STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2017AP000551

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RAFEAL NEWSON,

Defendant- Appellant.

BRIEF & APPENDIX OF DEFENDANT-APPELLANT

APPEAL FROM AN ORDER DATED MARCH 7, 2017,
IN THE CIRCUIT COURT OF MILWAUKEE COUNTY
The Honorable Jeffrey Conen, Presiding
Trial Court Case No. 2000 CF 4309

Respectfully submitted:

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ISSUES PRESENTED

I. WHETHER THE UNDERLYING PROCEEDINGS IN THIS CASE MUST BE VOIDED BECAUSE WISCONSIN'S EXTRADITION REQUEST WAS FATALLY FLAWED AS IT WAS NOT BASED ON A PENDING INDICTMENT, INFORMATION OR CRIMINAL COMPLAINT, BUT INSTEAD, ON A SIMULATION OF THE CRIMINAL PROCESS.

The trial court: did not answer this question, deeming the matter barred by *Escalona.*

II. WHETHER THE ABSENCE OF ANY PENDING CASE DEPRIVED THE CIRCUIT COURT OF PROPER JURISDICTION TO PRESIDE OVER THE PROCEEDING AND ENTER JUDGMENT AGAINST, AND SENTENCE, THE DEFENDANT.

The trial court: did not answer this question, deeming the matter barred by *Escalona.*

III. WHETHER TRIAL AND POST-CONVICTION COUNSEL WERE INEFFECTIVE DUE TO THEIR FAILURE TO CHALLENGE THE WRONGFUL EXTRADITION OF THE DEFENDANT AND THE RESULTANT JURISDICTIONAL PROBLEMS.

The trial court: **did not answer this question, deeming the matter barred by *Escalona.***

IV. WHETHER THE LEGAL ISSUES RAISED HEREIN ARE "CLEARLY STRONGER" THAN A HEARSAY/CONFRONTATION CLAUSE THAT POST-CONVICTION COUNSEL RAISED AND WHICH THIS COURT DEEMED SUITABLE FOR SUMMARY DISPOSITION AND DENIED.

The trial court: **did not answer this question.**

V. WHETHER A DEFENDANT'S IMPRISONMENT IN ANOTHER STATE THAT DEPRIVES HIM OF ACCESS TO WISCONSIN STATUTES AND CASELAW, INCLUDING *ESCALONA*, CONSTITUTES SUFFICIENT REASONS FOR THE DEFENDANT'S FAILURE TO HAVE RAISED THE ISSUES HEREIN IN PRIOR POST-CONVICTION MOTIONS.

The trial court: **did not answer this question.**

VI. WHETHER A DEFENDANT CAN BE SAID TO BE CAN BE DEEMED TO BE SERVING A SENTENCE, WITHIN THE MEANING OF SECTION 974.06, STATS., WHEN HE IS IMPRISONED IN ANOTHER STATE AND WAITING TO BE TRANSFERRED TO

WISCONSIN TO THEN BEGIN SERVING A CONSECUTIVE SENTENCE.

The trial court: did not answer this question.

STATEMENT ON PUBLICATION

The appellant believes the Court's opinion in this case will meet the criteria for publication as it will clarify and develop the law surrounding extradition and jurisdiction.

STATEMENT ON ORAL ARGUMENT

The appellant does not request oral argument insofar as he believes the briefs will sufficiently explicate the facts and law necessary for this Court to decide the issues presented.

STATEMENT OF THE CASE AND FACTS

On November 23, 1996, Terrance D. Maclin was killed. (R1). On December 6, 1996, Milwaukee Detective Louis Johnson and ADA Robert Kraemer signed a complaint charging Newson with First Degree Intentional Homicide. (R1). The complaint, however, was never filed. (*Id.*). Nevertheless, on that same day, a felony warrant and authorization for extradition was generated and signed. (R3). Neither, however, was this document ever filed. (*Id.*). These facts and circumstances beg the question of what judicial official could have signed the felony warrant and authorization for extradition, when no criminal complaint had been filed.

The record suggests the warrant and authorization was likely signed by ADA Kraemer. (R3). Indeed, in a police report generated by Detective Johnson, he stated:

> On Friday, 12-06-96. I Detective Louis JOHNSON, did go to the Milwaukee County District Attorney's Office, located at 821 W. State St., the Homicide Unit, regarding the above Homicide which was presented for an arrest warrant regarding a possible suspect to Assistant District Attorney Robert KRAMER. Upon reviewing this Homicide, **A.D.A. KRAEMER did issue a felony arrest warrant for First Degree Intentional Homicide for the arrest of Rafeal Dashawn NEWSON**, B/M, DOB: 03-25-77, 3256A N. Palmer St., I.D. No. 275124. At the present time we are seeking to locate and arrest

> the suspect, Rafeal D. NEWSON, who may possibly be driving a white, 4-door, Fleetwood Cadillac, unknown year.

(R84-43)(bold emphasis added; underlined emphasis in original). The reference to *ADA Kraemer* issuing the felony arrest warrant and authorizing Newson's extradition is confirmed by an affidavit Detective Johnson executed on December 12, 1996, to obtain a phone records subpoena. Detective Johnson again stated, this time under oath, that on December 6, 1996, *ADA Robert Kraemer* issued a felony arrest warrant for Newson. (R84-44). Interestingly, ADA Kraemer notarized the affidavit. (*Id.*).

