision to file a no-merit report not to do so, but move for a withdrawal from case so it will allow Smith to act pro se. (Exhibit-D, pp1-2.) Trial court granted counsel's motion to withdraw, and relieved him of his responsibilities in the case. (Exhibit-E.) Smith had wrote appellate counsel regarding the possible meritorous is-

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sues that existed within the case--that the strongest of them were a reasonable doubt claim whereby the jury had exhibited by asking the court could the §948.02, Wis.Stat. charge which was before it for deliberation could be changed to a lesser offense. Appellate counsel disagreed, and characterized Smith's suggestive determination on the reasonable doubt claim as being "illogical" and a "snafu." (Exhibit-A thru C.) Acting pro se, Smith, to the best of his God-given abilities, and with the unprofessional skills he possessed as a layperson in the law, tried presenting his constitutional claims in a way whereabout (he assumed) the state courts would be able to glean an understanding from his inartful litigation of the facts and presentation of the evidence within the record to allow the state courts an apt opportunity to recognize the constitutional violations he imposed in the direct appeal postconviction motion and proceedings.

After moving through the circuit court and this court, Smith's pro se direct appeal proceedings ended in the state courts with the Supreme Court of Wisconsin denying his petition for review. (Exhibit-F.) Smith moved the district court with a pro se 28 U.S.C. §2254 petition for writ of habeas corpus ("federal habeas"); the court, upon screening of the federal habeas claims, indicated that the claims therein were meritorous when it alleged that having conducted its preliminary review of the petition, it was unable to say that it plainly appears from the petition that Smith was not entitled to relief, and it ordered the respondent in the matter to answer--and it subsequently concluded that Smith's claim (regarding the improper suggestibility to the alleged child-victim by the investigating and interviewing police detective) was procedurally barred because Smith did not properly raise the claim in the state court (according to the requirements of **Verdin v. O'Leary**, 972 F.2d 1467, 1473-74 (7th Cir. 1992)). That with respect to Smith's

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Fourth Amendment claim, before the state courts, Smith did not cite any federal or state decision applying the Fourth Amendment to the facts similar to those upon which he relies. That Smith also did not assert the claim in terms so particular as to call to mind a specific constitutional right. That nor did Smith allege a pattern of facts that is well within the stream of constitutional litigation. That Smith cited two Supreme court of the United States cases (that's being: **Jackson v. Virgina**, 443 U.S. 307 (1979) and **Cleveland Board of Education v. Loudermill**, 470 U.S. 532 (1995)); that, however, neither of those Supreme Court cases did not rely upon state cases applying constitutional analysis to a similar situation. That Smith did not satisfy his burden showing that he presented his challenged claim in terms of a Fourth or Fourteenth Amendment challenge in state courts. (Exhibit-H at p2 and Exhibit-I at pp10-15.)

The respondent of the federal habeas argued that Smith blames his appellate attorney's ineffectivenss. That Smith can't rely upon ineffective assistance of counsel as cause for his procedural default because Smith did not fairly present an ineffective assistance of counsel claim in (this) state court, that (according to **Murray v. Carrier**, 477 U.S. 478, 489 (1986)) the exhaustion doctrine generally requires that an ineffective assistance of counsel claim be presented to the state court as an independent claim before it may be used to establish cause for a procedural default. (Exhibit-J at p4.)

Smith asserts that he is "actual innocent" of the §948.02(1), Wis.Stat. criminal charge in which he have been convicted thereof; that his conviction is premised upon insufficient evidence because the testimony of the witnesses were so incredible and inconsistent with their prior statements and testimonial evidence, that it caused the jury to

show reasonable doubt upon deliberation of the evidence as a whole; therefore, the state did not meet its burden of proving a guilt beyond a reasonable doubt. Had appellate counsel pursued a meritable direct appeal on at least the reasonable doubt claim (as well as the improper suggestibility claim), instead of opting out of his responsibility by moving to withdraw from representation, the outcome of Smith's appeal would have (most likely than not) been different as he would have prevailed on reversing his conviction and being exonerated therefrom or granted a new trial on grounds of an unfair trial. Smith should and must be restored to the position he was in before his counsel became ineffective and abandoned him, and that is a fresh appeal with the representation of counsel; he should be afforded a hearing so that his evidence can be produce to allow the opportunity to a full and fair presentation of his claims within this knight petition and the supplemental document nexus to (and accompany) it, as this is the appropriate vehicle. **State v. Machner**, 92 Wis.2d 797, 804, 285 N.W.2d 905 (Ct.App. 1997) and **State v. Johnson**, 133 Wis.2d 207, 226, 395 N.W.2d 176 (1986); cf. and see **Bousley v. United States**, 523 U.S. 614 (1986); **McQuiggin v. Perkins**, 133 S.Ct. 1924, 1935 (2013); **Kahlmann v. Wilson**, 477 U.S. 436, 455 n17, 106 S.Ct. 2616 n17 (1986) quoted by **United States ex rel. Przybylowski v. Page**, 2000 U.S. Dist. LEXIS 1406.

JURISDICTION

This court has subject matter jurisdiction over this matter pursuant to §§752.01, 782.01, 809.51, and Wis.Const. art. VII, §5(3).

ISSUES PRESENTED

DID SMITH's APPELLATE COUNSEL PEFORM DEFICIENTLY BY ABANDONING SMITH AND ULTIMATELY DECIDING NOT TO FILE A MERITS BRIEF ON NONFRIVOLOUS CLAIMS THAT: (1) SMITH's JURY EXHIBITED A PRIMA FACIE RESONABLE DOUBT WHEN IT ASKED THE TRIL COURT COULD THE CHARGE IN WHICH THEY WERE

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DELIBERATING UPON BE CHANGED TO A LESSER CHARGE and (2) THE POLICE DETECTIVE WHO INTERVIEWED ALLEGED VICTIM SASHA T. ADMITTED TO SUGGESTING WORDS/THINGS TO HER DURING THEIR CONVERSATION REGARDING ALLEGED CRIME?

FACTUAL AND PROCEDURAL BACKGROUND

(NOTE 1: The first portion of the background follows that of this court in appeal from denial of appeal motion. (See ¶¶2-8 of Decision dated March 10, 2009, Case No.2008AP814-CR, hereto attached as Exhibit-G.)

The State charged Smith with first-degeree sexual assault of a child. The amended criminal complaint alleged that on or about November 23, 2006, Smith had sexual contact with Sasha T., a person who had not attained the age of thirteen years, contrary to WIS.STAT. §948.02(1) (footnote omitted). Smith denied the allegations, and the matter was tried to a jury.

At trial, the State presented three witnesses. Sasha T. testified that her date of birth is May 3, 1995. She told the jury that she awakened during the night of November 23, 2006, and realized that Smith was lying on top of her "going up and down," and she described his penis as feeling like "a hard banana." Sasha T. told the jury that she immediately woke her father, Hal S., and reported that Smith had tried to rape her. Hal S. testified that Sasha T. woke him during night of November 23, 2006, "screaming and crying," and accused Smith of attempted rape. Hal S. called the police after observing Smith's pants were unzipped. Smith cross-examined both Sasha T. and Hal S. about their prior inconsistent statements regarding the incident. Additionally, Smith demonstrated some discrepancies between Sasha T.'s recollection of events and Hal S.'s recollection.

Milwaukee police detective Phillip Simmert testified that he was on duty on November 23, 2006, and interviewed Sasha T. in his squad car as part of his investigation of

her assault accusation. Detective Simmert acknowledged that child victims of sexual assault are sometimes interviewed at the Sexual Assault Treatment Center at Children's Hospital but he did not believe that he needed to use the treatment center to interview Sasha T. He explained that if a child is comfortable speaking with him, there is no reason to take the child to the treatment center or to arrange for a recorded interview with specially trained detectives. He testified that the Milwaukee police department does not have a policy or protocol dictating when a child should be interviewed at the treatment center.

Smith elected not to testify, and the defense rested without presenting any witnesses. In its closing argument, the State asserted that Sasha T.'s accusation was credible, and the State pointed to testimony that it believed corroborated the accusation. Smith's closing argument highlighted the discrepancies and inconsistencies in the witness's testimony.

The jury submitted two questions during its deliberations, one asking whether the charge could be "altered to a lesser degree" and a second asking if "misconduct" and "assault" are different. The parties and the court agreed to respond that "the only charge before you is the charge contained in the information. You must make your decision based upon the evidence and the law the court has given you."

The jury returned with a signed guilty verdict. In response to the circuit court's request the "not guilty" verdict form, the foreperson explained that she had thrown it away. The court then polled the jury, and each juror confirmed that he or she voted to find Smith guilty. The circuit court denied Smith's motion for judgment notwithstanding the verdict, and entered a judgment on the verdict. At sentencing, the circuit court imposed a fifteen-year term of imprisonment, bifurcated as ten years of initial confinement and five years of eextended supervision.

Smith moved for postconviction relief (denied by trial court).

This court of appeals denied appeal from denial of direct appeal postconviction relief motion. And the Supreme Court denied a petition for review.

A federal habeas corpus was filed on July 24, 2009, and denied on March 21, 2011 in the district court; the certificate of appealability ("COA") was also declined, dismissing the habeas action. (Exhibits-K & L.)

An appeal was taken to the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") regarding the denial and dismissal of federal habeas and COA; the COA in the Seventh Circuit was denied on December 11, 2013 on ground that no substantial showing of the denial of a constitutional right by district court. (Exhibit-M.)

A petition for rehearing and rehearing en banc was filed in the Seventh Circuit on May 7, 2013, without explanation. (Exhibit-N.)

A petition for writ of certiorari ("certiorari") was filed in the Supreme Court of the United States ("Supreme Court"), and was denied on October 7, 2013. (Exhibit-O.)

A petition for rehearing was filed with the Supreme Court regarding denial of certiorari; the rehearing petition was denied on December 9, 2013. (Id.)

A petition for writ of habeas corpus under 28 U.S.C. §1651(a) ("extraordinary writ") was filed with the Supreme Court, and denied on November 3, 2014 without explanation. (Exhibit-P.)

Discrepant & Inconsistent Facts

In his incident report, Detective Simmert reported that Sasha T. stated that she did not know what a penis was; but was, however, able to point to her pelvic region when asked where was a penis located. (Exhibit-Q at p2.)

Upon being question at trial did she know what a penis was, Sasha T. testified she did; but when confronted with what was reported in Detective Simmert's incident report,

and being asked was the detective telling the truth in the incident report when alleged that she didn't know what a penis was, she said he would be telling the truth. (Exhibit-R at pp69-70.)

In Detective Simmert's incident report, he reported that Sasha T. stated Smith pressed his penis against her buttocks for about 5 or 6 seconds. (Exhibit-Q at p2.) But in a statement to Smith's parole agent, Sasha T. never once mentioned anything about feeling something on her butt, but instead stated that she felt something on her leg--and that "it" felt like a banana. (Exhibit-T at pp1-2.) At the preliminary hearing she testified that Smith's penis was touching her butt by her butt-hole. (Exhibit-U at p10.)

Sasha T. stated to Smith's parole agent that when he was (allegedly) on top of her, that he did not have a shirt on (Exhibit-T at p2.) But at the preliminary hearing, Sasha T. testified Smith was wearing blue jeans with a red shirt tucked inside of the jeans, and that no clothes were removed at any time--that both her and Smith were fully clothed. (Exhibit-U at pp12-13,15.) At the preliminary hearing, Sasha T. testified that Smith had on jeans but that she could not remember if he had on anyting else. (Exhibit-R at p55.) At Smith's revocation hearing (related to the allegations in instant case), Hal S. testified that Smith did not have a shirt on and was wearing something like Khaki pants. (Exhibit-V at p29.) At trial Hal S. testified that he did not know what kind of pants Smith was wearing, and did not remember saying Smith had on Khaki pants. (Exhibit-R at pp93-94.)

At the preliminary hearing, Sasha T. testified that Smith did not try removing any of her clothes during the alleged sexual assault, that no clothes were removed at any time. (Exhibit-U at p12.) But Hal S. stated to Smith's parole agent that Sasha T. had come into his bedroom screaming and hollering that Smith was trying to rape her and had tried pulling down her pajamas. (Exhibit-W at p2.) But at trial

Hal S. testified that Sasha T. never told him that Smith had tried pulling down her pajamas during the alleged sexual assault--and that he did not ever remember saying that. (Exhibit-R at pp88,95-96). Sasha T. indicated at trial that she thought Smith was trying to rape her because he was by her. (Exhibit-R at p71.) At trial Detective Simmert testified that Sasha T. never indicated (said) to him that Smith tried pulling down her clothes. (Exhibit-R at pp103-104.)

At trial Sasha T. testified that she learned that a banana felt like a penis at home and from her eating them; she testified that Detective Simmert did not suggest to her that a banana was like a penis. (Exhibit-R at pp72-73.) But upon being confronted with what Detective Simmert had written or said that was contradictory to what she was saying, Sasha T. then testifyingly admitted that those words or phrase were brought up by Detective Simmert to her. (Exhibit-R at pp72-73.) At trial, when questioned did he "suggest" the word penis to Sasha T. during his interview with her, Detective Simmert testified: "I'm sure I used the word penis during our conversation"; he admitted that that word came from him at some point (or another) during the interview/conversation. (Exhibit-R at p102.)

At trial Detective Simmert testified that it is important not to suggest things to young children. (Exhibit-R at p101.) He testified that a CPC was a recorded interview that is used when interviewing alleged child-victim of sexual assault, that the CPC is conducted by police officers and detectives who are specifically trained on how to use different criteria and steps in order to determine whether a child is telling the truth or lie, and which allows this process to be used without suggesting things to the child during questioning. (Exhibit-R at pp104-105.) He testified that the CPC was not used in Smith's case because, in his and his supervisor's opinions, it was not necessary. (Exhibit-R at p105.)

At the close of the evidence Smith moved to dismiss the case. Asserting it won't disagree with the State's analysis that the evidence is "most favorable to the State," the trial court denied Smith's motion on the basis that it believed there was sufficient evidence to go forward with the case. (Exhibit-R at p111.) In his closing argument, trial counsel first (re)informed the jury that the burden of proof was upon the State to prove Smith's guilt beyond a reasonable doubt; that even if the jury thought something maybe or probably happened but they are not satisfied beyond a reasonable doubt like credible evidence (sic) then they must decide not to find guilt. (Exhibit-S at p20.) Second, trial counsel elaborated upon and pointed out that when listening to Sasha T. for just a short period (of time) one can see that she was subject to suggestion (by Detective Simmert), that she easily picks up on what other people suggests to her and goes off with it. (Exhibit-S at p20.) Third, trial counsel elaborated upon and pointed out Sasha T.'s contadictions and inconsistencies regarding the alleged sexual assault. He explains that once Sasha T. comes into contact with Detective Simmert, (how) she was lead by him (to what to say). For example, counsel explained tht Sasha T. never came up with the word banana or the word penis (and their use together in a phrase); he told the jury this was the "power of suggestion" had took place. Trial counsel explainingly indicated to the jury that Detective Simmert made bad decision--in his investigative strategy of--this case, who acted as if he was the judge and the jury, jumping to quick decisions. (Exhibit-S at pp21-25.)

