STATE OF WISCONSIN
I N S U P R E M E C O U R T

Case No. 2017AP2364-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

DAVID GUTIERREZ,

Defendant-Appellant.

ON PETITION TO REVIEW A DECISION OF THE WISCONSIN COURT OF APPEALS REVERSING A JUDGMENT OF CONVICTION AND AN ORDER DENYING POST-CONVICTION RELIEF

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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I. Whether the Court of Appeals correctly found that the Circuit Court erred when it allowed the State to present expert testimony that Mr. Gutierrez's DNA was absent because it was washed off but would not allow Mr. Gutierrez to present testimony that DNA evidence had not been washed off and it was, in fact, present from other males?

The trial court allowed the State to offer an explanation as to why Mr. Gutierrez's DNA was absent after an alleged sexual assault but denied him the right to rebut that explanation.

The Court of Appeals reversed and remanded the matter for a new trial indicating that to allow the State to present evidence that Mr. Gutierrez's DNA had been washed off while denying him the right to rebut that evidence was not harmless error and undermined the confidence in the trial's outcome. The Court of Appeals recognized that the purpose of Mr. Gutierrez's

offer of the DNA evidence was to simply rebut the State's argument and not to demonstrate any prior sexual conduct and therefore not violative of the rape shield law.

The WI State Supreme Court granted the State's petition for review. It should affirm the Court of Appeals and remand the matter to the Circuit Court for further proceedings.

II. Whether the Court of Appeals erred in upholding the trial court's ruling allowing admission of other acts evidence. The other acts evidence involved A.R.'s allegations of sexual contact from approximately six (6) years earlier.

The trial court originally limited the testimony to only evidence leading up to the charged acts that might put the facts in context. Upon motion to reconsider, the trial court allowed the testimony without restriction.

The Court of Appeals, applying the greater latitude rule, affirmed the ruling of the trial

court.

The WI State Supreme Court should reverse on this issue.

III. Whether Mr. Gutierrez's trial attorney was ineffective for failing to call as a witness, Mr. Gutierrez's mother, who would have testified that A.R. had recanted and given an explanation for making the allegations? Also, whether Mr. Gutierrez's trial counsel was ineffective for failing to strike a juror that repeatedly claimed she didn't know if she could be impartial and trial counsel could not recall why he did not use a peremptory strike?

The trial court relied on counsel's explanation that the witness could not provide specific details despite the fact that she did so at the hearing. The trial court found counsel's failure to strike the juror was reasonable despite the fact that counsel had no memory of the juror and could state no strategy for

allowing her to remain.

The Court of Appeals did not reach this issue.

The WI Supreme Court should reverse and remand this matter back to the trial court for further proceedings.

Statement on Oral Argument and Publication

The court has granted review and scheduled oral argument. Mr. Gutierrez believes that both argument and publication are appropriate.

Statement of the Case

Mr. Gutierrez was found guilty by jury in Green Lake County to three (3) counts of First Degree Child Sexual Assault - Under age 13 (§948.02), three (3) counts of Incest with Child by Stepparent (§948.06)(1m)) and three (3) counts of Exposing a Child to Harmful Material (§948.11(2)(a)). *Rec. 46. 118:200-02.*

Mr. Gutierrez was sentenced on July 9, 2015. He received concurrent sentences of twenty (20) years of initial confinement and twenty (20) years of extended supervision. *Rec. 115:33-36.* The Judgment of Conviction is appended hereto as "App-1."

At trial, A.R. testified that when she was twelve years old, Mr. Gutierrez sexually assaulted her. *Rec. 116:150-54, 155-57, 157-59, 174-81 & 185-87).* Most pertinent was the testimony that he forced her to perform oral sex on him and that he ejaculated.

Mr. Gutierrez testified at trial and adamantly denied ever sexually assaulting A.R. He testified to his belief that the allegations were fabricated

because A.R. was mad at him for not allowing her to stay with her cousins and for grounding her. *Rec. 118:19-32.*

On March 31, 2014, the defense filed a motion seeking to admit evidence obtained from the Wisconsin State Crime Lab. *Rec. 38.* On the night that A.R. reported the assaults, a sexual assault exam was completed by a SANE Nurse. Swabs were taken from the inside and outside of her mouth. The following day, law enforcement collected the underwear that A.R. said she was wearing during the assault. The evidence was submitted to the Crime Lab for testing. The defense motion sought to introduce the Lab's findings that DNA from at least five different males was found on the inside of A.R.'s underwear and DNA from at least three different males was found on the outside of her mouth. The DNA was not saliva or semen and none of it matched Mr. Gutierrez. The Court ruled that the evidence would not violate the rape shield law but found that it was not relevant *Rec. 119:38-41.* The Court did allow that Mr. Gutierrez could present evidence that DNA testing

was performed and that his DNA was not found.