Meanwhile, Newson had moved to Arizona and adopted an alias: Marquis Johnson. (R84-31). On March 20, 1999, an Arizona grand jury returned an indictment against Marquis Johnson. (R84-1). Newson (aka Johnson) would eventually receive a 19.5-year sentence in Arizona. (R84-2).

On April 11, 2000, and despite the fact a criminal complaint still had not been filed, ADA Jon Reddin and Judge Jeffery Wagner both signed a request for temporary custody to the Tucson State Prison which stated:

> Please be advised that the above-named inmate, who is presently an inmate in your institution, is under (indictment)(complaint)(information) in the jurisdiction of which I am a prosecuting officer. Said inmate is therein charged with FIRST DEGREE INTENTIONAL HOMICIDE . . . .

(R84-36) (emphasis added). Thereafter, the judge certified that the facts set forth in the request for temporary custody were correct and that the request was "duly recorded," although such was not true on either count. (*Id.*).

On April 28, 2000, Newson was given a Prisoner Option of Rights and Advisory Form notifying him that Milwaukee County was seeking his extradition for a charge of first degree intentional homicide. (R84-37-38). The document notified Newson, *inter alia,* of his right to waive extradition, petition the governor, have a court hearing, and his right to request disposition under Article III, etc. (*Id.*). Newson refused extradition and to that end, refused to sign any paperwork consenting to his extradition. (*Id.*).

Accordingly, on July 17, 2000, the Arizona court conducted an extradition hearing on the interstate detainer. (R84-31). It does not appear the Arizona judge took much care in considering the issues critical to extradition because at the conclusion of the hearing he ordered the temporary transfer of Newson to the *State of Washington*. (R84-31-32). In either event, on August 18, 2000, Newson was extradited from Arizona to Wisconsin. (R84-30). On August 28, 2000, Newson arrived in Milwaukee. (R84-30). Not until the next day - August 29, 2000 - was a criminal complaint, dated in 1996, finally filed against Newson in Wisconsin, and file-stamped August 29, 2000. (R1).

It was on that same date (August 29, 2000) that Newson made his initial appearance in this case, and reserved "all jurisdictional objections." (R92-2). On March 5, 2001, a jury

trial began and on March 8, 2001, the jury returned a guilty verdict. (R100; R101; R102; R103). On April 12, 2001, Newson was sentenced to life imprisonment with no possibility of parole until 2050, a sentence the Wisconsin court further made consecutive to the 19.5 year sentence Newson was already serving in Arizona. (R104).

When the Wisconsin proceedings ended, Newson was transferred back to Arizona to continue serving and complete his sentence in that state. On April 17, 2001, Newson notified the court of his intent to pursue post-conviction relief. (R29). Newson was assigned appellate counsel, but a disagreement arose as to what issue(s) should be pursued on appeal. (R33). Appellate counsel opined there was just a singular issue, while Newson believed there were several meritorious issues. (R33-2). Consequently, on December 19, 2001, counsel moved to withdraw. (R33). On January 7, 2002, the State Public Defender (SPD) notified the court that if Newson's counsel were to withdraw, it would not appoint successor counsel. (R34).

On the same day it received that notification, the circuit court entered an order holding the motion to withdraw in abeyance. (R35). The court used the order as a vehicle to inform Newson of the risks and obligations associated with proceeding without counsel and requested Newson confirm he understood as much, and still wished to proceed *pro se*. (R35-2-3). It should be noted Newson never asked to proceed *pro se*. That idea, instead, originated solely in counsel's motion to withdraw, which positioned Newson's putative *pro se* status as a *fait accompli* in the event of his withdrawal, and at a time, it should be added, when it was unknown whether the SPD would appoint

successor counsel. In either event, the court advised Newson to write the court and either affirmatively acknowledge his desire to proceed without appointed counsel, and his understanding of the attendant obligations and risks, or that in light of the court's warnings, he had decided to continue with present counsel. (*Id.*).

On January 31, 2002, Newson, writing from Buckeye, Arizona, responded in accordance with the court's January 7, 2002, order. (R36). Newson clarified he was not alleging his appointed counsel was a bad lawyer, only that he believed other issues, such as ineffective assistance of counsel, had merit and should be pursued. (R36-2). Newson further explained, however, that it would be impossible for him to proceed *pro se* given that in 1997, Arizona had restricted inmate access to law libraries in its prison system. (*Id.*). Newson explained that the only way he could proceed *pro se* was with some kind of appointed stand-by assistance. (*Id.*). Noting he had *not* been given his own court transcripts, Newson asked if there was any way the court could allow him a different attorney, or legal support. (*Id.*). On February 1, 2002, the circuit court responded by denying counsel's motion to withdraw.[1] (R37).