As alleged and indicated earlier, after viewing the evidence as a whole, the jury wondered if (or believed that) Smith maybe was guilty of a lesser charge, like sexual misconduct, rather than sexual assault, and it sent two questions to trial court, asking could the charge be "altered to a lesser degree" and if (sexual) "misconduct" and (sexual)

"assault" are different. (Exhibit-G at p4, ¶6 and Exhibit-Y.)

Smith wrote his appellate counsel regarding the jury's action (amongst other things) that existed in the case. Appellate counsel informed Smith that counsel had received Smith's letter and was going to be reviewing transcrip over the next two to three months. (Exhibit-A.)

Appellate counsel sent Smith copies of the transcripts (and record as Smith had requested) and informed him to write counsel about any issues Smith believed existed upon his review of transcripts; he raised, amongst other things, the issue with the jury questioning court about a lesser charge to appellate counsel. Appellate described Smith's concerns as "illogical" and a "snufu." (Exhibit-C.)

Appellate counsel advised Smith that counsel seen "no viable basis for an appeal on [Smith's] behalf," and informed Smith of Smith options how to proceed. (Id.) Counsel ended up moving for withdrawal from the case to allow Smith to file his direct appeal proceedings by himself after counsel continued to refuse to file a direct appeal/merit breif. (Exhibit-D at pp1-2.) Trial court granted the motion to withdraw. (Exhibit-E.)

The trial court alleged that "even if the jurors had speculated about other possible offenses [Smith] could be found guilty of, they were instructed to consider only the charge before them." (Exhibit-Z at p3.) This court asserted that Smith's contention that his jury "exhibited reasonable doubt" "primarily relies on [the] statement . . . made by a juror during a postverdict interview . . . [; that p]ursuant to WIS.STAT. §906.06(2), jurors may not testify regarding their mental process in deliberations [and, therefore, a]ccordingly, the statement is inadmissible and cannot be offered to impeach the verdict." (Exhibit-G at p9, ¶21.)

Smith now respectfully moves this court with this Knight petition, as it is the appropriate remedy. State v. Starks, 2013 WI 69, 349 Wis.2d 274, 833 N.W.2d 146.

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ARGUMENT

Standard of Review

Ineffective Assistance

The proper standard for analyzing a claim of ineffective assistance of appellate counsel for appellate counsel failing to file a merit brief--or direct appeal postconviction relief mtion--on nonfrivolous claims that existed in a particular case is the ordinary ineffective assistance of counsel standard set forth in **Strickland v. Washington**, 466 U.S. 668 (1984). A defendant must show deficient performance by showing counsel was objectively unreasonable in failing to find arguable issues on appeal. **Smith v. Robbins**, 528 U.S. 259, 285 (2000); **Strickland**, 466 U.S. at 687-91. It is said defendant must also show prejudice from the deficient performance by showing a reasonable probability that, but for counsel's unreasonable faliure to file merit brief--or direct appeal postconviction relief motion--, defendant would have prevailed on appeal. **Robbins**, 528 U.S. at 285. However, prejudice will be presumed when there is an issue of ineffective assistance of counsel for leaving a defendant to fend alone where there were claims of merit existing in case and where the defense was prejudiced by counsel failing to subject the State to a meaningful adversarial testing, making the adversay process itself presumptively unreliable. **United States v. Maverick**, 601 F.2d 921, 930, n.10 (7th Cir. 1979); **United States v. Cronic**, 466 U.S. 648, 658-59 (1984); **Bell v. Cone**, 535 U.S. 685, 692-97 (2002) (for Cronic presumed prejudice standard to apply, counsel's failures must be complete.) (quoted by **Flordia v. Nixon**, 543 U.S. 175, 190 (20004).

Issue Preclusion/Collateral Estoppel

"Under . . . law, collateral estoppel does not bar relitigation of an issue if party whom the doctrine is asserted was denied a full and fair opportunity to litigate the question

in previous case" because of ineffective assistance of appellate counsel for abandoning that party and leaving party to fend alone (i.e., pro se) without meaningful representation of counsel on direct appeal. **Rekhi v. Wildwood Inc.**, 61 F.3d 1313, 1319 (7th Cir. 1995) (comments omitted) (quoted by **Brown v. City of Chi.**, 599 F.3d 772 (7th Cir. 2010). See also **Kremer v. Chem. Constr. Corp.**, 456 U.S. 461, 480-81 (1982) quoting **Montana v. United States**, 440 U.S. U.S. 147, 164, n.11 (1979) ("Redetermination of issues is warranted if there is a reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation" due to ineffective assistance of appellate counsel.))

Res Judicata

In Wisconsin, "habeas petitions to the court of appeals . . . are . . . referred to as 'knight petitions.'" **State ex rel. Kyles v. Pollard**, 2014 WI 38, P27, n.11, 354 Wis.2d 626, 638 n.11, 847 N.W.2d 805, 811 n.11. Res judicata is inapplicable in habeas proceedings. **Sanders v. United States**, 373 U.S. 1, 8 (1963); see also, **Kyles**, 2014 WI 38, PP55-56 (In Kyles the State contended that the knight petition [claims] w[ere] procedurally barred. It asserted that because Kyles already had pursued remedies in the circuit court and the court of appeals, he [wa]s unable to raise claims again. The Supreme Court of Wisconsin was unpersuaded by that argument, and asserted that the "one principle reason why defendants are entitled to counsel on direct appeal is so that they will not make the kind of procedural errors that unrepresented defendants tend to commit." **Betss v. Litscher**, 241 F.3d 594, 596 (7th Cir. 2001). It is incongruous to state that a defendant was denied the right to counsel and then preclude the defendant from raising a claim because of counsel failures. **Page v. Frank**, 343 F.3d 901, 909 (7th Cir. 2003); see also **Coleman v. Thompson**, 501 U.S. 722, 754 (citations omitted) (1991) ("if the procedural [error] is the result of ineffective assistance

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of counsel, the Sixth Amendment itself requires that responsibility for the [error] be imputed to the state.")

Sufficiency of Evidence

"When presented with a claim of insufficient evidence [the court] will 'affirm the verdict if the evidence, when viewed in light of most favorable to the government, establishes that any rational trier of fact could find the elements of the crime beyond a reasonable doubt.'" **United States v. Leibowitz**, 857 F.2d 373, 380 (7th Cir. 1988); **United States v. D'Antonio**, 801 F.2d 979, 981 (7th Cir. 1986) quoted by **United States v. Muskovsky**, 863 F.2d 1319, 1322 (7th Cir. 1988); see also, **United States v. Torres-Chavez**, 744 F.3d 988, 993 (7th Cir. 2014) (quoting **Jackson v. Virgina**, 443 U.S. 307, 319 (1979); **State v. Scott**, 2014 WI App, PP4-5, 356 Wis.2d 325, 855 N.W.2d 491 quoting **State v. Poellinger**, 153 Wis.2d 493, 503-04, 451 N.W.2d 752 (1990) and **State v. Alles**, 106 Wis.2d 362, 376-77, 316 N.W.2d 378 (1982).

Actual Innocence

Generally, the requirement for an assertion of actual innocence is for petitioner to show new evidence proving such innocence, an exception is made when underlying claim is that the conviction in which petitioner sits is presumed to be predicated upon insufficient evidence. **McQuiggin v. Perkins**, 133 S.Ct. 1924, 1935 (2013) quoted by **Jacobason v. Douma**, 2014 U.S. Dist. LEXIS 10399 at *3 (E.D. Wis. Jan. 29, 2015).

I. Smith's appellate counsel performed deficiently by abandoning Smith and ultimately deciding not to file a merits brief on nonfrivolous claim that: Smith's jury exhibited a prima face reasonable doubt when it asked the trial court could the in which they were deliberating upon be changed to a lesser charge.

We commence by arguing that Smith's appellate counsel

failed to present this claim in a merit brief upon direct appeal after Smith (persistently) presented it to counsel in writing and through conversation. (Exhibit-C.) This claim is in no way frivolous. Therefore, since appellate counsel continued to advise Smith that counsel was going to file a no merit report unless Smith wanted to--otherwise--proceed pro se on direct appeal, Smith allowed counsel to withdraw in order to prevent counsel from filing an unnecessary no-merit report and proceeding. By law, appellate counsel abandoned Smith. **Van Hout v. Endicott**, 2006 WI App 196, 296 Wis.2d 850, 724 N.W.2d 692 ("If a defendant does not want a no merit report, the defendant has . . . choice[to] forbid appointed counsel from filing no merit report and then claim counsel has abandoned him or her when counsel moves to withdraw from representation.")

Smith contends that had it not been for appellate counsel abandoning him, he would have been afforded a full and fair opportunity to present his claim to the circuit court in a fashion whereby circuit court would have been able to comprehend the constitutional violation being asserted; and that he would have--mostly than not--prevailed upon direct appeal. **Robbins**, 528 U.S. 259, 285 (2000); **Strickland**, 466 U.S. 668 (1984).

Smith argues that the discrepancy in the testimonial evidence of Sasha T. and Hal S. was so inconsistent that, viewed as a whole, it amounts to incredible evidence that is too insufficient to rely upon to sustanin Smith's conviction under §948.02(1), Wis.Stat. charge in which he was charge. The dubious evidence only divulges that Smith is "actually innocent" of that charge. This conclusion can clearly be inferred by our viewing the testimonies of Sasha T. and Hal S. in their entirety. (Exhibit-R at pp50-98; Exhibit-U at pp11-16; and Exhibit-V at pp13-31.) (See als ibid. at pp9-11.)

It's well understood that "matters of a witness crdibility, absent 'extraordinary circumstances,' are solely for jury to evaluate." **United States v.D'Antonio**, 801 F.2d 979, 982 (7th Cir. 1986) quoted by **United States v. Muskovsky**, 863 F.2d 1319 (7th Cir. 1987); see also, **United States v.Edmond**, 560 Fed.Appx. 580 (7th Cir. 2014) quoted by **United States v. Hampton**, 585 F.3d 1033, 1042 (7th Cir. 2009) ("Appellate court will not second-guess a jury's assessment of witness's credibility.") When, as in instant case, a court is "presented with a claim of insufficient evidence, when viewed in light most favorable to the government, establishes that a rational trier of fact could not have found the elements of crime beyond a reasonable doubt," the defendant must be exonerated. **Leibowitz**, 857 F.2d 373, 380 (7th Circ. 1988); **D'Antonio**, 801 F.2d 979, 981 (7th Cir. 1988); **Muskovsky**, 863 F.2d 1319, 1322 (7th Cir. 1988); **Torres-Chavez**, 863 F.3d 988, 993 (7th Cir. 2014) quoting **Virgina**, 443 U.S. 307, 319 (1979); **United States v. Garten**, 777 F.3d 392 (at HN3) (7th Cir. 2015) quoting **United States v. Molton**, 743 F.3d 479, 483 (7th Cir. 2014); **Scott**, 2014 WI App 90, PP4-5, 356 Wis.2d 325, 855 N.W.2d 491 quoting **State v. Poellinger**, 153 Wis.2d 493, 503-04, 451 N.W.2d 752 (199) and **Alles**, 106 Wis.2d 368, 376-77, 316 N.W.2d 378 (1982).

Smith argues that Sasha T.'s credibility should be called into question propounding the many conflicting and inconsistent accounts of the alleged incident (notwithstanding the fact of her being subject to suggestibility which we will elaborate upon later in this petition). (Exhibit-R at pp50-80; Exhibit-U at pp11-16; and Exhibit-V at pp13-26.) We understand that the burden is a very heavy one for Smith to show that he has been convicted on insufficient evidence. **United States v. Brunn**, 809 F.2d 397, 408 (7th Cir. 1987); **United States v. Carraway**, 612 F.3d 642, 645 (7th Cir. 2010). The burden becomes even more heavier for Smith upon his challenging the reliability and credibility of Sasha T. (and the other state

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witnesses). **Id.** quoted by **Muskovsky**, 863 F.2d 1319. In other words, the courts will not, as said before, second-guess or disturb the jury's finding of guilt unless the finding is based upon an erroneous application of the law or because external factors existed that may have resulted in unduly persuasion of the jury to render guilt. **Edmond**, 560 Fed.Appx. 580 (7th Cir. 2014) quoted by **Hampton**, 585 F.3d 1033, 1042 (7th Cir. 2009); **United States v. Hayes**, 236 F.3d 891, 896 (7th Cir. 2001); **United Statesv. Farmer**, 717 F.3d 559, 562-63 (7th Cir. 2013).

As a matter of law, Smith argues, his conviction should and must be reversed because the evidence, viewed as whole, is insufficient to sustanin his conviction and the state has not convinced the jury on the elements beyond a reasonable doubt. These factors establishes an "extraordinary circumstance" to impeach the jury's guilty verdict.

First, as we have alluded to many times throughout this knight petition, Sasha T. and Hal S.'s testimonies and statements regarding the alleged incident various at almost every new proceeding. Although it's too many to present here at this moment, we will point to an essential few of them. (But one can still view the entire testimony of Sasha T. and Hal S. at Exhibit-R at pp50-98.) Sasha T. spoke with Detective Simmert on the night/day of the alleged incident, whereby she made a statement to him that Smith pressed his penis against her buttocks. (Exhibit-Q at p2.) But when she--approximately a week or so later--spoke to Smith's parole agent regarding the alleged incident she made a statement that she felt something on her leg that felt like a banana--she said nothing about Smith pressing his penis against her buttocks, a very important factor. (Exhibit-T at pp1-2.) Argumentatively, if it was true that Smith pressed his penis against her buttocks, a very essential factor that's needed to support the element that to charge Smith with having sexual contact with

her he must have touched an intimate part of her body or caused her to touch an intimate part of his body, why would she not tell this to the parole agent as she told to the detective? Pondering on this, just as Smith's trial counsel argued during closing argument, it would leave one to conclude that she had been coerced and led by the suggestibility of the detective. (Exhibit-S at p20.) What is significant here is Sasha T.'s indication that she only made the sexual assault allegations against Smith because he was by or near her when she awoke. (Exhibit-R at p71.)

Second, amongst other discrepancies, in considering the inconsistent statements presented in latter paragraph made by Sasha T., it is obvious that the the jurors had a problem with wholly believing her, which would call her credibility and the reliabitlity of the evidence into question, as they was not convinced beyond a reasonable doubt before finding guilt. This was shown by jurors asking the trial court could the jury change the sexual assault charge to a sexual misconduct charge. (Exhibit-G at p4, ¶6 and Exhibit-Y.)