At trial, the State elicited testimony from the lab analyst that the DNA evidence would likely be removed if a person were to wash him or herself. *Rec. 118:14*. In accordance with the trial court's ruling, Mr. Gutierrez was unable to rebut this testimony. The State argued in closings that . . . "[I]n real life some kinds of sexual contact do not leave physical evidence." *Rec. 118:124*.

On February 13, 2014, the State filed a Motion in Limine to admit other acts evidence. *Rec. 33:40*. The State was asking to be allowed to introduce an alleged incident where A.R. was approximately six years old as well as other unspecified sexual acts. The trial court ruled that the State could only introduce evidence of things that maybe (Gutierrez) did leading up to the charged acts that would put the case in context. *Rec. 110:30-32*. The State would not be allowed to present evidence of specific acts of prior sexual assault.

On April 4, 2014, the State filed a motion to reconsider, requesting that the court allow the same

evidence from its previous request. *Rec. 40.* The court modified its prior ruling and allowed the State to present evidence to the jury of the alleged incident when A.R. was approximately six years old. *Rec. 119:51-52.*

Accordingly, at trial, the State was allowed to elicit testimony from the SANE Nurse that A.R. had told her that she had an earlier sexual encounter with Mr. Gutierrez. The witness testified that A.R. told her that it had gone on "since I was little". *Rec. 117:188-189.* The witness provided no further details.

A.R. provided few additional details. She testified that when she was "little" she was doing something wrong and was told to go into the closet. Mr. Gutierrez asked if she wanted candy then picked her up and put her either on the washer or dryer and "started doing something." *Rec. 116:154.*

The Court of Appeals concluded that the Circuit Court conducted a proper "other acts" analysis and reached a reasonable conclusion without addressing the trial court's original findings that the testimony

would make it "almost impossible" for Mr. Gutierrez "to raise any reasonable response" and then later admit the evidence without explaining why the concerns for undue prejudice no longer existed. *Rec. 110:32; 119:51.*

On August 11, 2016, Mr. Gutierrez filed a motion for Post-Conviction Relief. *Rec. 66.* The motion requested a new trial asserting that the jury was not impartial because trial counsel failed to strike a juror after she stated that she didn't know if she could be impartial. During Voir Dire, Juror Golz stated, "I don't know if I could be impartial. I work with kids. I drive school bus, so I deal with kids all the time, and I just, I don't know if I can be impartial." *Rec. 116:69.*

No other questioning was explored with Juror Golz and she remained on the jury panel.

At the hearing, trial counsel could give no reason or trial strategy for allowing the juror to remain. Counsel had no memory of the juror or why he did not use a preemptory strike. *Rec. 120:8-10.*

Further, it was claimed that counsel was ineffective for his failure to call Mr. Gutierrez's mother as a witness at trial. Andrea Gutierrez had told trial counsel, before trial, that A.R. had fabricated the allegations. At the December 9, 2016 post-conviction motion hearing she testified accordingly and explained that she did so because she was angry and sad that she had not been allowed to go to a party and was grounded when she went without permission. *Rec. 120:37-38.*

The Court of Appeals did not address this issue.

Summary of Argument

I. The Court of Appeals correctly found that the circuit court erroneously exercised its discretion by refusing to allow Mr. Gutierrez to use the DNA evidence for rebuttal. No DNA from Mr. Gutierrez was found on any sample tested; however, DNA of unknown males was detected on numerous samples. The State was allowed to elicit testimony that DNA could be washed off but Mr. Gutierrez was not permitted to present evidence to rebut that theory. This testimony was critical as the case rested almost entirely on A.R.'s testimony and Mr. Gutierrez's testimony. The only purpose in requesting admission of the evidence was to counter what the State had presented the jury with: that there was no DNA and you wouldn't expect to find any under the circumstances. This purpose is not violative of the rape shield law.

The trial court's contrary rulings were a clear abuse of discretion and this court should affirm the Court of Appeals.

The Court of Appeals also correctly noted that it

is likely a Constitutional violation to have prohibited admission of the DNA evidence.

II. The Court of Appeals should have found that allowing testimony of a vague accusation of sexual assault from approximately six years prior was an abuse of discretion. Although it was admitted for a proper purpose, and was arguably relevant, any probative value was outweighed by its unfair prejudice.

III. The trial court abused its discretion where it found that trial counsel was not ineffective for calling a witness that clearly indicated A.R. had recanted her testimony and stated reasons for fabricating her accusations. The testimony was critical in a case that hinged largely on the credibility of Mr. Gutierrez and his accuser.