For the ensuing thirteen years, the indigent Newson remained in the custody of the State of Arizona and continued seeking whatever free legal assistance he could, given the

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[1]Thereafter, the sole argument appellate counsel raised on appeal was whether improper hearsay had been admitted during Newson's trial or whether Newson's right of confrontation had been violated. (R41). On September 22, 2003, this Court rejected the argument and summarily affirmed Newson's conviction. (*Id.*); *State v. Newson,* 2002 AP 000959-CR.

significant geographical and access-to-research impediments. For example, on November 6, 2003, Newson asked the circuit court if it would appoint advisory counsel for purposes of post-conviction relief under section 974.06, Stats. (R43). Newson, perhaps unaware of the novelty of his request, nevertheless set forth a solid basis for it: as an inmate in Arizona, he had no access whatsoever to Wisconsin statutes or case law, and that all of his efforts to gain such access had been thwarted and denied, which he posited was unlawful. (*Id*.). Newson attached to his request Arizona prison regulations that stated, *inter alia,* that "[n]o provision is made in this system for extensive, generalized legal research" and, more importantly, that "[t]he Department shall not supply inmates with . . . any legal materials from other states." (R43-8-9). Newson further attached written denials, by Arizona officials, to his written requests for access to Wisconsin statutes and other law. (43-10). On November 11, 2003, the circuit court denied his request. (R44). Accordingly, Newson was left to fend for himself, and with no access to Wisconsin legal materials.

So it was that on July 9, 2004, Newson filed a pro se motion for post conviction relief. (R48). On October 7, 2004, the motion was denied. (R52). On September 20, 2005, this Court affirmed that denial. (R56); *State v. Newson,* 2004 AP 002988. Having been defeated at every turn, Newson did not file anything pertaining to his case for the next five years.

Then, on July 29, 2010, Newson, relying on the Freedom of Information Act, filed a request for information surrounding his criminal complaint, felony warrant, and request for extradition. (R59). Newson, however, never received any

response. (R63-7). Thus, he did not have the benefit of that information when, on September 7, 2010, he filed a second post-conviction motion raising, as best as a *pro se* litigant could, the fundamental problems with the process by which his case began, and in particular, the issuance of a felony warrant and authorization for extradition with no associated pending case. (R60). Perhaps predictably, Newson's second motion was denied on the grounds that any relief was barred pursuant to *State v. Escalona Naranjo,* 185 Wis. 2d 169, 517 N.W.2d 157 (1994). (R62). For Newson, however, that outcome could not have been predicted. Without access to Wisconsin law, he could not have been aware of the *Escalona* decision. Thereafter, Newson appealed, voluntarily withdrew it, and asked this Court to construe his appeal as a *Knight* petition, which this Court declined to do. (R67; R73; R74; R75; R76; R77).

In the meantime, Newson continued his quest for additional information about his case. On March 28, 2011, he requested of the circuit court the documents pertaining to his warrant and extradition request. (R71). Newson noted that his efforts to obtain said information from the clerk of courts had resulted in responses that his arrest warrant could not be found, that a list of judges from 1996 was not available, and that the name of the individual who signed the warrant could not be determined. (R71-3-4, 9-10). Newson's motion for information, too, was denied. (R72).

As noted earlier, Newson did not return to Wisconsin until July of 2016, at which point, for the first time since his conviction, he finally had access to Wisconsin legal materials. Accordingly , on February 6, 2017, Newson was able to file a

motion that raised the issues that are the subject of this appeal. (R84). Unfortunately for Newson, the circuit court dodged the substance of the legal issues he raised. On March 7, 2017, the circuit court denied Newson's motion on purely procedural grounds, again reasoning his motion was barred by *Escalona.* (R85). This appeal followed. (R89).

ARGUMENT

I. WISCONSIN'S EXTRADITION REQUEST WAS FATALLY FLAWED BECAUSE IT WAS NOT BASED ON A PENDING INDICTMENT, INFORMATION OR CRIMINAL COMPLAINT, BUT INSTEAD, ON A SIMULATION OF THE CRIMINAL PROCESS.

The issuance and filing of criminal complaints in Wisconsin is governed by section 968.02, Stats., which states, in pertinent part:

> (1) Except as otherwise provided in this section, a complaint charging a person with an offense shall be issued only by a district attorney of the county where the crime is alleged to have been committed. A complaint is issued when it is approved for filing by the district attorney. The approval shall be in the form of a written endorsement on the complaint or the electronic signature of the district attorney as provided in s. 801.18(12).
>
> (2) After a complaint has been issued, **it shall be filed with a judge and either a warrant or summons shall be issued or the complaint shall be dismissed,** pursuant to s. 968.03. **Such filing commences the action.**

(Emphasis added). This section reveals that the filing of the complaint with a judge is a prerequisite to the issuance of a warrant or, alternatively, a summons, and confers subject matter jurisdiction on the court.