Considering the factors in the latter two paragraphs, we can see the "extraordinary circumstance" that exist in instant case to impeach the jury verdict; and that is the prima facie reasonable doubt. But we need to present why or how the jurors ultimately entered a finding of guilt on the charge before it when it initially wanted to find guilt on a lesser charge. We will show that the jurors was coerced by an entity outside the province of the jury--and that was the trial judge himself. According to evidence produced after trial, one juror explained that when they first entered the deliberation room a majority of the jurors voted to enter guilt with the exception of 3 or 4 of them who were undecided and wondered if maybe Smith was guilty of sexual misconduct until the jury questioned the trial judge on whether the charge could be changed, and were told (and misled to believe) that they didn't get decide what

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charge Smith was guilty, that "the only charge before [them wa]s the charge contained in the information. [That they] must make [their] decision based upon the evidence and the law the court ha[d] given to [them]." (Exhibit-G atp p4, ¶4 and Exhibit-Y; see also Exhibit-Z at p3, n.4.)

Generally, the rule is that a defendant may not, as in instant case, challenge the jury verdict when the jurors were polled and agreed to the verdict. However, if a juror or jurors who were undecided and holding out on their verdicts to--complicate the unanimousness of the jury--, but changed their minds only by undue influence and pressure from other members of the jury and the trial judge, then the unanimousness of the jury's verdict is suspect. (Exhibit-G at p9, ¶23.) **United States v. Brito**, 136 F.3d 397, 414 (5th Cir. 1998) (quoting **United States v. Straach**, 987 F.2d 232, 241-42 (5th Cir. 1993)). In its prior decision regarding this issue, this court erroneously applied §906.06(2), Wis.Stat. in Smith's direct appeal appeal proceedings when it asserted that "jurors may not testify in deliberations"--that, accordingly, the statement [Smith presents from a juror] is not admissible and cannot be offered to impeach the verdict. (Exhibit-G at p9, ¶21.) That statutory law provides an "exception" to the general rule that this court neglected to apply, which is when an outside or external influence is brought to bear upon the jury's decision-making process, the jury's verdict may be impeach through a juror or jurors testimonies or statement about what took place that influenced their decision one way or the other. The law clearly says that "to protect jurors from . . . intimidation and to enhance the finality of jury verdits, jurors are not permitted to impeach their verdicts (citations omitted). They are, however, permitted to testify [or make statements] about 'whether extraneous prejudicial information was improperly brought to jury's attention.'" **Straach, id.** citing **Mattox v. United States**, 146 U.S. 140 (1892)

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quoted by **United States v. Romos**, 481 F.Supp.2d 717, 720 (W.D. Tex. 2006); **United States v. Fozo**, 904 F.2d 1166, 1171 (7th Cir. 1990); **United States v. Llyod**, 269 F.3d 228, 237 (3d Cir. 2001); **United States v. Hall**, 85 F.3d 367, 370-71 (8th Cir. 1996); **Griffin v. State**, 754 N.E.2d 899, 902-03 (ind. 2001) quoted by **Stephenson v. Wilson**, 619 F.3d 664, 671-72 (7th Cir. 2010). It is argued that "such an impropriety [upon province of jury] is a ground for reversal." **Id**.

According to the **Websters Third New International Dictionary**, the meaning of the word "extraneous" is existing or originating outside or beyond: external in origin: coming from outside." The dictionary defines "information" as "knowledge" communicated by others or obtained from investigation, study, or instruction" or "knowledge of a particular event or situation." Thus "extraneous prejudicial information" is knowledge coming from outside which is prejudicial. **State v. Schillcut**, 119 Wis.2d 788, 794-95 (1984).

The trial judge in instant case "improperly" instructed the jury upon the jury's questioning the court could it change the charge in which it was deliberating on to a lesser charge of sexual misconduct in lieu of sexual assault when it told jurors that they must make their decision based upon the evidence and the law the court had given them, that the only charge before them was the charge contained in the information. (Exhibit-G at p4, ¶6; Exhibit-Y; and Exhibit-Z at p3, n.4.) Smith's situation is synonymous to the situation in **Jenkins v. United States**, 380 U.S. 445, 446 (1965) where the entire justices of the court concluded that the judge's statement: "you have got to reach a decision in this case" was coercive, and they reversed the conviction. The judge in Smith's--instant--case told the jury "You must make your decision based on the evidence and the law the court has given you." The same difference as the Jenkins situation is Smith's situation, thus, Smith conviction must be reversed also. Smith's trial judge

could have did one of the three when the jury showed an apparent reasonable doubt: (1) reinstruct the jury on the reasonable doubt instructions, i.e., if the jury did not believe Smith committed the charge before the jury for deliberations, then it must return with a not guilty verdict; (2) once the jury showed the apparent reasonable doubt, instruct the jury with an order to return with a signed not guilty verdict; and (3) once the jury entered a verdict of guilty, grant Smith's motion notwithstanding the verdict. Either one of these actions by the trial court court would have been in the best interest of justice and would have prevented a fundamental miscarriage of justice.

It cannot be argued that Smith agreed with the State and the trial court to instruct the jury in the--coercive and prejudicial--manner in which it did when the jury questioned it about changing the charge to a lesser charge. (Exhibit-G at p4, ¶6.) Trial counsel was ineffective for agreeing.

Also, in its prior decision on this claim, this court asserted that it disagreed that "the jury's inquiry during deliberations asking whether a lesser charge was available" demonstrates reasonable doubt. (Exhibit-G at p9, ¶22.) Apparently, this court misapplied law. The definition was clearly included in the reasonable doubt instruction the court gave to the jury. Reasonable doubt means a doubt based upon reason and common sense. It is a doubt for which a reason can be given arising from a fair and rational consideration of the evidence or lack of evidence. It means such a doubt would cause a person of ordinary prudence to pause or hesitate when called upon to act in the important affairs of life. (Exhibit-S at pp15-16.) **United States v. Chas. Pfizar & Co., Inc.**, 367 F.Supp. 91, 101 (S.D.N.Y 1973); see also **Jackson v. State**, 657 N.E.2d 131, 137-38 (Ind.App. 1995) ("Reasonable doubt is such a doubt as would casuse a reasoanble and prudent person, in one of the graver and important transaction of life to pause

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and hesitate before taking represented facts as true and relying and acting thereuon. It is a doubt as will permit you after a full, fair and impartial consideration of all evidence to have an abiding conviction to a moral certainty of accused.")

Let's view the evidence in instant case, it said that "the jurors wondered if may Mr. Smith was guillty of a lesser charge." (Exhibit-Y.) First of all, after viewing all the evidence, the jury "paused" and "hesitated" and then asked the trial court "whether charge could be 'altered to a lesser degree' (Exhibit-G at p4, ¶4), like sexual misconduct, rather than sexual assault." (Exhibit-Y.) Considering the use of the word wonder in the context it is being used, it clearly indicates a prima facie doubt on behalf of the jurors. Examining **The American Heritage College Dictionary** (3d Ed. 2000), at definition #3 of the noun section, "wonder" means "a feeling of . . . doubt." And if we examine just about any Thesarus, we will discover that the word "doubt" falls under the word "wonder." Thus, Smith's jury doubted that he was guilty as charged under §948.02(1), Wis.Stat. and wanted to find him guilty of a lesser offense of sexual misconduct until it was unduly persuaded and led to believe by the trial court that it had no other choice but to find Smith guilty of the charge before it for deliberation when the court told them they must make their decision.

"The Fifth Amendment's due process guarantee, applied to the states by operation of the Fourteenth Amendment, protects 'the accused against conviction except upon proof beyond a reasonable doubt of ever fact necessary to constitute the crime with which he is charged.'" **In re Winship**, 397 U.S. 358, 384 (1970). The State, in instant case, failed to prove its case--or convince the jury--with proof beyond a reasonable doubt. The evidence, when viewed as a whole, in favor of the State, was so insufficient and incredible that it left a reasonable doubt in the juror's mind that Smith was guilty as charged under §948.02(1), Wis.Stat.

II. **Smith's appellate counsel performed deficiently by abandoning Smith and ultimately deciding not to file claim that: the police detecitve who interviewed alleged victim Sasha T. admitted to suggesting words/ things to her during their conversation regarding alleged sexual assault.**

Smith argues that appellate counsel failed to present this claim in a merit brief upon direct appeal. This claim is and was no way frivolous. Counsel continued to advise Smith that cousnel felt there were no issues of merit to file a merit brief, that counsel was going to file a no-merit report unless Smith wanted to--otherwise--proceed pro se on direct appeal. Smith allowed appellate counsel to withdraw. By law, appellate counsel abandoned Smith. **Van Hout**, 2006 WI App 196, 296 Wis.2d 850, 724 N.W.2d 692. ("If a defendant does not want a no merit report, the defendant has . . . choice[to] forbid appointed counsel from filing no merit report and then claim counsel has abandoned him or her when counsel moves to withdraw from representation.")

Smith argues that had it not been for appellate counsel abandoning him, he would have been afforded a full and fair opportunity to present his claim to the circuit court in a fashion whereby circuit court would comprehend the constitutional violation being asserted; and he would have (most likely than not) prevailed on direct appeal. **Robbins**, 528 U.S. 259, 285 (2000); **Strickland**, 466 U.S. 668.

When children who are the age Sasha T. was at time of alleged incident (i.e., 11 years of age) are making sexual assault allegations, the "common-sense" and appropriate thing to do is to transport the child to a Sexual Assault Treatment Center so that people who are trained in how to use the proper techniques to question the child without subjecting the child to suggestibility--and whereby that child could be video taped during questioning so that the courts and the

lawyers in the case will have available to them visible and physical evidence of the interview to assure the child was not a subject of suggestions. But that didn't happen in instant case because Detective Simmert said it was his and his supervisor's opinions that it was unnecessary, especially if a child is comfortable in speaking with him; he didn't even take Sasha T. to the police station, but interviewed her in his squad car. (Exhibit-R at pp99-100.) Both Sasha T. and Detective Simmerit testified that Sasha T. initially did not know what a penis was (or that if felt like a banana until he (suggestingly) brought these words and phrases into the conversation during his interview with her. Sasha T. first tried denying that Detective Simmert suggested these words and phrases to her, but, after being confronted with what he reported in his incident report with her the night of the alleged incident, she eventually admitted that he did bring these words and phrases to her. When trial counsel characterized this to him as being suggestibility, he said although the word penis (and the indication that a banana felt like a penis) came from him, he would not characterize them as suggestive. He testified that he used these terms and phrases to try to determine what exactly Sasha T. was feeling and to learn whether she knew the truth from a lie. (Exhibit-R at pp69-78, 100-102.)

Smith argues that Sasha T.'s statement and allegation that he sexual assaulted her by pressing his "penis" against her buttocks and was "humping" her and that the "penis" "felt like a banana" were none other but Detective Simmert's words through suggestibility; he was putting words and ideas in her mind. Such a coercive and prejudicial statement is deemed insufficient evidence in violation of the Fourteenth Amendment. Cf. and see **State v. Hoppe**, 2003 WI 43, P36, 261 Wis.2d 294, 661 N.W.2d 401 (citing **Roger v. Richmond**, 365 U.S. 534, 540 (1961) ("Our decisions under th[e Due Process Clause of Fourteenth] Amendment have made clear

that convictions following the admission into evidence of . . . involuntary [statements], i.e., the product of coercion, either physical or psychological, cannot stand. This is because such [statements] are unlikely to be true method used to extract them offend an underlying principle in the enforcement of our criminal law[.]")). State v. McManus, 152 Wis.2d 113, 130, 447 N.W.2d 654 (1989); see also, Chambers v. Flordia, 309 U.S. 227 (1940; Lisenba v. California, 314 U.S. 219, 236 (1941); Rochin v. California, 342 U.S. 165, 172-174 (1952); Spano v. New York, 360 U.S. 315, 320-21 (1959); Blackburn v. Alabama, 361 U.S. 199, 206-07 (1960); Watss v. Indiana, 338 U.S. 49, 54-55 (1949). Sahsa T.'s statement was involuntary and of a coercive nature, thus this is not just a Fourteenth Amendment violation, but also a Forth Amendment one, and the statement must be suppressed because it is part of the "fruits of the poisonous tree." See, Wong Sun v. United States, 371 U.S. 471 (1963).

CONCLUSION

Smith has undoubtedly demonstrated that his appellate counsel was ineffective and prejudiced his direct appeal when counsel abandoned him by moving to withdraw from representation and presenting Smith's meritable claims (argued in this knight petition) in a merit brief on direct appeal. Had counsel did so the outcome of this case would have been different on appeal because Smith would have prevailed and he would have been granted the opportunity for the court to have a fair presentment of claims so that the court would have had a full and fair opportunity to address the claims on the merits. Smith is actual innocent and if this court try to apply any procedural default (due to unprofessional and laymen mistakes) to avoid redetermining the claims set forth in this petition, then a fundamental miscarriage of justice will take place. Smith seeks an evidentiary hearing and a new appointment of appellate counsel to assure

justice is served--especially where a witness's credibility is being challenged by a pro se petitioner, as Smith. See for example **Navejar v. Iyiola**, 718 F.3d 692, 696 (7th Cir. 2013); **Bracey v. Grondin**, 722 F.3d 1012, 1016 (7th Cir. 2013); **Santiago v. Walls**, 599 F.3d 749, 761 (7th Cir. 2010); **Swofford v. Mandrell**, 969 F.2d 547, 552 (7th Cir. 1992) (quoted by **Jackson v. Hepp**, 558 Fed.Appx. 689, 693 (7th Cir. 2014) ("Constitutional claims that . . . turn on witness credibility may too complex for a pro se plaintiff to litigate.")

Dated this 27 day of May, 2015.

Respectfully submitted,

Tyrone Davis Smith
AKA: Abdulla Wakeel Nassir
Pro Se.

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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

No. 15AP1092

State ex rel. Tyrone Davis Smith
(also known as Abdulla Wakeel Nassir),

Petitioner,

V. L.C. #2006CF6287

Randall Hepp, Warden of
Fox Lake Correctional Institution,

Respondent.

SUPLEMENTAL TO
PETITION FOR WRIT OF HABEAS CORPUS
Under §782.01(1), Wis.Stat.

ISSUES PRESENTED

DID SMITH's APPELLATE COUNSEL PERFORM DEFICIENTLY BY ABANDONING SMITH AND ULTIMATELY DECIDING NOT TO FILE A MERITS BRIEF ON CLAIM THAT: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND DISCOVER THAT HAL S.'s WIFE WAS A WITNESS AT THE SCENE OF THE (ALLEGED) CRIME WHOSE INFORMATION AND/OR TESTIMONY WOULD AND COULD HAVE DISCREDITED HAL S.'s AND SASHA T.'s ALLEGATIONS OF SEXUAL ASSAULT?

FACTS

On November 30, 2006, Hal. S. made a statement to Smith's parole agent (in relation to the alleged sexual assault in which Smith was charged with and ultimately was convicted of) against Sasha T., that his wife (a Sandra Johnson (hereinafter,

Sandra J.") had told him she had gotton up during the night to shut off the television and discovered that Smith was up watching it while sitting in the orange chair (at the table) shirtless.. (Exhibit-W at p1.)