Further, the trial court abused its discretion where it found that trial counsel was not ineffective for either pursuing that a juror be excused for cause

or preemptively striking that juror which twice stated that she wasn't sure if she could be impartial.

Argument

I. The Court of Appeals correctly reversed the trial court's decision where the DNA evidence was critical to a fair trial.

This Court reviews the circuit court's decision to exclude DNA evidence using an erroneous exercise of discretion standard. *State v. Shomberg*, 2006 WI 9, ¶10, 288 Wis.2d 1, 709 N.W.2d 370. The circuit court properly exercised its discretion only if it "examined the relevant facts, applied a proper legal standard, and ... reached a reasonable conclusion." *State v. Kandutsch*, 2011 WI 78, ¶23, 336 Wis.2d 478, 799 N.W.2d 865 (citations omitted). Absent harmless error, the remedy for an erroneous exercise of discretion is a new trial. *Martindale v. Ripps*, 2001 WI 113, ¶30, 246 Wis.2d 67, 629 N.W.2d 698.

A. The disputed testimony was relevant.

Mr. Gutierrez's ability to elicit testimony relative to the DNA results should have been allowed if it was relevant and its probative value was not substantially outweighed by the danger of unfair

prejudice, confusion of the issues, or misleading the jury. *State v. Sullivan*, 216 Wis.2d 768, 772-73, 576 N.W.2d 30 (1998).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. §904.01.

The results of the DNA testing are not in dispute. DNA from three unidentified males was found to be on the outside of A.R.'s mouth and DNA from five unidentified males was found on one of the two pairs of A.R.'s underwear that were taken upon execution of a search warrant. Mr. Gutierrez was excluded as a source of the DNA in all samples. *Rec: 38*

Mr. Gutierrez presented the expert testimony of Samantha Delfosse, an analyst from the Wisconsin State Crime Laboratory. She testified Mr. Gutierrez's DNA was not found on any of the tested swabs or clothing. *Rec. 118:12*. She also testified that DNA could be transferred by touch and from person to person to

object. *Rec. 118:12–13.* On cross-examination, the State stressed how DNA can be easily removed:

> Q: Now, in terms of DNA itself, can it be washed off?
>
> A: Yes, it can.
>
> Q: Can it be scrubbed off?
>
> A: Yes.
>
> Q: Can it be wiped off?
>
> A: Yes.
>
> Q: If there was biological material on the person's body and that person showered, cleansed themselves, wiped themselves off, might you expect something would happen to the biological or DNA material?
>
> A: Yes, I would.
>
> Q: What do you think?
>
> A: Basically, if you are washing or wiping, the more this is done, the more likely you are removing any

kind of DNA that was deposited.

Rec. 118:14-15.

Thus, the jury was given an explanation as to how Mr. Gutierrez could have committed the sexual assaults even though there was no DNA evidence, when in fact, there was DNA evidence. This fact is clearly relevant because it tends to show that there was no sexual assault. It is inescapable that the absence of his DNA made it less likely that he was guilty of the alleged assaults. It is equally inescapable that the fact that there was DNA evidence that had not been removed, in light of the testimony elicited by the State, made it less likely that Mr. Gutierrez had committed an assault.

Further, this allowed the State to argue that it would be no surprise that DNA of Mr. Gutierrez was not found. During closing arguments, the State emphasized that "[Delfosse] was also not surprised that no DNA of the Defendant was found under the circumstances the way this case developed in terms of the timing of the SANE exam and search warrant when we compare that to

the assault from November 1st." *Rec. 118:121.* The State also argued:

> In real life some kinds of sexual contact do not leave physical evidence. Sometimes they do, but if the evidence is not collected quickly and under the right circumstances, that is not likely to exist. Just because there is no physical evidence, that doesn't mean there is reasonable doubt. *Rec. 118:24.*

The Court's ruling forbade Mr. Gutierrez from rebutting this argument.

B. The probative value of the testimony outweighs any potential prejudice.

Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . ." Wis. Stat. §904.03. Here, the DNA evidence wasn't merely probative, it was critical in light of the fact that the state was able to elicit testimony explaining why it would be expected that Mr. Gutierrez's DNA was not found.

The State argues that this evidence had little probative value because nobody knows where or who the positive DNA samples came from; that Mr. Gutierrez didn't follow up with questions related to transfer

DNA or how long DNA may remain after washing; and that its only probative value would have been for the prohibitive proposition that A.R. had sexual contact with other unidentifiable males.