This basic concept is also embodied in the interstate compact known as the Interstate Agreement on Detainers (hereinafter, "IAD"), into which forty-eight states, including both Wisconsin and Arizona, have entered. 18 U.S.C. App. § 2, p. 692. *See* section 976.05, Stats.; Ariz. Rev. Stat. Chapter 2, Article 6, § 31-481 (1983). The IAD creates uniform procedures for lodging and executing a detainer, i.e., a legal order that requires a state in which an inmate is currently imprisoned to hold the inmate when he has finished serving his sentence so he may be tried by a different State for a different crime. *Alabama v. Bozeman,* 533 U.S. 146, 148 (2011). The interpretation of the IAD (i.e., section 976.05) presents a question of law this Court will review without deference to the circuit court. *State v. Blackburn*, 214 Wis.2d 372, 378, 571 N.W.2d 695 (Ct. App.1997). Moreover, the IAD is a remedial statute this Court will construe liberally in favor of a prisoner. *State v. Tarrant,* 2009 WI App 121, ¶7, 321 Wis. 2d 69, 772 N.W.2d 750.

A prisoner incarcerated in any jurisdiction that has adopted the Uniform Criminal Extradition Act is entitled to the procedural protections of that Act, particularly the right to a pretransfer hearing, before being transferred to another jurisdiction pursuant to article of Interstate Agreement on Detainers providing procedure by which prosecutor of receiving state may initiate transfer. *Cuyler v. Adams,* 449 U.S. 433 (1981). A primary purpose of the IAD is to protect prisoners

against whom detainers are outstanding. *Id*. *See also Blackburn*, *supra* at 379–80. Federal case law interpreting the IAD has stated that the primary purposes of the IAD "are to encourage the expeditious and orderly disposition of outstanding charges, to determine the proper status of detainers, and to establish cooperative procedures for the attainment of those goals." *See Schofs v. Warden, FCI, Lexington*, 509 F. Supp. 78, 82 (E.D. Ky. 1981). The IAD was created, *inter alia,* to protect the interests and rights of the prisoner. *Blackburn,* at 380.

Section 976.05(1), Stats., embodies Article I of the IAD and sets forth both the IAD's *raison d'être* and parameters:

> The party states find that charges outstanding against a prisoner, **detainers based on untried indictments, informations or complaints,** and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers **based on untried indictments, informations or complaints.** The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures.

(Emphasis added). As can be seen, at the core of the IAD is the prerequisite that an indictment, information or complaint be pending before a detainer can be issued. This language (i.e., "indictment, information or complaint") is repeatedly referenced throughout section 976.05, Stats. Section 976.05(2)(a), for example, defines "[r]eceiving state" as "the state in which trial is to be had **on an indictment, information or complaint** under sub. (3) or (4)." (Emphasis added). *See also, e.g.,* section 976.05(3)(a).

The procedure by which a receiving state obtains jurisdiction over an out-of-state prisoner by issuing a detainer is set forth in section 976.05(4)(a), Stats.:

> The appropriate officer of the jurisdiction in which an **untried indictment, information or complaint is pending** shall be entitled to have a prisoner against whom the officer has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with sub. (5)(a) upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated: **provided that the court having jurisdiction of such indictment, information or complaint has duly approved, recorded and transmitted the request:** and that there shall be a period of 30 days after receipt by the appropriate authorities before the request is honored, within which period the governor of the sending state may disapprove

> the request for temporary custody or availability, either upon the governor's own motion or upon motion of the prisoner.

(Emphasis added). All of these provisions fit hand-in-glove. A pending indictment, information or complaint confers jurisdiction upon the court which must prove, record and transmit the detainer.[2]

Because Newson refused extradition, Wisconsin was obliged to pursue extradition of him under Article IV of the IAD. Section 976.05(4)(d), Stats., states:

> Nothing contained in this subsection shall be construed to deprive any prisoner of any right which the prisoner may have to contest the legality of the prisoner's delivery under par. (a), but such delivery may not be opposed or denied on the grounds that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.

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[2]Wisconsin courts have defined the word "detainer" as a "notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face **pending criminal charges** in another jurisdiction." *State v. Eesley*, 225 Wis. 2d 248, 257-58, 591 N.W.2d 846 (1999)(emphasis added), *quoting United States v. Mauro*, 436 U.S. 340 (1978). *See also State v. Miller*, 2003 WI App 74, ¶ 3 n. 2, 261 Wis. 2d 866, 661 N.W.2d 466; *State v. Nonahal*, 2001 WI App 39, ¶ 5, 241 Wis. 2d 397, 626 N.W.2d 1.

In the circuit court proceeding now *sub judice,* Newson posited that because he was extradited from another state to Wisconsin, where there was no information, complaint or indictment pending against him, the proceedings which occurred thereafter were void *ab initio.* Factually, Newson is correct. The complaint was drafted on December 6, 1996, but never filed, and yet, via some unknown and inexplicable process, a felony warrant and authorization for extradition was issued. Thereafter, on April 11, 2000, and still with no pending case, Milwaukee officials issued a request for temporary custody based on an extension of the fiction that there was a pending complaint against Newson in Wisconsin that had been "duly recorded." These representation made in that request are incontrovertibly false. The record reveals it was not until August 29, 2000, *after* Newson had already had his extradition hearing and *after* Newson had already been extradited to Wisconsin, that any case was ever filed against him.