Smith argued in his direct appeal proceedings in the trial court that his trial counsel was ineffective for failing to investigate thoroughly and produce Sandra J. as a potential witness. The trial court--in footnote #3 of its decision denying reconsideration motion--asserted that Smith "state[d] that [Sandra J.] 'possessed material fact and evidence in this case that may have contributed to the [determination of (as this is what was included into the text)] credibility of testimonies of Hal S. [the victim's father] and S.T. [the victim].'" The trial court alleged that Smith's ineffective of counsel claim [wa]s "completely conclusory" and "insufficient to warrant a hearing." (Exhibit-AA at p2.)

STANDARD OF REVIEW

(For the standard of review, see the standard of review presented in the knight petition in nexus to this supplemental document.)

ARGUMENT

Smith's appellate counsel performed deficiently by abandoning Smith and ultimately deciding not file a merits brief on claim that: Trial counsel was ineffective for failing to investigate and discover that Hal S.'s wife was a witness at the scene of the (alleged) crime whose information and/or testimony would and could have discredited Hal S.'s and Sasha T.'s allegations of sexual assault.

Smith's appellate counsel was unquestionably deficient in his duties. It is obvious that he did not thoroughly investigate and research all possible nonfrivolous and substantial claims that existed in Smith's case. Amongst the other two "strong" claims presented in the knight petition in nexus to this supplemental document, this claim that trial counsel failing to produce a vital witness that most likely or not could have either discredited opposing party's witness's testimonies or corroborated the inconsistency and discrepancy within the evidence in favor of Smith's defense. Had counsel

performed his obligated duty and not abandon Smith by withdrawing from Smith's case, then the outcome of Smith's appeal would have been different because Smith would not have made the errors he made in trying to argue his nonfrivolous claims on direct appeal by himself--the trial court would not have alleged that the failure to produce witness claim was "completely conclusory" and "insufficient to warrant a hearing." (Exhibit-AA at p2, n3.) Smith would have prevailed on the claim with effective assistance of appellate counsel. **Smith v. Robbins**, 528 U.S. 259, 285 (2000). See also, **Strickland v. Washington**, 466 U.S. 668 (1984).

Albeit Smith will be able to show that he was undoubtedly prejudiced by appellate counsel's failure to argue this claim in a merits brief, he's not obligated to do so because prejudice is automatically presumed when appellate counsel abandons his or her client, leaving client to make devastating errors in appealing by him- or herself. See, **Roe v. Flores-Ortega**, 528 U.S. 470, 483 (2000); **Strickland**, 466 U.S. at 692. **United States v. Nagib**, 56 F.3d 798, 801 (7th Cir. 1995).

As we argued with the issues presented in the knight petition in nexus to this supplemental document, this court cannot apply the preclusion or collateral estoppel doctrines to this document or proceeding, the "exception" rule is always in play in this typical circumstances and situations. **Rekhi v. Wildwood Inc.**, 61 F.3d 1313, 1319 (7th Cir. 1995) (citation omited.) ("Under . . . law, collateral estoppel does not bar relitigation of an issue if party whom doctrine is asserted was denied a full and fair opportunity to litigate the question in previous case.") quoted by **Kremer v. Chem. Constr. Corp.**, 456 U.S. 461 , 480-81 (1982) (quoting **Montana v. United States**, 440 U.S. 147, 164, n11 (1979)) ("Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed prior to litigation.")

Smith argues that had trial counsel thoroughly investigated this claim, he would have discovered that Sandra J. possessed vital information that could have favored the defense

in some way or another. Sandra J. could and would have provided information--upon testimony--that it was later than 10:00pm or 11:00pm as Sasha T. testifyingly indicated was the time the alleged sexual assault was to have taken place. (Exhibit-V at p22.) or later than midnight or 1:00am as Hal S. testifyingly indicated was the time the alleged sexual assault was to have taken place. (Exhibit-V at p28.) In his statement to Smith's parole agent (which would be deemed hearsay, which would make it even more of a reason why the defense/trial counsel should have produced Sandra J. as a potential witness) Hal S. stated that Sandra J. told him Smith was sitting at the table in "Hal S.'s" orange chair watching television with no shirt on. (Exhibit-W at p1.) Sandra J. could and would have testified differently; she would've (because she would have been under oath and subject perjury, most likely than not) told the truth and disclosed that Smith did have on a shirt when she saw him at the table watching television. See **State v. Eckert**, 203 Wis.2d 497, 513, 553 N.W.2d 539 (Ct.App. 1996) (if a defendant claims ineffective assistance of counsel due to failure to investigate a potential witness, the defendant must prove that prospective witness's testimony would have influenced the outcome of the trial) quoted by **State v. Ringold**, 2005 WI App, P21, 277 Wis.2d 825, 609 N.W.2d 885.

Matter of fact, a "failure to call a potential witness . . . . constitute[s] deficient performance." "In **Toliver v. Pollard**, 688 F.3d 853, 862 (7th Cir. 2012), the court declared that "in a 'swearing match' between two sides, counsel's failure to call two useful, corroborating witnesses, despite [potential bias as a result of] the family relationship, constitutes deficient performance." **Goodman v. Betrand**, 467 F.3d 1022, 1030 (7th Cir. 2006) (the testimony of witness who would corroborate the defendant's account was a "crucial aspect of [the] defense"); **State v. White**, 2004 WI App 78, ¶¶20-21, 271 Wis.2d 742, 680 N.W.2d 362 (trial counsel's performance was deficient for failure to call witnesses who would have brought in evidence that "went to the core of [the] de-

fense") quoted by **State v. Jenkins**, 2014 WI 59, P41, 355 Wis.2d 180, 197, 848 N.W.2d 786, 795. Assumingly, we argue that trial counsel probably didn't want to interview/investigate Sandra J. for reliable evidence because he might have thought that being the fact she was Sasha T.'s stepmother and Hal S.' common law wife, that she would not be able to proffer useful information; however, regardless of what Sandra J. may have attested to or asserted, it was trial counsel duty to still investigate her--or at least attempt to and then record the date and time of such an attempt. Smith contends that at this stage of litigation, the information Sandra J. will provide is "new evidence" that will establish the fact that he is "actually innocent" of the charge in which he has been convicted. See **Fairman v. Anderson**, 188 F.3d 635, 644 (5th Cir. 1999) quoting **Sclup v. Delo**, 513 U.S. 298 (1995). Sandra J.'s account as an eyewitness--that was on the alleged scene of the crime along with Sasha T. and Hal S.--staisfies the example of new evidence. **Stewart v. Quarterman**, 2006 U.S. Dist. LEXIS 76038 at *16 (S.D. Tex. Oct. 16, 2006).

CONCLUSION

Due to Smith's appellate counsel abandoning him by moving to withdraw from Smith's direct appeal proceedings, leaving him to fend for himself (and committing some substantial procedural errors along the way), Smith was deprived of the right for the circuit court and this court to be presented with a fair presentmentation so that thet claims would have had an adequate and full and fair opportunity to be addressed (on thier merit). Had appellate counsel not performed ineffectively by abandoning Smith, the outcome of Smith appeal would have been different because he would have prevailed.

Dated this 27 day of May, 2015.

Respectfully submitted,

Tyrone Davis Smith, Pro Se

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A137b

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

No.2015AP1092-W

State of Wisconsin *ex rel.* TYRONE DAVS SMITH,

Petitioner,

V.

RANDALL HEPP, Warden,

Fox Lake Correctional Institution,

Respondent.

MOTION FOR RELIEF FROM JUDGMENT AND ORDER

CASE AND FACTS

Upon being convicted of a criminal charge under §948.02(1), Wis.Stat. on March 22, 2007, and, thereafter, was sentenced to fifteen (15) years in the Wisconsin Prison System: ten (10) years initial confinement, followed by five (5) years extended supervision. (*See* Court of Appeals Opinion and Order, 08/24/2016, at 2.)

Smith was appointed a postconviction/appellate counsel to pursue direct appeal postconviction motion proceedings. Counsel claimed he discovered no meritorious claims for appeal and advised Smith of three options: (1) Smith could agree to counsel filing no-merit

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report, (2) Smith could have counsel close case without appeal, or (3) Smith could proceed *pro se* or retain another counsel at Smith's own expense. (*Id.*)

Smith elected to proceed *pro se* and allow counsel to withdraw from representation as it was counsel's desire to do so. The circuit court denied Smith's direct appeal motion and the court of appeals affirmed. The Wisconsin Supreme Court denied a petition for review.

After a round in the federal courts, Smith filed a petition for writ of habeas corpus (better known as a *knight petition*) in this court of appeals under §782.01, Wis.Stat. This court denied the knight petition *ex parte* on grounds that Smith's postconviction/appellate counsel was not deficient and did not abandon Smith. (*Id.* at 2 and 5.)

LEGAL STANDARD

Pursuant to §806.07(2), Wis.Stat., this court has authority to entertain an independent action to relieve a party from judgment, order, or proceeding, or set aside a *void judgment*. (*Id.* at subs. (1)(d))

ARGUMENT

1. Smith did not waive his right to have meritorious issues reached via ways of Knight (habeas corpus) petition.

The August 24, 2016 Opinion and Order of this court is *null and void*. Upon ruling on the knight petition, this court did not conclude or allege nowhere within the four-corners of the Opinion and Order that the issues presented in the knight petition were frivolous and without merit; it only asserted that it "need not reach the merits of the issues Smith wishes were raised in his prior *pro se* appeal." (Opinion and Order at 5.) Instead, Smith *elected* to have counsel withdraw so Smith could proceed on his own. (Id.)

An "[e]lection is simply what its name import; a choice, shown by an overt act between two inconsistent rights either of which may be asserted at the will of the chooser alone. ***Bierce, Ltd. V. Hutchins***, 205 U.S. 340, 346 [citation omitted] (1907) cited by ***Gaugert v. Duve***, 217 Wis.2d 164, 173 (Ct.App. 1998)

It must be understood that a "choice should not be confused with concept of waiver. Waiver is the 'voluntary and intentional relinquish of a *known* right.'" ***Schwantes v. Schwantes,*** 121

Wis.2d 607, 627, 360 N.W.2d 607, 627, 360 N.W.2d 69, 78 (Ct.App. 1994) cited by ***Gaugert***, ***id.*** Smith argues that when he made the choice—or elected to—proceed on his own in his criminal appeal instead of allowing counsel to file no-merit report and proceedings, he did not "voluntary" or "intentionally" waive any right he had to have issues knight petition decided on its merits. Smith was unknowledgeable and ignorant to all essential facts and consequence of his making a particular choice. Had he known that the choice he made of proceeding on his own and allowing counsel to withdraw from representation instead of allowing counsel to file a no-merit report would deprive him of having this court reach the merits of his knight petition because counsel abandoned or decided not to argue what actually turned out to be meritorious issues, then he would have elected the no-merit proceedings. "Although it has been held that ignorance of facts will not relieve a party from the consequences of his election, where such relief would injure an innocent party, ordinarily, if a litigant commences . . . action[] or proceedings in ignorance of substantial facts which offer an alternative, he may, when informed, adopt a different remedy." ***Stadler v. Rohm***, 40 Wis.2d 32, 161 N.W.2d 906, 916 (1968). Smith is—and has continued to maintain his—innocence and would be injured by a continued manifestation of justice if this court fails to reach the merit of his knight petition.

"The duty to elect implies a perquisite knowledge . . . of . . . facts material to . . . right." ***Id***. As this court has recognized, "counsel determined 'that there [we]re no issues which warrant post-conviction review or appeal' and that there was 'no viable basis for appeal[.]' Counsel informed Smith of this conclusion by letter and offered Smith three choices: to have a no-merit report filed with the Court of Appeals; to have counsel close the file without an appeal; or to proceed without an attorney or with attorney retained at Smith's expense." (Opinion and Order at 2.) (Exhibit-1, hereto attached and incorporated by reference.) Nothing within the circuit court December 13, 2007 Order informed Smith that he would later lose the right to have issues heard on merit in a knight petition if he elected to proceed *pro se* and did not chose to allow counsel to file no-merit report proceedings; the court only explained to Smith the risks of proceeding alone without representation of counsel and that if Smith changed his mind the State Public Defender would not appoint new counsel but would appoint same counsel back onto the case. (Exhibit-2 at 1-4.) ***Id.*** Since Smith was not adequately and clearly informed of

the *true* consequences of his electing one of the other two choices instead of the one that would allow counsel to commence no-merit report proceedings, his choice is revocable, leaving this court no other option but to reach merits of issues presented in Knight petition.

2. Counsel was deficient for concluding issues presented in knight petition frivolous and failing to raise them on appeal or in direct appeal motion.

We must pay much attention to ***State v. Van Hout v. Endicott,*** 2006 WI App 196, ¶14, 296 Wis.2d 580, 724 N.W.2d 724 N.W.2d 62, which argues that "if counsel's . . . performance deprived [defendant] of a direct appeal, prejudice is presumed," and ***Smith v. Robbins***, 528 U.S. 259, 285 (2000) which argues that if there is at least one meritorious issue, and counsel failed to argue it, counsel then is ineffective. Smith issues are—and were—meritorious and counsel bogusly deemed them unwarranted for appeal, he was ineffective and prejudiced Smith. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); *see also* ***State ex rel. Flores v. State***, 138 Wis.2d 587, 620, 516 N.W.2d 362 (1994); ***Evitts v. Lucey***, 469 U.S. 387 (1985) (A defendant has right to *effective* assistance of counsel on his or her first appeal). (We know without a doubt that the issues presented were not frivolous and were worthy of appeal because upon filing a federal §2254 habeas petition to the district court, those same issues that were presented in knight petition and to appellate counsel by Smith passed the district court's Rule 4 screening, which is a determination on whether issues presented in federal habeas application were worthy of being presented to the court for review. The district court did not reach the merit of the claims because it ruled that Smith did not give state court a *full and fair opportunity* to recognize constitutional claims and address them. An issue is legally frivolous when it lacks arguable basis in law or fact. *Cf.* and *see* ***Denton v. Hernandez***, 504 U.S. 25, 31 (1992); ***Neitzke v. Willians***, 490 U.S. 319, 328 (1989). Smith's issues were and are arguable in law and fact.

It really does not matter if Smith misquoted ***Van Hout***, "we must decide . . . question on what counsel's reason[s] for his decision [not to pursue Smith's meritorious issues] actually were, not on the basis of what reason he could had for . . . decision[]. Thus, just as we may not second-guess a lawyers reasonable tactical or strategic decisions, we may not deem unreasonable acts to have been 'the result of reasonable professional judgment,' grounding

them in considerations that were not, in fact, the lawyer's reasons for actin or failing to act." *Cf.* and *see* ***Moore v. Czeniak***, 574 F.3d 1092 (9th Cir. 2009) (Prejudice [is] found in that "[t]he probability that [the petitioner] would not have pled . . . had his counsel filed motion" is sufficient to undermine confidence in outcome as "the state's case would have been weaker.") If Smith's counsel did not know, he *should have known* from his investigation of the issues that the issues were meritorious and therefore arguable on an appeal or in a direct appeal motion. *Cf.* ***State v. Cummings***, 199 Wis.2d 722, 748 n.10, 546 N.W.2d 406, 416 (1996) (an attorney's failure to pursue merit*less* motion does not constitute deficient performance); *see also* ***State v. Waites***, 158 Wis.2d 376, 392-93, 462 N.W.2d 206, 213 (1990) cited by ***State ex rel. Rothering v. McCauhtry***, 255 Wis.2d 675, 678 (Ct. App. 1946).

3. Court of Appeals must assess the merits of Smith's Knight Petition because sufficient facts are show that would entitle him to relief from his liberty being illegally restrained.

Since "a [habeas] knight petition is correct procedure, a hearing is required if petitioner alleges sufficient facts which, if true, show [he or she] is entitled to relief." This analysis is consistent with the Wisconsin Supreme Court jurisprudence. ***State v. Balliette***, 336 Wis.2d 258, §18. The trifurcated process for meritorious knight petition are: (1) it is first submitted to court of appeals, (2) then referred to circuit court for an evidentiary hearing, and (3) then returned to the court of appeals for a decision based upon the factual findings of the circuit cout. ***State ex rel. Panama v. Hepp***, 2008 WI 146, P22, 314 Wis.2d 112, 124, 758 N.W.2d 806, 812. *See* §752.39, Wis.Stat. This court should have exercised that process so that the circuit court could have established the findings of fact and conclusion of law.

According to the United States Supreme Court, "the function of the [petition for] writ [of habeas corpus], and always has been,

> to provide a prompt and efficious remedy for whatever society deems intolerable restraints. Its root principle is that in a civilized society, government *must* be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of the law, the individual is entitled to his immediate

release.

Fay v. Noia, 372 U.S. 391, 401-02, 83 S.Ct. 822, 838-29 (citations omitted) (1963) cited by ***Gilroy v. Ferroa***, 534 F.Supp. 321, 324 (W.D.N.Y 1992).

Smith argues that this court must decide claims presented in the knight petition on their merits because had not it been for appellate counsel failure to present those meritorious claims on direct appeal motion, then the claims would have been properly and adequately presented to the circuit court—and to this court upon appeal. *Cf.* ***United States v. Barefoot***, 6 Fed. Appx. 351, 355 (7th Cir. 2001). Smith has shown cause and prejudice in the knight petition that allows this court to reach the meritorious issues presented therein. *See* ***United States v. Frady***, 456 U.S. 152 (1982). If this court fails to reopen this case and reach the colorable and meritorious claims Smith presented the knight petition that are restraining him from his liberty, not to add the fact that he is *actually innocent* of the criminal charge in which he was erroneously convicted of, a *miscarriage of justice* will (continue to) occur. ***Conner v. McBride***, 375 F.3d 643, 648 (7th Cir. 2004); ***Sawyer v. Whitley***, 505 U.S. 333, 339 (1991); ***Coleman v. Thompson***, 501 U.S> 722, 750 (1991); ***McCleskey v. Zant***, 499 U.S. 467, 493-95 (1991).

Finally, Smith argues that because this court have original jurisdiction of the knight petition, it must decide issues on their merits. Smith's claims are not barred. *Cf.* ***State ex rel. Kyles v. Pollard***, 2014 WI 38, P27 n.11, 354 Wis.2d 626, 638 n.11, 847 N.W.2d 805.

CONCLUSION

This court August 24, 2016 Opinion and Order denying Smith knight petition *ex parte* is void or *null and void* and must be set aside; if Smith continues to be restrained of his liberty when he have shown sufficient facts that entitles him to relief, as he continues to maintain his *actual innocence*, a manifestation of injustice will (continue to) occur.

Dated this 09th day of September, 2016.

Respectfully submitted,

Tyrone Davis Smith Pro Se

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2015AP1092-W

TYRONE DAVIS SMITH,

Defendant-Appellant.

PUBLIC DEFENDER REPORT

Appellant Tyrone Davis Smith, *pro se*, moved this court for appointment of counsel in pursuing his petition for writ of habeas corpus in this case. On August 5, 2015, this court held this matter in abeyance while ordering the State Public Defender to advise the court whether Mr. Smith is entitled to or eligible for representation by the SPD for purposes of pursuing his writ petition. For the reasons stated below, the State Public Defender advises Mr. Smith and the court of appeals that it will not appoint counsel to represent him in this appeal.

1. Mr. Smith is appealing his conviction in Milwaukee County Case No. 2006CF6287. Electronic court records indicate that in March 2007, a jury convicted Mr. Smith of one count of first-degree sexual assault

of a child, and in May 2007, the circuit court imposed a prison term of 10 years confinement and 5 years supervision, consecutive to any other sentence. Trial counsel filed a notice of intent to pursue postconviction relief on Mr. Smith's behalf, and the SPD appointed Attorney Thomas Erickson as postconviction/appellate counsel. In November 2007, Attorney Erickson filed a motion to withdraw in the circuit court at Mr. Smith's request, indicating that he had found no arguable issues for appeal and had offered to file a no-merit report, but that Mr. Smith had declined and requested to proceed *pro se*. It appears that the circuit court issued an order to Mr. Smith on December 13, 2007, requiring his response to the motion to withdraw. Mr. Smith filed his response on December 27, 2007. In addition, Mr. Smith also filed, on December 18, 2007, his own motion asserting his constitutional right to represent himself, detailing his educational background, asserting that he was competent to represent himself, and specifically requesting that the court allow Attorney Erickson to withdraw because Mr. Smith disagreed with counsel over the merits of his case and wished to proceed *pro se*. On January 3, 2008, the circuit court entered an order permitting Attorney Erickson to withdraw and allowed Mr. Smith to proceed *pro se*. Mr. Smith subsequently filed a *pro se* postconviction motion that raised numerous issues, and a motion to reconsider, which the circuit court denied, and *pro se* briefs on appeal. (2008AP814-CR). On March 10, 2009, this court affirmed the judgment of conviction, and the supreme court denied review on July 15, 2009.

2. According to Mr. Smith's pending petition for writ of habeas corpus, he has pursued federal habeas relief and a petition for writ of certiorari in the United States Supreme Court, which were both denied.

3. Mr. Smith does not have a constitutional right to appointment of counsel for further appeal at this juncture. Thus, the question is whether the State Public Defender will make a discretionary appointment of counsel pursuant to its authority under Wis. Stat. § 977.05(4)(j). Such appointments are rarely made due to a lack of resources. In general, the State Public Defender makes a discretionary appointment of counsel only when convinced the issue presented: (a) has a reasonable chance of success; (b) has statewide importance; (c) is significant to the development of the law; (d) will not drain agency resources away from its principal mission of providing constitutionally mandated counsel on direct appeal; (e) and is so complex that representation by an attorney is necessary. See e.g. *State ex rel. Payton v. Kolb*, 135 Wis. 2d 202, 400 N.W.2d 285 (Ct. App. 1986).

4. The State Public Defender applies the above criteria to the information that it receives from the court and the moving party. In this case, the State Public Defender received from the court a copy of Mr. Smith's petition for writ of habeas corpus and supplemental petition, along with his motion for appointment of counsel. In essence, Mr. Smith asserts that he was "abandoned" by his appointed appellate counsel because counsel moved to withdraw from his appeal and because counsel determined that his case had no arguable merit for appeal. The record and Mr. Smith's own petition, however, reflect that Mr. Smith chose to forego the no-merit process under Wis. Stat. §809.32 in favor of proceeding *pro se* with a merits appeal. And, it appears that the circuit court found that Mr. Smith's response to the court's order demonstrated his knowing and intelligent waiver of his right to counsel on direct appeal. Mr. Smith's pending habeas petition does not provide any basis to conclude otherwise.

5. Moreover, it appears that the substance of the claims presented in Mr. Smith's habeas petition are similar or identical to issues previously raised in his direct appeal, including sufficiency of the evidence, inconsistencies in the testimony and credibility of the witnesses, and whether the jury should have been instructed on a lesser-included offense. In addition, Mr. Smith's supplemental petition asserting ineffective assistance of trial counsel for failure to investigate a potential witness, is unsupported and conclusory.

6. Consequently, on the basis of this review and the current posture of this case, the State Public Defender concludes that Mr. Smith's case fails to meet the standards for a discretionary appointment of counsel. Consequently, the State Public Defender will not appoint counsel for Mr. Smith in this appeal.

Dated this 17th day of August, 2015.

Respectfully submitted,

Andrea Taylor Cornwall

ANDREA TAYLOR CORNWALL
Regional Attorney Manager
State Bar No. 1001431

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cc: Mr. Tyrone Davis Smith
Mr. Greg Weber, Asst. Attorney General
Ms. Karen Loebel, Asst. District Attorney
Clerk of Circuit Court

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CLERK OF CIRCUIT COURT
CRIMINAL DIVISION

Milwaukee County

JOHN BARRETT • Clerk of Circuit Court/Court Services Director

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In re: Case Number 2006CF006287
STATE OF WISCONSIN, Plaintiff -vs- TYRONE DAVIS SMITH, Defendant

APPEAL NUMBER 2008AP000814CR

Notice is hereby given that the appeal record for the above entitled case has been assembled and is available for inspection. A list of the papers constituting the record is attached.

All examinations of the record and additions thereto, must be completed before the mailing date. The record will be forwarded to the Clerk of the Court of Appeals on MAY 8, 2008 per 809.15 (2) and (4).

Sincerely,

JOHN BARRETT
Clerk of Circuit Court/
Court Services Director

By: Tamara Franken
Tamara Franken

Attachment

THE RECORD ON APPEAL NO. 2010AP002875CR CONSISTS OF THE FOLLOWING:

1	- 5	Judgment Roll for Appeal No. 2008AP000814CR
2	- 2	Criminal Complaint
3	- 1	No Contact Order
4	- 1	Bail/Bond dated November 25, 2006
5	- 1	Order Appointing Counsel dated November 27, 2006
6	- 1	Information
7	- 1	Defendant's Motion for Discovery and Inspection
8	- 10	Defendant's Demand for Discovery and Inspection and Motions in Limine
9	- 2	Defendant's Proposed Jury Instructions
10	- 2	State's Proposed Jury Instructions
11	- 1	State's Witness List
12	- 1	Jury Instructions
13	- 2	Exhibit List with photo exhibits
14	- 1	Verdict – Count 1 GUILTY
15	- 1	Order for Pre Sentence Investigation Report dated March 22, 2007
16	- 1	Gold Envelope Containing Pre Sentence Investigation Report
17	- 6	Letter from Defendant dated May 4, 2007 to Attorney Hart/CC Judge Wagner
18	- 1	Notice of Right to Seek Post Conviction Report
19	- 1	Written Explanation of Determinate Sentence
20	- 1	Ineligible Voting Notice and Acknowledgment
21	- 1	Judgment of Conviction dated May 16, 2007
22	- 2	Notice of Intent to Pursue Post Conviction Relief
23	- 1	Order for Release of Pre Sentence Report dated July 25, 2007
24	- 2	Court of Appeals Order dated November 19, 2007 motion to withdraw as counsel is denied
25	- 2	Motion to Withdraw as Counsel
26	- 4	Public Defender Report
27	- 4	Order dated December 14, 2007
28	- 4	Motion to Request Withdrawal of Appellate/Post Conviction Counsel and to Proceed Pro Se
29	- 2	Letter dated December 18, 2007 from Defendant to Judge Wagner
30	- 1	Decision and Order Granting Motion to Withdraw as Counsel
31	- 1	Court of Appeals Order dated January 16, 2008 deadline for defendant to file a post conviction motion or notice of appeal is extended to 3/18/08
32	- 19	Post Conviction Motion and Motion for Evidentiary Hearing
33	- 4	Decision and Order Denying Motion for Post Conviction Relief
34	- 8	Reconsideration Motion for Denial of Motion for Post Conviction Relief
35	- 2	Decision and Order Denying Motion for Reconsideration March 20, 2008
36	- 1	Notice of Appeal Motion
37	- 1	Statement on Transcript

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38 - 5 Transcript of Reporters notes dated November 25, 2006 – INITIAL APPEARANCE
39 - 4 Transcript of Reporters notes dated December 4, 2006 – ADJOURNED HEARING
40 - 18 Transcript of Reporters notes dated December 5, 2006 – PRELIMINARY HEARING
41 - 3 Transcript of Reporters notes dated December 13, 2006 – SCHEDULING CONFERENCE
42 - 5 Transcript of Reporters notes dated March 21, 2007 – FURTHER PROCEEDINGS
43 - 113 Transcript of Reporters notes dated March 21, 2007 PM – JURY TRIAL
44 - 35 Transcript of Reporters notes dated March 22, 2007 – JURY TRIAL
45 - 9 Transcript of Reporters notes dated March 22, 2007 PM – VERDICT
46 - 17 Transcript of Reporters notes dated May 15, 2007 – SENTENCING
~~47 - 3 Certificate of the Clerk~~
47 - 40 Transcript of the Proceedings Taken at the Secure Detention Facility on January 25, 2007
48 - 3 Certificate of the Clerk
49 - 12 Court of Appeals Decision dated 3-10-2009
50 - 1 Supreme Court order denying petition for review dated 7-15-2009
51 - 2 Remittitur
52 - 7 Judgment Roll for Appeal No. 2009AP002211CR
53 - 3 Motion for Extension of Time to File Brief dated 8-15-2008
54 - 2 Letter to Governor Doyle from Defendant dated 8-25-2008
55 - 1 Court of Appeals order dated 3-25-2009 denying motion for reconsideration
56 - 2 Motion for change of name/amendment to Judgment of Conviction dated 3-24-2009
57 - 1 Order for Briefing Schedule dated 4-28-2009
58 - 4 Affidavit of William Pollard dated 4-11-2009
59 - 5 State's Brief in Opposition to Defendant's Motion to Amend Judgment of Conviction to Reflect Use of "Spiritual Name" dated 5-18-2009
60 - 4 Defendant's Response Brief Opposing State's Brief in Opposition to Defendant's Motion to Amend Judgment of Conviction to Reflect Use of "Spiritual Name" 5-28-2009
61 - 2 Decision and Order Denying Motion to Amend Judgment of Conviction dated 8-6-2009
62 - 1 Letter to Judge Conen from Defendant date stamped 8-11-2009
63 - 1 Notice of Appeal
64 - 1 Statement on Transcript
65 - 3 Certificate of the Clerk
66 - 2 Court of Appeals order dated July 27, 2010
67 - 2 Remittitur dated September 2, 2010
68 - 8 Judgment Roll
69 - 10 Request for Pre Sentence Report and any other Confidential Material dated November 5, 2010

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70 - 1 Decision and Order Denying Request for Pre Sentence Report dated November 10, 2010
71 - 1 Notice of Appeal
72 - 1 Statement on Transcript
73 - 4 Certificate of the Clerk

CIRCUIT COURT

STATE OF WISCONSIN CRIMINAL DIVISION MILWAUKEE COUNTY

STATE OF WISCONSIN Plaintiff

vs.