In other words, the felony warrant and authorization for extradition in this case was issued via an unlawful extra-judicial process. This was not, however, the only problem with how these proceedings were commenced. This fundamental flaw was further compounded by suspicious circumstances surrounding the very issuance of the warrant. The signature on the warrant, for example, is illegible, and the clerk of court is unable to identify it, or otherwise say to whom it belongs. Neither of these irregularities would be problematic had the warrant complied with section 968.04(3)(a)5., stats., which requires that it include the name of the issuing judicial official. Here, however, no name is affixed to the warrant, the signature is illegible, and the court cannot identify to whom the signature belongs.

It must also be assumed that no judicial authority would have issued a warrant devoid of any case number and in the absence of any pending case. As previously noted, section 968.02, Stats., demands as much. All of this makes what might otherwise seem implausible - that the ADA purported to issue the felony warrant and authorization for extradition - not only plausible, but the most logical explanation of what occurred. Both the police reports and an affidavit by the investigating officer further confirms this.

The absence of a criminal complaint makes both the requisition of Newson and the commencement of these proceedings defective. Where a complaint fails to charge an offense, the case is jurisdictionally defective. *Champlain v. State*, 53 Wis. 2d 751, 754, 193 N.W.2d 868 (1972), *abrogated on other grounds by State v. Petrone*, 161 Wis. 2d 530, 468 N.W.2d 676 (1991)(complaint and information omitting element of crime, but referring to correct substantive criminal statute by number, sufficiently alleges all elements of offense). *Champlain* stated:

> A complaint which charges no offense is jurisdictionally defective and void and the defect cannot be waived by a guilty plea; the court does not have jurisdiction. Nor can a void charge sustain a verdict or a sentence based on it. While a verdict can aid the charge or information which is defective, indefinite but not void, a verdict cannot cure the absence in the information of a material element of the crime.

Id., citing State v. Lampe, 26 Wis. 2d 646, 648, 133 N.W.2d 349 (1965); *Burkhalter v. State*, 52 Wis.2d 413, 424, 190 N.W.2d 502 (1971); *Howard v. State*, 139 Wis. 529, 534, 121 N.W.2d 133 (1909); and *Paxton v. Walters*, 231 P.2d 458 (Ariz. 1951). The circumstances here are more egregious than a defective complaint, as there was no complaint at all.

This Court has held that criminal subject-matter jurisdiction is the "power of the court to inquire into the charged crime, to apply the applicable law and to declare the punishment," and that such attaches when the complaint is filed. *State v. Aniton,* 183 WIs. 2d 125, 303-04, 515 N.W.2d 302 (Ct. App. 1994). *See also State v. Estrada*, 63 Wis. 2d 476, 492, 217 N.W.2d 359, *cert. denied*, 419 U.S. 1093. Where a complaint does not charge an offense known to law, the circuit court lacks criminal subject-matter jurisdiction. *Id.* This case began, not merely with a criminal complaint that did not charge an offense known to law, but with no criminal complaint at all. And while *Aniton* held that a defendant can waive such a challenge by entering a plea, Newson never did so. Moreover, when he first appeared in court on this case, he reserved any and all jurisdictional objections. *See also State v. Webster,* 196 Wis. 2d 308, 538 N.W.2d 810 (Ct. App. 1995).[3]

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[3]Even if Newson had entered a plea, such would not have deprived this Court of the ability to address the issues raised herein. The guilty plea waiver rule is a rule of judicial administration and not of power. *State v. Riekkoff*, 112 Wis. 2d 119, 124, 332 N.W.2d 744 (1983). Therefore, this Court can, in the exercise of its discretion, decline to apply the rule, particularly if the issues are of state-wide importance or resolution will serve the interests of justice and there are no factual issues that need to be resolved. *State v. Grayson*, 165 Wis. 2d 557, 561, 478 N.W.2d 390 (Ct.

Nor did the circuit court ever obtain proper jurisdiction over Newson, because his presence in Wisconsin was obtained via a fraud. It has long been the law of this state that if the presence of a party to a suit is obtained via a fraud, the resultant verdict cannot stand. In *Townsend v. Smith,* 47 Wis. 623, 3 N.W. 439 (1879), the Wisconsin supreme court stated:

> If a person is induced by false representations to come within the jurisdiction of a court for the purpose of obtaining service of process upon him, and process in an action brought against him in such court is there served, it is an abuse of legal process, and the fraud being shown the court will, on motion, set aside the service. This rule is elementary, and has been uniformly enforced in numerous cases both in this country and England. The principle of the rule seems to be that "a valid and lawful act cannot be accomplished by any unlawful means; and whenever such unlawful means are resorted to the law will interpose and afford some suitable remedy, according to the nature of the case, to restore the party injured by these unlawful means to his rights.

Id.

Townsend further rejected the idea that because the plaintiff committed the fraud for the sole purpose of getting the defendant within this state so that he might be arrested on

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App.1991).

criminal process, the fraud should be excused. Because the defendant was within the jurisdiction of the court by means of the fraud of the plaintiff, and through no act of his own, the judgment could not be allowed to stand. *Id. Townsend* noted that the court could not permit a plaintiff to utilize fraud for any purpose. *Townsend* quoted with approval Lord Chancellor Hardwicke when he said:

> Even at law, where there is an irregular arrest, and an advantage is taken of the irregularity to charge him in custody at the suit of another person, the courts of law will discharge him from both.