Smith, Tyrone Davis
1940 N. 26th St. Lower
Milwaukee, Wisconsin 53205
(D.O.B. : September 27, 1972)

CRIMINAL COMPLAINT

Complaining Witness:

PO Michael Hansen

DA Case Number: 06XF8390

Defendant(s) Circuit Court Case Number:

THE ABOVE NAMED COMPLAINING WITNESS BEING DULY SWORN SAYS THAT THE ABOVE NAMED DEFENDANT(S) IN THE COUNTY OF MILWAUKEE, STATE OF WISCONSIN.

COUNT 01: SEXUAL ASSAULT OF A CHILD, FIRST DEGREE

On ~~October 1,~~ 2006, at 1940 N. 26th St. City of Milwaukee, did have sexual contact with Sasha T., born May 3, 1995, a person who had not attained the age of 13 years, contrary to Wisconsin Statutes Section 948.02(1).

AS TO COUNT 01:

Upon conviction of this charge, a Class B Felony, the maximum possible penalty is imprisonment for not more than 60 years.

Complainant states that he is a City of Milwaukee Police Officer and bases this complaint upon information and belief and upon his reading of official City of Milwaukee Police Department reports prepared by fellow police officers, which reports are of the kind that he has used in the past and found to be truthful and reliable, and which reports are of the kind he knows are prepared in the regular course of police business. Based upon his review of said reports, your complainant states as follows:

Detective Phil Simmert was informed by Sasha T., a juvenile citizen whose date of birth is May 3, 1995, that on ~~October 1,~~ 2006 she was at her father's house located at 1940 N. 26th St., City and County of Milwaukee, when she awoke to the defendant being on top of her and rubbing his penis against her clothed buttocks. Sasha stated the defendant had both hands on the couch at this time and that she jumped off the couch and started for her dad's room. Sasha stated the defendant told her not to tell her dad but she went in and woke her dad up and told him what the defendant had done.

Detective James Olson was informed by Hal S., an adult citizen and father of Sasha, that when he went to bed, Sasha was on the couch watching television. Hal stated that shortly after midnight Sasha woke him up and told him the defendant tried to rape her. Hal stated he went into the living room where he could see the defendant, his nephew, on his knees facing the couch where Sasha had been sleeping and that when the defendant turned around he could

see his pants were unzipped.

****End of Complaint****

Subscribed and sworn to before me and approved for filing on this 24 **day of** November, **2006**

Patti L Wabitsch

DEPUTY / ASSISTANT DISTRICT ATTORNEY 12:00 noon

Complaining Witness

Patti L. Wabitsch\PLW

-- FELONY COMPLAINT --

J:\REVIEW\06XF\08000 - 08499\06XF8390\2006-11-24 COMP COMPLAINT ~SMITH,TYRONE~~06XF8390.DOC
TYPIST: PLW

STATE OF WISCONSIN CIRCUIT COURT BRANCH 38 MILWAUKEE COUNTY *For Official Use Only*

State of Wisconsin vs. Tyrone Davis Smith 297130

Date of Birth: 09-27-1972

Judgment of Conviction

Sentence to Wisconsin State Prisons and Extended Supervision

Case No.: 2006CF006287

DCI (Manitowoc Co.)

The defendant was found guilty of the following crime(s):

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
1	1ST-DEGREE SEXUAL ASSAULT OF CHILD	948.02(1)	Not Guilty	Felony B	On or abount 11-23-06	Jury	03-22-2007

IT IS ADJUDGED that the defendant is guilty as convicted and sentenced as follows:

05-15-2007 : On count 1 defendant is confined to prison for 10 years followed by a period of 5 years extended supervision for a total length of sentence of 15 years.

Concurrent with/Consecutive to/Comments: Consecutive to any other sentence. Imprisonment of 15 years in WSP consecutive to any other sentence with credit for 0 days time served. Confinement of 10 years and extended supervision of 5 years. Conditions: May not carry or possess any firearms/body armor. Voting privllege are suspended during the length of this sentence. Not eligible for the challenge incarceration program or the earned release program.

Ct.	Sent. Date	Sentence	Length	Concurrent with/Consecutive to/Comments	Agency
1	05-15-2007	Restitution		Set at $0.	
1	05-15-2007	Costs		Pay all costs, assessments and v/w surcharges Provide DNA and pay costs if not already complied with.	

Conditions of Sentence or Probation

Obligations: (Total amounts only)

Fine	Court Costs	Attorney Fees	Restitution	Other	Mandatory Victim/Wit. Surcharge	5% Rest. Surcharge	DNA Anal. Surcharge
	20.00			8.00	70.00		250.00

IT IS ADJUDGED that **0** days sentence credit are due pursuant to § 973.155, Wisconsin Statutes

IT IS ORDERED that the Sheriff execute this sentence.

Jeffrey A. Wagner-38, Judge
Patti L. Wabitsch, District Attorney
Richard H Hart, Defense Attorney

BY THE COURT:

Court Official

May 16, 2007
Date

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CR-212(CCAP) 1/00 Judgment of Conviction

§§ 939.50, 939.51, 972.13, Chapter 973, Wisconsin Statutes

This form may not be modified. It may be supplemented with additional material.

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State v. Smith, 2009 WI App 56 (Copy w/ Cite) Pages: 12

2009 WI App 56; 317 Wis. 2d 730;
*768 N.W.2d 62; 2009 Wisc. App. LEXIS 174, **

STATE OF WISCONSIN, PLAINTIFF-RESPONDENT, v. TYRONE DAVIS SMITH, DEFENDANT-APPELLANT.

Appeal No. 2008AP814-CR

COURT OF APPEALS OF WISCONSIN, DISTRICT ONE

2009 WI App 56; 317 Wis. 2d 730; 768 N.W.2d 62; 2009 Wisc. App. LEXIS 174

March 10, 2009, Decided
March 10, 2009, Filed

NOTICE: PURSUANT TO RULE 809.23 OF APPELLATE PROCEDURE, AN UNPUBLISHED OPINION IS OF NO PRECEDENTIAL VALUE AND FOR THIS REASON MAY NOT BE CITED IN ANY COURT OF THIS STATE AS PRECEDENT OR AUTHORITY EXCEPT TO SUPPORT A CLAIM OF RES JUDICATA, COLLATERAL ESTOPPEL OR LAW OF THE CASE.

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SUBSEQUENT HISTORY: Review denied by **State v. Smith,** 2009 WI 98, 2009 Wisc. LEXIS 601 (2009)

PRIOR HISTORY: [*1]
APPEAL from a judgment and orders of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. Cir. Ct. No. 2006CF6287.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant appealed a judgment and orders of the circuit court for Milwaukee County (Wisconsin) convicting him of sexual contact with a person who had not attained the age of 13 years under Wis. Stat. § 948.02(1) and denying his motions for postconviction relief.

OVERVIEW: On appeal, the court held that the criminal complaint and information were not defective due to the fact that they did not allege a date certain for the crime, but only stated that defendant sexually assaulted the victim "on or about" November 23, 2006, because the date of the offense was not a material element. The court rejected defendant's challenge to his conviction on the ground that the evidence was inconsistent, uncorroborated, and unsubstantiated because the jury had an opportunity to consider variations in the victim's narrative and was free to consider whether the lack of a recorded interview raised concerns about the victim's accusations. In addition, DNA evidence was not required for a conviction and the court found that the testimony of the victim and her father permitted the jury to find that the State had met its burden. The trial court did not err by failing to instruct the jury on the lesser included offense of second-degree sexual assault under Wis. Stat. § 948.02(2) (2003-04) because had the jury accepted defendant's argument that the evidence was insufficient to prove sexual contact, it could not have found guilt as to either the greater or lesser offense.

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OUTCOME: The judgment and orders were affirmed.

CORE TERMS: sexual assault, sexual contact, guilty verdict, Wis Act, interview, reasonable doubt, lesser, accusation, detective, juror, guilt, citation omitted, lesser offense, postconviction, ineffective, attained, trial counsel, interviewed, assault, felony, treatment center, years old, charging documents, closing argument, greater offense, lesser-included, investigative, deliberations, discrepancies, credibility

LEXISNEXIS® HEADNOTES Hide

Criminal Law & Procedure > Accusatory Instruments > Indictments > Contents > Requirements

HN1 Where time of commission of a crime is not a material element of the offense charged, it need not be alleged with precision. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > General Overview

HN2 Time is not of the essence in sexual assault cases. More Like This Headnote

Criminal Law & Procedure > Accusatory Instruments > Indictments > Contents > Requirements

Criminal Law & Procedure > Witnesses > Credibility

HN3 When the victim is a child, application of flexible notice requirements is particularly appropriate. The vagaries of a child's memory more properly go to the credibility of the witness and the weight of the testimony, rather than to the legality of the prosecution in the first instance. More Like This Headnote

Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence > Sufficiency of Evidence

HN4 An appellate court reviews the sufficiency of evidence using a strict standard. It may not reverse a conviction on the basis of insufficient evidence unless the evidence, viewed most favorably to the State and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. More Like This Headnote

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Credibility of Witnesses

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Factual Issues

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Weight of the Evidence

HN5 The jury, and an appellate court, resolves conflicts in the testimony, weighs the evidence, and draws reasonable inferences from basic facts to ultimate facts. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > General Overview

Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence > Sufficiency of Evidence

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Evidence > Scientific Evidence > DNA

HN6 DNA evidence is not required to sustain a sexual assault conviction. In sexual assault cases, there is seldom any physical evidence implicating the defendant. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Abuse of Children > Elements

HN7 See Wis. Stat. § 948.02(2) (2003-04).

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Lesser Included Offenses > Elements

HN8 A lesser included offense means that all the statutory elements of the lesser offense can be demonstrated without proof of any fact or element in addition to those that must be proved for the greater offense. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Lesser Included Offenses > Sex Crimes

HN9 Second-degree sexual assault of a child is a lesser included offense of first-degree sexual assault of a child. More Like This Headnote

Criminal Law & Procedure > Jury Instructions > Particular Instructions > Lesser Included Offenses

HN10 If a reasonable view of the evidence can support a guilty verdict beyond a reasonable doubt for both the greater and the lesser included offense, then no lesser included instruction may be given. If, however, a reasonable view of the evidence supports a guilty verdict on the lesser-included offense but casts doubt on an element of the greater offense, both verdicts should be submitted. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Abuse of Children > Elements

HN11 The victim of first-degree sexual assault must be under thirteen years old for the State to secure a conviction under Wis. Stat. § 948.02(1)(e) (2003-04) (as affected by 2005 Wis. Act 430). The victim of a second-degree sexual assault must be under sixteen years old for the State to secure a conviction under Wis. Stat. § 948.02(2) (2003-04). Both offenses include a second element, which can be satisfied by proof of sexual contact. Sections 948.02(1)(e) (2003-04) (as affected by 2005 Wis. Act 430) & 948.02(2) (2003-04). Therefore, if the State proves both that the defendant had sexual contact with a child and that the child was under thirteen, then the State has proved all the elements for both crimes. More Like This Headnote

Criminal Law & Procedure > Trials > Closing Arguments > General Overview

HN12 The prosecutor may tell the jury how he or she views the evidence. More Like This Headnote

Evidence > Competency > Jurors > Deliberations

HN13 Pursuant to Wis. Stat. § 906.06(2), jurors may not testify regarding their mental processes in deliberations. More Like This Headnote

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Criminal Law & Procedure > Juries & Jurors > Jury Deliberations > Ability to Follow Instructions

HN14 An appellate court presumes that jurors follow a circuit court's instructions. More Like This Headnote

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

HN15 To establish ineffective assistance of counsel, a defendant must show both deficient performance by counsel and prejudice as a result of the deficiency. To prove deficient performance, the defendant must show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. To prove prejudice, the defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. The defendant must satisfy both the deficiency and the prejudice components of the test to be afforded relief. An appellate court may choose to examine either component first. If the defendant's showing is inadequate on one, the appellate court need not address the other. More Like This Headnote

Criminal Law & Procedure > Counsel > Effective Assistance > General Overview

HN16 A defendant is not automatically entitled to a hearing on claims of ineffective assistance of counsel. Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, an appellate court determines whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that the appellate court reviews de novo. If the motion raises such facts, the circuit court must hold an evidentiary hearing. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing. More Like This Headnote

Criminal Law & Procedure > Jury Instructions > Particular Instructions > Use of Particular Evidence

HN17 The falsus in uno instruction is not appropriate when discrepancies in the testimony are most likely attributed to defects of memory or mistake. Rather, the instruction may be given only if the circuit court finds something in the testimony of a witness as would reasonably tend to show that the witness willfully swore falsely. The circuit court has the opportunity to observe the witnesses, and its determination as to the propriety of giving the instruction is therefore entitled to much weight. More Like This Headnote

Criminal Law & Procedure > Appeals > Standards of Review > Deferential Review > Credibility & Demeanor Determinations

HN18 An appellate court defers to a circuit court's credibility determinations unless those determinations are based upon caprice, an erroneous exercise of discretion, or an error of law. More Like This Headnote

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

OPINION

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P1 PER CURIAM. Tyrone Davis Smith, *pro se*, appeals from a judgment of conviction and from orders denying his postconviction motion and motion to reconsider. He raises numerous issues, none of which provides a basis for relief. We affirm.

BACKGROUND

P2 The State charged Smith with first-degree sexual assault of a child. The amended criminal complaint alleged that on or about November 23, 2006, Smith had sexual contact with Sasha T., a person who had not attained the age of thirteen years, contrary to WIS. STAT. § 948.02(1). [1] Smith denied the allegations, and the matter was tried to a jury.

FOOTNOTES

1 The complaint and information reference WIS. STAT. § 948.02(1), found in the 2003-04 version of the statutes. That statute provided: "[w]hoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of a Class B felony." Effective June 6, 2006, however, § 948.02 was amended. *See* 2005 Wis. Act 430, §§ 3-4; 2005 Wis. Act 437, §§ 1-2, 7. Because the offense in this case occurred **[*2]** in November 2006, it appears that the information and complaint properly should have contained references to WIS. STAT. § 948.02(1)(e) (2003-04) (as affected by 2005 Wis. Act 430). Nonetheless, the State's failure to cite the amended statutory subsection did not prejudice Smith.

The version of WIS. STAT. § 948.02(1)(e) affected by 2005 Wis. Act 430, like the version affected by 2007 Wis. Act 80 that is currently in effect, provides: "[w]hoever has sexual contact with a person who has not attained the age of 13 years is guilty of a Class B felony." Under both the prior and the amended versions of the statute, sexual contact with a person under thirteen years of age is a Class B felony carrying a maximum sentence of sixty years. Further, the prior and amended versions require proof of the same two elements to secure a conviction: (1) the accused had sexual contact with the victim; and (2) the victim was under the age of thirteen. *See* WIS JI--CRIMINAL 2102 (2002) and WIS JI--CRIMINAL 2102E (2008) (stating the elements of an offense under § 948.02(1)(e) (as affected by 2007 Wis. Act 80)). Thus, citation to the predecessor statute in the complaint and information was nothing more than a **[*3]** harmless technical error. *See* ***State v. Wachsmuth***, 166 Wis. 2d 1014, 1026-27, 480 N.W.2d 842 (Ct. App. 1992) (citation to successor statute mere technical error that did not prejudice defendant where prior and successor statutes contain identical elements); *see also* WIS. STAT. § 971.26 (2005-06) (no complaint or information is invalid by reason of a defect or imperfection that does not prejudice the defendant). Moreover, and perhaps most significantly for purposes of this appeal, Smith has never objected to the citations in the charging documents. Accordingly, any claim of error in this regard is waived. *See* WIS. STAT. § 971.31(2) (2005-06) (defects in charging documents are deemed waived unless raised before trial). All further references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

P3 At trial, the State presented three witnesses. Sasha T. testified that her date of birth is May 3, 1995. She told the jury that she awakened during the night of November 23, 2006, and realized that Smith was lying on top of her rubbing his penis against her clothed buttocks. Sasha T. stated that Smith was "going up and down," and she described his penis as feeling like "a **[*4]** hard banana." Sasha T. told the jury that she immediately woke her father, Hal S., and reported that Smith had tried to rape her. Hal S. testified that Sasha T. woke him during the night of November 23, 2006, "screaming and crying," and that she accused Smith of attempted rape. Hal S. called the police after observing that Smith's pants were unzipped. Smith cross-examined both Sasha T. and Hal S. about their prior inconsistent statements regarding the incident. Additionally, Smith demonstrated some discrepancies between Sasha T.'s recollection

of events and Hal S.'s recollection.

P4 Milwaukee police detective Phillip Simmert testified that he was on duty on November 23, 2006, and he interviewed Sasha T. in his squad car as part of his investigation of her assault accusation. Detective Simmert acknowledged that child victims of sexual assault are sometimes interviewed at the Sexual Assault Treatment Center at Children's Hospital but he did not believe that he needed to use the treatment center to interview Sasha T. He explained that if a child is comfortable speaking with him, there is no reason to take the child to the treatment center or to arrange for a recorded interview with specially **[*5]** trained detectives. He testified that the Milwaukee police department does not have a policy or protocol dictating when a child should be interviewed at the treatment center.

P5 Smith elected not to testify, and the defense rested without presenting any witnesses. In its closing argument, the State asserted that Sasha T.'s accusation was credible, and the State pointed to testimony that it believed corroborated the accusation. Smith's closing argument highlighted the discrepancies and inconsistencies in the witnesses' testimony.

P6 The jury submitted two questions during its deliberations, one asking whether the charge could be "altered to a lesser degree" and a second asking if "misconduct" and "assault" are different. The parties and the court agreed to respond that "the only charge before you is the charge contained in the information. You must make your decision based upon the evidence and the law the court has given to you."

P7 The jury returned with a signed guilty verdict. In response to the circuit court's request for the "not guilty" verdict form, the foreperson explained that she had thrown it away. The court then polled the jury, and each juror confirmed that he or she had **[*6]** voted to find Smith guilty. The circuit court denied Smith's motion for judgment notwithstanding the verdict, and entered a judgment on the verdict. At sentencing, the circuit court imposed a fifteen-year term of imprisonment, bifurcated as ten years of initial confinement and five years of extended supervision.

P8 Smith moved for postconviction relief. The circuit court denied the motion without a hearing and then denied Smith's motion for reconsideration. This appeal followed.

DISCUSSION

P9 We first consider Smith's contention that the criminal complaint and information are defective because they do not allege a date certain for the crime. The charging documents allege that Smith sexually assaulted Sasha T. "on or about" November 23, 2006. According to the State, it could not allege a date certain because Sasha T. was asleep when the assault began and she does not know if Smith assaulted her before or after midnight.

P10 Smith asserts that "it is not proper or sufficient" to allege that an offense occurred "on or about" a stated date, and in support he cites ***Mau-zau-mau-ne-kah v. United States***, 1 Pin. 124, 130 (1841). The Wisconsin courts refined the rule stated in ***Mau-zau-mau-ne-kah*** **[*7]** in later decisions. HN1 "[W]here time of commission of a crime is not a material element of the offense charged, it need not be alleged with precision." ***State v. George***, 69 Wis. 2d 92, 96, 230 N.W.2d 253 (1975). The date of the offense is not a material element in the instant matter. HN2 "Time is not of the essence in sexual assault cases." ***State v. Fawcett***, 145 Wis. 2d 244, 250, 426 N.W.2d 91 (Ct. App. 1988).

P11 Smith asserts that uncertainty in the date alleged was prejudicial because "the dilemmas with the dates played to the credibility determination of the witnesses." In fact, HN3 when the victim is a child, application of flexible notice requirements is particularly appropriate. ***Id.*** at 254. "The vagaries of a child's memory more properly go to the credibility of the witness and the weight of the testimony, rather than to the legality of the prosecution in the first instance." ***Id.***

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P12 We next address Smith's challenge to the conviction on the grounds that the evidence is "inconsistent and uncorroborated or unsubstantiated." HN4 We review the sufficiency of evidence using a strict standard. We may not reverse a conviction on the basis of insufficient evidence "unless the evidence, viewed most favorably **[*8]** to the [S]tate and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

P13 Smith asserts that the victim's description of events changed over time. He emphasizes the different terminology the victim used to describe the assault before and after she was interviewed by Detective Simmert, and he suggests that the accusation is particularly suspect because Detective Simmert did not record his investigative interview with the victim. The jury, however, had an opportunity to consider variations in the victim's narrative. Moreover, on cross-examination, Smith developed the theory that Detective Simmert should have recorded the investigative interview, and the jury was free to consider whether lack of a recorded interview raised concerns about the victim's accusations. HN5 The jury, and not this court, resolves conflicts in the testimony, weighs the evidence, and draws reasonable inferences from basic facts to ultimate facts. ***Id.*** at 506.

P14 Smith further complains that the State failed to offer DNA evidence. HN6 Such evidence is not required **[*9]** to sustain a sexual assault conviction. *See* ***State v. Holt***, 128 Wis. 2d 110, 120, 382 N.W.2d 679 (Ct. App. 1985). In sexual assault cases, "there is seldom any physical evidence implicating the defendant." ***State v. Davis***, 2002 WI 75, P18, 254 Wis. 2d 1, 645 N.W.2d 913.

P15 The circuit court instructed the jury that it could not find Smith guilty unless the State proved beyond a reasonable doubt that: (1) Smith had sexual contact with Sasha T; and (2) Sasha T. had not attained the age of thirteen years. *See* WIS JI--CRIMINAL 2102 (2002). We are satisfied that the testimony of Sasha T. and Hal S. permitted the jury to find that the State had met its burden. Accordingly, we reject Smith's challenge to the sufficiency of the evidence. We also reject Smith's related claims that the circuit court acted improperly when it denied Smith's motions during trial to dismiss the case and to direct a verdict for the defense. *See* ***Bere v. State***, 76 Wis. 2d 514, 524, 251 N.W.2d 814 (1977) (both on appeal and on motion to dismiss for insufficient evidence, the issue is whether a trier of fact, acting reasonably, could make findings supporting guilt).

P16 We turn to Smith's contention that the jury should **[*10]** have been instructed on the lesser included offense of second-degree sexual assault as defined in WIS. STAT. § 948.02(2) (2003-04). That statute provides: HN7 "[w]hoever has sexual contact or sexual intercourse with a person who has not attained the age of 16 years is guilty of a Class C felony." ***Id.*** HN8 "A lesser included offense means that all the statutory elements of [the lesser] offense can be demonstrated without proof of any fact or element in addition to those that must be proved for the greater offense." ***State v. Moua***, 215 Wis. 2d 511, 519, 573 N.W.2d 202 (Ct. App. 1997). The State acknowledges that HN9 second-degree sexual assault of a child is a lesser included offense of first-degree sexual assault of a child. *See* ***id.*** at 520. The State asserts that an instruction regarding a lesser-included offense nonetheless was not proper here, and we agree.

P17 HN10 "If a reasonable view of the evidence can support a guilty verdict beyond a reasonable doubt for both the greater and the lesser included offense, then no lesser included instruction may be given." ***Id.*** at 517. If, however, a reasonable view of the evidence supports a guilty verdict on the lesser-included offense but casts doubt on an element **[*11]** of the greater offense, both verdicts should be submitted. ***Id.*** at 518.

P18 HN11 The victim of first-degree sexual assault must be under thirteen years old for the State to secure a conviction under WIS. STAT. § 948.02(1)(e) (2003-04) (as affected by 2005

Wis. Act 430). The victim of a second-degree sexual assault must be under sixteen years old for the State to secure a conviction under WIS. STAT. § 948.02(2) (2003-04). Both offenses include a second element, which can be satisfied by proof of sexual contact. *See* §§ 948.02(1)(e) (2003-04) (as affected by 2005 Wis. Act 430) & 948.02(2) (2003-04). Therefore, if the State proves both that the defendant had sexual contact with a child and that the child was under thirteen, then the State has proved all the elements for both crimes. *See* ***Moua***, 215 Wis. 2d at 519-20.

P19 In this case, the parties did not dispute that the victim was eleven years old at the time of the incident. This undisputed fact supports a guilty verdict on either the greater or the lesser offense. *See* ***id.*** at 520. The State presented evidence of sexual contact, which could have sustained a guilty verdict as to either the greater or the lesser offense. Smith argued that the evidence **[*12]** was insufficient to prove sexual contact. Had the jury accepted Smith's argument, the jury could not have found guilt as to either the greater or the lesser offense. Accordingly, there is no reasonable view of the evidence that casts doubt on an element of the greater offense while also supporting a guilty verdict on the lesser offense. Pursuant to ***Moua***, Smith was not entitled to an instruction on a lesser-included offense. [2]

FOOTNOTES

2 Smith also asserts that the circuit court "failed to instruct the jury that 'intentional' touching ... was required." In fact, the court did give such an instruction.

P20 Next, Smith alleges prosecutorial misconduct. He contends that the State made improper comments during closing argument by asserting that the evidence against Smith was credible and by highlighting testimony that corroborated the victim's accusations. Smith's contentions are wholly without merit. HN12 The prosecutor may tell the jury how he or she views the evidence. ***State v. Adams***, 221 Wis. 2d 1, 19, 584 N.W.2d 695 (Ct. App. 1998).

P21 Smith next contends that the jury "exhibit[ed] reasonable doubt" when it returned its guilty verdict. He primarily relies on a statement allegedly made by a juror during **[*13]** a postverdict interview describing the jurors' deliberative process. HN13 Pursuant to WIS. STAT. § 906.06(2), jurors may not testify regarding their mental processes in deliberations. Accordingly, the statement is not admissible and cannot be offered to impeach the verdict.

P22 Smith also points to the jury's inquiry during deliberations asking whether a lesser charge was available and to the foreperson's actions in discarding the "not guilty" verdict form. Smith asserts that these factors demonstrate that the jury had a reasonable doubt as to his guilt. We disagree.

P23 First, the jury was instructed that it could return a guilty verdict only if it was satisfied beyond a reasonable doubt of the defendant's guilt. *See* WIS JI--CRIMINAL 140. HN14 We presume that jurors follow the circuit court's instructions. ***Adams***, 221 Wis. 2d at 12. Second, the circuit court polled the jury, and the jurors' individual confirmations of the guilty verdict demonstrate that the verdict was both unanimous and freely given. *See* ***State v. Kircher***, 189 Wis. 2d 392, 399-400, 525 N.W.2d 788 (Ct. App. 1994). We are satisfied that the verdict in this case reflects a unanimous finding of guilt beyond a reasonable doubt.

P24 **[*14]** We turn to Smith's contention that his trial attorney was ineffective and his related claim that the circuit court erred by failing to hold a hearing on this issue. HN15 To establish ineffective assistance of counsel, a defendant must show both deficient performance by counsel and prejudice as a result of the deficiency. ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To prove deficient performance, Smith must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *See* ***State v. Pote***, 2003 WI App 31, P15, 260 Wis. 2d

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426, 659 N.W.2d 82 (citation omitted). To prove prejudice, Smith must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *See* ***Strickland***, 466 U.S. at 694. Smith must satisfy both the deficiency and the prejudice components of the test to be afforded relief. *See* ***State v. Allen***, 2004 WI 106, P26, 274 Wis. 2d 568, 682 N.W.2d 433. We may choose to examine either component first. ***Pote***, 2003 WI App 31, 260 Wis. 2d 426, P14, 659 N.W.2d 82. If Smith's **[*15]** showing is inadequate on one, we need not address the other. *See* ***id***.

P25 HN16 A defendant is not automatically entitled to a hearing on claims of ineffective assistance of counsel.

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. If the motion raises such facts, the circuit court must hold an evidentiary hearing. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing.

Allen, 2004 WI 106, 274 Wis. 2d 568, P9, 682 N.W.2d 433 (citations omitted).

P26 Smith's claim that trial counsel was ineffective by failing to request an instruction on second-degree sexual assault lacks merit. We have already concluded that Smith was not entitled to a jury instruction on second-degree sexual assault. Accordingly, trial **[*16]** counsel did not err by failing to request such an instruction.

P27 Smith next asserts that the State's witnesses testified inconsistently and therefore trial counsel should have asked the circuit court to instruct the jury as to WIS JI--CRIMINAL 305, *Falsus In Uno*. This instruction provides: "[i]f you become satisfied from the evidence that any witness has willfully testified falsely as to any material fact, you may disregard all of the testimony of the witness which is not supported by other credible evidence in the case." ***Id***.

P28 HN17 The *falsus in uno* instruction is not appropriate when discrepancies in the testimony are "'most likely attributed to defects of memory or mistake.'" ***State v. Robinson***, 145 Wis. 2d 273, 281, 426 N.W.2d 606 (Ct. App. 1988) (citation omitted). Rather, the instruction may be given only if the circuit court finds something in the testimony of a witness "'as would reasonably tend to show that the witness willfully swore falsely.'" ***Id***. at 282 (citation omitted). The circuit court has the opportunity to observe the witnesses, and its determination as to the propriety of giving the instruction is therefore entitled to "much weight." ***Id***.

P29 In its order denying Smith **[*17]** postconviction relief, the circuit court determined that it would not have entertained a request by trial counsel for the *falsus in uno* instruction because nothing persuaded the court that any witness willfully gave false testimony. HN18 We defer to the circuit court's credibility determinations unless those determinations are "'based upon caprice, an [erroneous exercise] of discretion, or an error of law.'" ***Jacobson v. American Tool Cos.***, 222 Wis. 2d 384, 390, 588 N.W.2d 67 (Ct. App. 1998) (citation omitted). The record does not suggest that the circuit court's determinations here were improper. In light of the circuit court's assessment of the testimony, Smith was not prejudiced by his counsel's failure to request WIS JI--CRIMINAL 305.

P30 Smith last asserts that his counsel performed deficiently by failing to retain an expert to testify regarding the suggestive questioning of children. His claim is conclusory and therefore insufficient to warrant relief. *See* ***Allen***, 2004 WI 106, 274 Wis. 2d 568, P15, 682 N.W.2d 433.