Id., citing In Ex parte Wilson, 1 Atk. 152.

Finally, the facts and circumstances also implicate the circuit court's competency in this case. A circuit court's ability to exercise the subject matter jurisdiction vested in it by the constitution may be affected by noncompliance with statutory requirements pertaining to the invocation of that jurisdiction in individual cases. *City of Eau Claire v. Booth,* 2016 WI 65, ¶ 7, 370 Wis. 2d 595, 882 N.W.2d 738. *Village of Trempealeau v. Mikrut*, 273 Wis.2d 76, ¶ 9, 681 N.W.2d 190, 2004 WI 79. Noncompliance with statutory mandates affects a court's competency and "a court's 'competency,' as the term is understood in Wisconsin, is defined as 'the power of a court to exercise its subject matter jurisdiction' in a particular case. *Id.*

II. TRIAL AND POST-CONVICTION COUNSEL WERE INEFFECTIVE DUE TO THEIR FAILURE TO CHALLENGE THE WRONGFUL EXTRADITION OF THE DEFENDANT AND THE RESULTANT JURISDICTIONAL PROBLEMS.

Neither trial counsel nor post-conviction counsel raised the flawed commencement of these proceedings. Both counsel missed the issue entirely, and post-conviction counsel opted for pursuing a direct appeal raising only a single issue: a hearsay challenge this Court deemed a candidate for summary disposition. When the issues explicated herein are juxtaposed to this Court's facile disposition of the direct appeal, it cannot be disputed that the issues raised herein are clearly stronger than the issue counsel pursued.

The right to counsel is the right to the effective assistance of counsel. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990), *citing McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970). The benchmark for judging whether counsel acted ineffectively is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* requires a defendant to demonstrate counsel's performance was deficient by showing specific acts or omissions of his attorney that fall "outside the wide range of professionally competent assistance." *Strickland*, at 687. Generally speaking, a defendant must also show counsel's errors were prejudicial, or in other words, so serious as to deprive him of a fair trial - a trial for which the result is reliable. *Id*.

The Wisconsin Supreme Court has emphasized the duty of a lawyer to reasonably investigate adequately the

circumstances of the case and to explore all avenues for relief. *State v. Felton*, 110 Wis. 2d 485, 501, 329 N.W.2d 161 (1983).Prevailing professional norms require defense counsel to be aware of, and apply, well-settled law whenever necessary to protect his or her client. *See, e.g.*, *State v. Dekeyser*, 221 Wis. 2d 435, 443, 585 N.W.2d 668 (Ct. App. 1998). In *Felton,* trial counsel's failure to inform himself of applicable statutes germane to defending his client or to make any meaningful investigation of the facts to that end defense constituted ineffective assistance of counsel entitling the defendant to a new trial.

Here, the deficient performance consisted of failing to recognize what should have been obvious. The criminal complaint was drafted in 1996, but the case was assigned a "2000" case number. This should have been a red flag that Newson had been improperly extradited, because not only was there no pending complaint or indictment, but Wisconsin officials had falsely advised Arizona officials that there *was* a pending case. Defense counsel should have filed, but did not, a motion to dismiss the proceedings due to a failure to properly comply with the IAD.

The same analysis will apply and thwart any effort by the State to argue Newson somehow waived any jurisdictional challenges at any subsequent proceedings in his case, such as the arraignment. An arraignment, for example is a critical stage in a criminal proceeding. *Hamilton v. Alabama,* 368 U.S. 52, 54 (1961). In *Powell v. Alabama*, 287 U.S. 45, 69 (1932), the Court said that an accused in a capital case requires the guiding hand of counsel at every step in the proceedings against him. While

this is not a capital case per se, it is the functional equivalent because it resulted in a life sentence for Newson.

In *United State v. Williams,* 615 F.2d 585 (3rd Cir. 1980), the Third Circuit considered an ineffective assistance of counsel claim based on counsel's failure to address important IAD issues. After concluding it could consider the claim in the context of a proceeding pursuant to section 2255, *Williams* went on to state:

> Williams alleges that he brought the possibility of an IADA defense to the attention of his counsel who failed to raise it at trial and did not prosecute an appeal. Given the *pro se* character of Williams' section 2255 petition, we must take as true the allegations of the petitioner, unless they are clearly frivolous. There is no evidence on the summary record before us that Williams did not bring the IADA defense to the attention of counsel. Hence, we must assume that this allegation is true. If Williams is correct that he urged his counsel to raise the IADA defense, then the failure of counsel to raise it would be the "cause" of Williams' failure to assert the defense at trial or on direct appeal. Because a successful assertion of the IADA defense would have resulted in a dismissal of the indictment, the failure of counsel to raise it would undoubtedly have been prejudicial to Williams.

Id. at 591.

Williams ultimately reversed and remanded the case for an evidentiary hearing on the defendant's ineffective assistance of counsel claim. In so doing, it noted that:

> Because an assertion of an IADA defense, if successful, would have achieved a dismissal of the indictment, failure to assert this defense by counsel, especially if brought to his attention by the defendant, may have been a fatal error prejudicing Williams' case. The failure to assert a defense which could result in the dismissal of an indictment may not be the type of decision by trial counsel entitled to the "measure of latitude and discretion" found by the district court.

Id. at 594.

With regard to the prejudice prong of *Strickland,* Newson need not prove prejudice as such is presumed. This Court has held that a defendant need not prove he was prejudiced by a violation of the IAD, to be entitled to relief under the IAD. *Tarrant, supra* at ¶ 21. *See also State v. Bishop*, 139 P.3d 363, 366 (Wash. App. 2006) (mandatory language of article III supports the recognition by *Carchman v. Nash*, 473 U.S. 716 (1985) that a defendant does not have to establish prejudice for dismissal of charges under the IAD).

Finally, a defendant who alleges in a § 974.06 motion that his postconviction counsel was ineffective for failing to bring certain viable claims must demonstrate that the claims he wishes to bring are clearly stronger than the claims

postconviction counsel actually brought. *State v. Starks*, 2013 WI 69, ¶ 6, 349 Wis.2d 274, 833 N.W.2d 146. However, in evaluating the comparative strength of the claims, reviewing courts should consider any objectives or preferences that the defendant conveyed to his attorney. A claim's strength may be bolstered if a defendant directed his attorney to pursue it. *State v. Romero-Georgana*, 2014 WI 83, ¶ 4, 360 Wis. 2d 522, 849 N.W.2d 668.

Here, the strength of the claims raised in this appeal speaks for itself. When juxtaposed to the claims post-conviction counsel did raise, which were so weak that this Court summarily disposed of them, the issues raised by Newson in his section 974.06, Stats., are clearly stronger.

III. NEWSON CANNOT, NOR SHOULD HE, BE PROCEDURALLY BARRED FROM HAVING HIS MOTION ADJUDICATED ON THE MERITS.

A. The Extradition, And Therefore the Ensuing Proceeding, Was Flawed *Ab Initio,* And The Circuit Court Therefore Did Not Have Proper Jurisdiction.

As noted above, a criminal complaint that fails to allege any offense known at law is jurisdictionally defective and void. *State v. Christensen*, 110 Wis. 2d 538, 542, 329 N.W.2d 382 (1983). If no offense is charged, then the court has no jurisdiction to proceed to judgment. *Lampe*, 26 Wis. 2d at 648. *In re Carlson*, 176 Wis. 538, 545, 186 N.W. 722 (1922) ("[I]f the information charged no offense the court had no jurisdiction

to proceed to judgment," citing Article I, Section 7 of the Wisconsin Constitution). The point need not be belabored here, as it is established above, that a jurisdictionally defective and void case cannot be waived. *Champlain, supra.* It was therefore error to apply the waiver rule of *Escalona* to deprive Newson of any consideration of the merits if his positions.

B. There Are Sufficient Reasons Why Newson Was Unable To Raise The Legal Issues Herein Until Now.

The circuit court never reached the merits of Newson's position, but instead, dodged the issue by using *Escalona* as a bar to any challenge to the legality of the proceedings. As Newson was back in Wisconsin by that time and able to access the law he needed, he anticipated the possibility of this issue and provided numerous reasons why *Escalona* should not be interposed between the flawed commencement of these proceedings and meaningful relief on the merits. The circuit court, however, ignored all of Newson's positions and seized on just one to deny him any relief:

> [T]he defendant argues that neither of [his two prior] filings should be counted against him . . . because he was incarcerated in Arizona at the time, and therefore, he was not a "prisoner in custody under sentence of a court." The defendant's argument is preposterous. Jurisdiction under section 974.06(1), Stats., is not limited to prisoners in *Wisconsin* custody. The sentence in this case was ordered to run consecutive to the

> Arizona sentence. All consecutive sentences for crimes committed before December 31, 1999 are computed as one continuous sentence. §302.11(3), Stats.

(R85-1). The circuit court then recognized Newson was challenging the trial court's jurisdiction, but concluded the issue was procedurally barred. (R85-2). The circuit court's disposition of this issue is addressed in the next section of this brief.

The basis for the denial of Newson's motion is found in section 974.06(4), Stats., which states:

> All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, **unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.**

(Emphasis added).

The record in this case establishes a sufficient basis for why the issue raised herein should be addressed on its merits

and not be brushed off as procedurally barred. Newson raised these sufficient bases but the circuit court simply ignored them. The record reveals, with supporting documents, that Newson was severely hampered in researching and filing these motions by Arizona prison officials. He was barred access to Wisconsin statutes and case law. Accordingly and most importantly, he was denied access to section 974.06 and the case law surrounding it, most notably the *Escalona* case. It is one thing to apply the *Escalona* bar to an inmate who has access to Wisconsin law through a law library and therefore can be held responsible for actual, constructive or imputed knowledge of the warnings it constitutes. It is another thing, however, and fundamentally unfair, to apply that bar to an inmate banished to an island where all access to Wisconsin law, including *Escalona*, is forbidden.