Smith has not demonstrated who, if anyone, would have provided expert testimony, what the witness could say, or how that testimony would have assisted Smith's defense. *See* ***id***., P23 (reflecting that postconviction **[*18]** motions should allege facts that show "who, what, where, when, why, and how"). Smith appears to assume that an expert would be critical of the investigative interview of the victim in this case, but nothing in Smith's submission demonstrates the availability of a witness who would testify that the interview was improper in any way. Thus, Smith has not demonstrated any deficiency in his counsel's failure to retain an expert witness.

P31 In light of the foregoing, we conclude that the circuit court committed no error in denying Smith's claims of ineffective assistance of counsel without conducting a hearing. For the reasons stated, we affirm.

By the Court.--Judgment and orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

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Attorney Assist
P.O. Box 070034
Milwaukee, WI 53207-0034

November 16, 2007

TO: Attorney Thomas Erickson
FROM: Sarah Decorah
RE: State vs. Tyrone Smith

Interview of:
Maria Solis
Milwaukee, WI

On 11/16/07, the writer interviewed Maria Solis in person. Maria Solis stated the following to the writer: She does recall serving on a jury around March of this year. The name Tyrone Smith does sound familiar and she believes that was the name of the defendant on the case. Maria felt that the jury did a good, thorough job during deliberations. There was no confusion at all among the jurors. Everyone had an opportunity to speak and voice their opinions on the case. Everyone's thoughts were taken into consideration. The jurors took the case very seriously. The testimony given at trial was carefully reviewed during deliberations. Maria is comfortable with the verdict that was reached.

Maria stated that the jurors voted when they first entered the deliberation room. Most everyone voted guilty with the exception of 3-4 jurors who were undecided. The jurors then spent a lot of time carefully reviewing the evidence. During deliberations, some of the jurors wondered if maybe Mr. Smith was guilty of a lesser charge, like sexual misconduct, rather than sexual assault. The jurors discussed what the difference is between the two and whether or not the situation fit the parameters of misconduct. Maria believes that a written question was sent to the Judge regarding this matter. Maria does not know if the question actually contained the words misconduct and assault though. Maria stated however the question was worded, the answer that they got back cleared up the question. Maria stated that the answer from the Judge was that basically they didn't get to choose what charge Mr. Smith was guilty of; their decision was only whether or not he was guilty as charged.

Maria stated that she does recall a minor issue coming up with the verdict forms. The foreperson was given two forms, a 'guilty' form and a 'not guilty' form. After the jurors reached their decision the foreperson filled out the 'guilty' form and thinking that she did not need the other form, she threw it in the garbage. Once they returned to the courtroom the Judge requested both forms. The foreperson told the Judge what she had done and a bailiff was sent to retrieve the other form. Maria stated that it was an honest mistake and that the foreperson turned in the form that they wanted, the 'guilty' form.

Exhibit-C

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App M
Item #1
Page 2

suggestive interviews with child victims; and (3) the jury was not permitted to consider a lesser charge.

Having conducted a preliminary review of Smith's petition, the court is unable to say that it plainly appears from the petition that the petitioner is not entitled to relief in the district court. Accordingly, the respondent shall be required to answer the petition.

Smith has also filed numerous other motions. His motion for leave to proceed in forma pauperis, (Docket No. 6), is moot and shall be denied as such. The filing fee was received by this court on August 7, 2009.

Smith has also requested an evidentiary hearing. (Docket No. 8.) Evidentiary hearings regarding federal habeas petitions are governed by 28 U.S.C. § 2254(e), and ordinarily require federal courts to accept the factual determinations of state courts. When the petitioner has failed to develop a factual record at the state court level, the federal court shall not conduct an evidentiary hearing unless the petitioner's failure to develop the record in the state court was "due to 'a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel.'" United States ex rel. Hampton v. Leibach, 347 F.3d 219, 241 (7th Cir. 2003) (quoting Williams v. Taylor, 529 U.S. 420, 432 (2000)). Smith simply contends that an evidentiary hearing is necessary "so the court may have available all necessary facts to make the constitutional and appropriate conclusion in this case." This contention is insufficient to merit an evidentiary hearing and therefore Smith's request shall be denied.

The court shall also deny Smith's motion for the appointment of counsel. (Docket No. 7.) Smith contends he sent letters to "several" attorneys requesting pro bono representation, but has not received a response from "either one of them." Documents included with his motion suggest that Smith might have sent letters to three attorneys.

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DEPARTMENT OF CORRECTIONS
Division of Community Corrections
DOC-1305 (Rev. 7/02)

WISCONSIN

STATEMENT

☑ VICTIM ☐ PROBATION / PAROLEE / EXTENDED SUPERVISION / OFFENDER I have been advised that I must account in a truthful and accurate manner for my whereabouts and activities, and that failure to do so is a violation for which I could be revoked. I have also been advised that none of this information can be used against me in criminal proceedings. **This warning statement does not apply to victim or witness.**

☐ WITNESS ☐ INTENSIVE SANCTIONS OFFENDER I have been further advised that I have the right to **not** make a statement until after 24 hours of receipt of a notice of any alleged violation(s). I waive that right and choose to make a statement immediately. ***Offender Initials*** _____

Sasha T. made the following statement on 12-15-06 at the 2453 W. 25th St to Nicole Pabon, a State Department of Corrections staff person.

I Sasha Taylor give Nicole Pabon permission to write the following Statement.

On November 23, 2006, I was in another room watching TV. My dad told me to put my pajamas on, so that is what I did. My dad went to bed and I was in the other room (front) laying down watching tv. Tyrone came in the room, where I was and sat at the table He was doing his homework. I fell asleep and I woke up because I felt something on my leg. I looked up and Tyrone was on me. I got up real fast and Tyrone said "Do not tell" I ran to the room where my Dad was and told him. I thought Tyrone was looking at me Strange the entire time I was there, but I didn't know why. Since the incident has happened I have been scared to go by my dad house. I am Scared and do not like to talk about the incident.

I have read/had read to me this statement consisting of 1 page(s). This statement is a true and accurate account of my whereabouts and activities.

VICTIM / WITNESS / OFFENDER SIGNATURE — DATE SIGNED
X Sasha T. — X 12/15/06

WITNESS SIGNATURE — DATE SIGNED
Nicole Pabon — 12/15/06

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DEPARTMENT OF CORRECTIONS
Division of Community Corrections
DOC-1305A (Rev. 9/96)

STATEMENT
Continued

WISCONSIN

PAGE 2 OF 2

VICTIM / WITNESS / OFFENDER NAME Sasha T. DOC NUMBER

because of the incident I have Nightmares. I do not like to go to Sleep. I would feel Safer if he sent to prison. When Tyrone was on top of me he was moving back and forth while he was on top of me. It felt like a ~~banana~~ NP banana on my leg. While he was on top of me, he did not have a shirt on. I don't want this to be over.

SOR

VICTIM / WITNESS / OFFENDER INITIALS S.N.T WITNESS INITIALS NP

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DEPARTMENT OF CORRECTIONS
Division of Community Corrections
DOC-1305 (Rev. 7/02)

WISCONSIN

STATEMENT

☐ VICTIM ☒ PROBATION / PAROLEE / EXTENDED SUPERVISION / OFFENDER I have been advised that I must account in a truthful and accurate manner for my whereabouts and activities, and that failure to do so is a violation for which I could be revoked. I have also been advised that none of this information can be used against me in criminal proceedings. **This warning statement does not apply to victim or witness.**

☐ WITNESS ☐ INTENSIVE SANCTIONS OFFENDER I have been further advised that I have the right to **not** make a statement until after 24 hours of receipt of a notice of any alleged violation(s). I waive that right and choose to make a statement immediately. ***Offender Initials*** _____

Tyrone Smith made the following statement on 11/27/06 at the MSDF to Agent Nicole Patterson, a State Department of Corrections staff person.

I Tyrone Smith give Nicole Patterson permission to write the following statement.

On 11/23/06 me and my Cousin Sasha was watching the awards in the front room. Before the awards went off She got up and left and I think She went and took a Shower. She later went into the living room and laid down on the Couch. I later went into the living room where Sasha was at and turned the television from some Cartoon to basket ball because She was sleep. I sat at the table and began to do some homework. I later saw Sasha get off the Couch and go into my Uncle Hal room and whisper something to him. I heard him say "Tyrone tried to do what"? He came into the living room and asked me what happened and I told him nothing happened. He then said I do not

I have read/had read to me this statement consisting of 2 page(s). This statement is a true and accurate account of my whereabouts and activities.

VICTIM / WITNESS / OFFENDER SIGNATURE A Refused to Sign DATE SIGNED

WITNESS SIGNATURE X Nicole Patterson DATE SIGNED 11/27/06

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DEPARTMENT OF CORRECTIONS
Division of Community Corrections
DOC-1305A (Rev. 9/96)

STATEMENT
Continued

WISCONSIN

PAGE 2 OF 2

VICTIM / WITNESS / OFFENDER NAME Ty Rone Smith DOC NUMBER

believe Sasha would lie to me. While this was going on Sasha remained in my Uncle Hal room. My Uncle Hal said he was going to call the police and I told him go right ahead because I have not done anything. When my Uncle came to his room Sasha and I was sitting at the table doing my homework and watching television. I waited for the police to come, because I had not done anything. At no time did I get on top of Sasha. Why would I do some shit like that"? I do not know why my cousin Sasha would say something like that. I do not understand it. I have been feeling like my Uncle want me out of his home because we had a misunderstanding that I do not want to talk about at this time. My Uncle did not see me on my knees on the floor nor did he see my pants unzipped. I last had a drink about three week ago and I have not had or used in drugs.

VICTIM / WITNESS / OFFENDER INITIALS I refuse to sign

WITNESS INITIALS

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WISCONSIN INTERSCHOLASTIC ATHLETIC ASSOCIATION

5516 Vern Holmes Drive • Stevens Point, WI 54482-8833
Phone: 715-344-8580 • Fax: 715-344-4241 • Email: info@wiaawi.org • Web site: www.wiaawi.org

June 19, 2012

Mr. Tyrone Davis Smith
Box 147
Fox Lake, WI 53933

Dear Mr. Smith:

You currently are not licensed with the WIAA as a sport official; therefore, I do not have any current information to provide you.

Enclosed is the information we have on file for you from when you were licensed with our office for the 2006-07 school year.

Once your legal matters have been resolved, and if you choose to become licensed with our office, your file will be reviewed.

Sincerely,

Joan Gralla
WIAA Office Manager

enclosure

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DAVE ANDERSON
Executive Director
danderson@wiaawi.org

WADE LABECKI
Deputy Director
wlabecki@wiaawi.org

DEBRA HAUSER
Associate Director
dhauser@wiaawi.org

TOM SHAFRANSKI
Assistant Director
tshafranski@wiaawi.org

MARCY THURWACHTER
Assistant Director
mthurwachter@wiaawi.org

TODD CLARK
Communications Director
tclark@wiaawi.org

Official: TYRONE SMITH	VIEW	EDIT	RESTRICTED	RANKINGS	New Search: SMITH	Search

210123 - TYRONE SMITH

Number:	210123	Gender:	M	Status:	R
Name:	SMITH, TYRONE D	Age:	40	Occupation:	AFRICOLOGY
Address 1:	1940 N 26TH ST	Birthdate:	01/01/1972	Primary Phone:	(414) 933-8171
Address 2:		Years Reg:	1	Alternate Phone:	(414) 229-4155
City:	MILWAUKEE, WI 53205-1445	Last Year Reg:	2007	**Official's Associations:**	
Email:	TDSMITH@UWN.EDU	Lic. Date:	10/11/2006	1:	
District:	7			2:	
				3:	

[Add New Note]

YEAR	SPT	CLS	MTG	CLC	EX1 PCT	EX1 LATE	EX1 DATE	EX2 PCT	EX2 LATE	EX2 DATE	EX3 PCT	EX3 LATE	EX3 DATE	GMS SCH	RE/ NEW	YRS REG	LAST YR	SPT LATE	REG DATE	EDIT
2007	BK	L1	Y		79		11/17/2006	0						0	N	1	2007		10/11/2006	EDIT

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UNIVERSITY of WISCONSIN MILWAUKEE
Department of Financial Aid
Mellencamp Hall [illegible]n 162
PO Box 469
Milwaukee, WI 53201-0469
414-229-4541 *voice* 414-229-5699 *fax*
finaid@uwm.edu *email*
www.uwm.edu/Dept/FINAID/

2006-2007
Financial Aid Award Notice
Empl: 0758810
Notification Number 1
M001N

NAME

Tyrone Davis Smith
210 W 3rd Ave
PO Box 254
Milltown, WI 54858-0254

Date: 03/31/2006

Grade Level Sophomore

1. To avoid delays in the disbursement of your aid, please read this award letter carefully. You should also visit our web site www.uwm.edu/Dept/FINAID/ and read the 2006-2007 Financial Handbook for more detailed information and additional instructions. There have been significant changes for 2006-2007 that are discussed in the handbook.
2. If you wish to accept this award and if there are no changes, keep both copies of this award letter for your records.
3. To reduce or decline an award, cross out the amount offered in each column and enter the reduced amount next to it.
4. Please take note of the message codes (if any) for each award line. Each message code is explained on the reverse side of the white copy. These are very important.
5. Use the reverse side to inform us of other sources of aid you will receive.
6. You may notify us of any changes made to this award letter by signing and returning the white copy, sending an email with the information including your name and student ID#, or by calling us.
7. This letter reflects eligibility for both fall and spring semesters. If you will be enrolled at least halftime for a semester for which aid is not reflected, contact our office.

FINANCIAL AID OFFER

	Fall 2006	Spring 2007	TOTAL	Message
Fed Subsidized Stafford LnF/S	1,750.00 D	1,750.00 D	3,500.00	FFEL
Fed Unsub Stafford Loan F/S	2,000.00 D	2,000.00 D	4,000.00	FFEL
Federal Pell Grant	2,025.00 D	2,025.00 D	4,050.00	
Federal Perkins Loan Fall Sprg	1,750.00 D	1,750.00 D	3,500.00	PERK
Federal Supplemental Ed Opt Gr	500.00 D	500.00 D	1,000.00	
Federal Work Study	1,800.00 D	1,800.00 D	3,600.00	
		TOTAL	19,650.00	

Fall and Spring Less Than Full-time Enrollment

Your awards assume full-time attendance each semester. Full-time is 12 credits for undergraduates, 8 credits for graduates, and 3 credits for dissertators. You must notify us if you plan to enroll less than full-time for either semester. Please check the box in front of your credit level below.

Definitions	Less than half-time	Half-time	Three-quarter-time
Undergraduate	☐ Fall ☐ Spring 1-5 credits	☐ Fall ☐ Spring 6-8 credits	☐ Fall ☐ Spring 9-11 credits
Graduate	N/A	☐ Fall ☐ Spring 4-5 credits	☐ Fall ☐ Spring 6-7 credits

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