The difficulties Newson experienced, and the efforts he took to overcome the hurdles he faced, are not convenient and *post hoc* "sufficient reasons" that Newson has manufactured to cover up prior shortcomings. On the contrary, the record establishes these problems in real time. For example, on October 6, 2003, Newson requested access to Wisconsin caselaw, statutes, etc., to represent himself on the case *sub judice.* (R84-50). On October 8, 2003, however, Arizona denied his request as not a qualified legal claim. (*Id*). Newson tried again, on October 17, 2003, requesting access to Wisconsin law, but on October 18, 2003, his request was again denied. (R84-51). Attached to the denial was a laundry list of materials Arizona would not provide Newson, which included any law from a state other than Arizona. (R84-52-54).

The record further establishes that Newson brought this problem to the court's attention immediately, and repeatedly throughout the years. Indeed, he explained at the outset that the box Arizona officials had put him in made it impossible for him to agree to the withdrawal of his post-conviction counsel and proceed *pro se*. To that end, Newson requested some form of legal assistance (e.g., different counsel) to assist him in dealing with his dilemma. Rather than being responsive to Newson's quandary, however, the circuit court simply denied counsel's motion to withdraw, leaving Newson stuck with counsel and the singular issue he pursued, an issued which this Court summarily rejected. His November 6, 2003, request for advisory counsel was also promptly denied. (R43; R44).

Newson renewed his efforts in 2010 while still incarcerated in Arizona. In September of 2010, Newson wrote the Milwaukee County circuit court requesting documents pertaining to his case. (R84-40). On September 20, 2010, the Milwaukee County Clerk of Court responded and advised she could not locate any arrest warrant in his file with this case number (i.e., 00 CF 4309). (*Id.*). On July 29, 2010, he filed a *pro se* request for information under the Freedom of Information Act, to which he never received any response. (R59). He fared no better with his March 28, 2011, *pro se* motion for post-conviction discovery, which was also promptly denied. (R71; R72).

In the face of these restrictions, Newson cobbled together a post-conviction motion that endeavored to raise the issues now before this Court. He did not, however, include any sufficient reasons for why he had not raised these issues in his first post-

conviction motion. With no access to Wisconsin law, and therefore no access to *Escalona,* he could not have known to do so. The "sufficient reasons" for not applying the *Escalona* bar in this case canned be summed up in a simple observation: the first time Newson was aware of *Escalona* was after it had already been applied to deny him any consideration of the merits of his motion. If these circumstances do not constitute a "sufficient reason" for not having raised this issue before now, then the legislature's considered determination that a defendant should not be barred from a ruling on the merits of his claims when he could not have raised them earlier is an empty promise.

C. The Procedural Bar Of Section 974.06, Stats., Should Not Apply To An Inmate Not In *Wisconsin* Custody.

Finally, Newson argued that section 974.06, Stats, should not be applied to him because he was not in custody in a Wisconsin prison. This is the one issue the circuit court addressed and, as noted above, rejected. The language upon which Newson relied is found in section 974.06(1) which states:

> After the time for appeal or postconviction remedy provided in s. 974.02 has expired, a prisoner in custody under sentence of a court or a person convicted and placed with a volunteers in probation program under s. 973.11 claiming the right to be released upon the ground that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state, that the court was without jurisdiction to

> impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

While the language, on the one hand, is broad, it must also be conceded that it is Wisconsin-centric. It cites applicable Wisconsin statutes and constitutional provisions.

Newson's position was that until he was transferred to Wisconsin, he was not serving a Wisconsin sentence, and. more specifically, the sentence in this case. It should be noted that his experience as an inmate in Arizona reveals the dangers and flaws of applying section 974.06 to an out-of-state inmate. In either event, the circuit court rejected the argument on the grounds that all consecutive sentences for crimes committed before December 31, 1999 are computed as one continuous sentence. §302.11(3), Stats.

This rationale, however, merely begs the question because section 302.11 addresses how "Wisconsin" sentences are treated. Indeed, Wisconsin prisons do not have the authority to "compute" sentences imposed in another state. And in section 302.02, the state institutions subject to Chapter 302 are identified and no out of state institutions can be found in the list. On the contrary, section 302.02(3t) states that " For all purposes of discipline and for judicial proceedings, each institution that is located in another state and authorized for use under s. 301.21 and its precincts are considered to be in the county in which the institution is physically located, and the courts of that county

have jurisdiction of any activity, wherever located, conducted by the institution."

CONCLUSION AND RELIEF REQUESTED

For all of the foregoing reasons, Newson respectfully requests this Court vacate his conviction and sentence, and remand to the circuit court with directions that dismiss the case against Newson with prejudice.

Dated this 28th day of February, 2018.

/s/ Rex Anderegg
REX R. ANDEREGG
Attorney for the Defendant-Appellant

CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, minimum 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 7,062 words.

Dated this 28th day of February, 2018.

/s/ Rex Anderegg
REX R. ANDEREGG

CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, and a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 28th day of February, 2018.

/s/ Rex Anderegg
REX R. ANDEREGG

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that I have submitted an electronic copy of the brief-in-chief and appendix, if available electronically, in *State of Wisconsin v. Rafeal Newson,* Appeal No. 2017AP000551, which complies with the requirements of s. 809.19 (12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 28th day of February, 2018.

/s/ Rex Anderegg
Rex Anderegg