These arguments entirely miss the point. The DNA evidence was not offered to identify where or who it came from. The DNA evidence wasn't offered to infer that A.R. may have had sexual contact with other males.

The DNA evidence was offered to counter the State's assertion that Mr. Gutierrez's DNA was washed off. The State was allowed to present evidence to the jury that it would not be expected to find Mr. Gutierrez's DNA due to A.R.'s washing and cleansing and he was denied the right to rebut that evidence.

C. Failure to admit the DNA evidence was not harmless error.

A harmless error is one which did not affect the substantial rights of the party. *Martindale v. Ripps* 2001 WI 113, 30, 246 Wis.2d 67, 629 N.W.2d 698. "For an error to 'affect the substantial rights' of a party, there must be a reasonable probability that the

error contributed to the outcome of the action or proceeding at issue." *Martindale*, at ¶32, citing *State v. Dyess*, 124 Wis.2d 525, 524, 370 N.W.2d 222 (1985). A reasonable probability is one that undermines the confidence in the outcome. *Id.*

The Court of Appeals noted, "This case was largely a case involving competing testimony." *Gutierrez*, ¶12. Mr. Gutierrez agrees.

Although law enforcement tested several items and swabs were collected from A.R. and her home, none of Mr. Gutierrez's DNA was found. There was no physical evidence of sexual assault. Mr. Gutierrez testified at trial that he never sexually assaulted A.R. *Rec 118:29-32*. Additionally, the State did not present any witnesses to the alleged assault, even though A.R. testified that during the November assault, she lived in an apartment with her mother and seven younger siblings. *Rec. 116:150*.

Although A.R. testified at trial about these alleged assaults, her testimony was inconsistent with her previous statements to law enforcement. When first

interviewed, A.R. said that one of the incidents occurred in the front seat of a van and involved her giving oral sex. *Rec. 85, 38:05-39, 02*. However, A.R. actually testified that the assault occurred in the back seat of the van and involved A.R. receiving oral sex. *Rec. 116:157-158*.

In light of the State's lack of physical or corroborating evidence and A.R.'s inconsistent statements, the DNA evidence was of great importance. It was critical to rebut the State's assertion that DNA is easily washed away thereby explaining why Mr. Gutierrez's DNA was not present. Denying him the ability to rebut this evidence undermines confidence in the outcome.

D. The Court of Appeals did not err in considering the nature of the DNA evidence.

Respectfully, the State's analysis is contradictory and flawed. It first points out the uncertainty of its origins. "No one can say with any degree of certainty where it came from, whose it was, or what it means." *State's Brief* at p. 15. However, the State then argues at length that the DNA came to

be on A.R. sometime after the alleged assault. There are two obvious flaws in that argument.

First, there is absolutely no evidence that the disputed DNA evidence was not on A.R. at the time of the alleged assault. There is no evidence whatsoever that it came to be on A.R. only sometime after the alleged assault.

Second, the State's argument relies entirely on generalizations of the assumed good grooming habits of twelve-year-old children.

E. The Court of Appeals correctly notes that the denial to admit the DNA evidence is likely a constitutional violation, as well.

The Court of Appeals correctly notes that Mr. Gutierrez has a constitutional right to submit favorable evidence to the jury. *Gutierrez*, ¶8 at FN 4. This court has explained:

> The rights granted by the confrontation and compulsory process clauses are fundamental and essential to achieving the constitutional objective of a fair trial. The two rights have been appropriately described as opposite sides of the same coin and together, they grant defendants a constitutional right to present evidence. The former grants

> defendants the right to 'effective' cross-examination of witnesses whose testimony is adverse, while the latter grants defendants the right to admit favorable testimony. *State v. Pulizzano*, 155 Wis.2d 633, 645, 456 N.W.2d 325 (1990) citing *Chamber v. Mississippi*, 410 U.S. 284, 294-95 (1973), *Davis v. Alaska*, 415 U.S. 308, 318 (1974) [other citation omitted].

Here, Mr. Gutierrez was denied the right to effectively cross-examine the analyst (Delfosse) when she testified that washing and cleaning makes it more likely that Mr. Gutierrez's DNA would be removed.

Further, Mr. Gutierrez was denied the right to present favorable evidence, i.e., that despite testimony that there wouldn't be any DNA evidence because it had been washed away, in fact there was. Clearly, these are violative of Mr. Gutierrez's constitutional rights.

Of course, as this court previously points out, these rights are not limitless. "Confrontation and compulsory process only grant defendants the constitutional rights to present relevant evidence not substantially outweighed by its prejudicial affect." *Id.* We reassert our arguments to that effect

contained in the prior portions of this Brief.

II. The trial court erroneously exercised its discretion when it admitted other acts evidence that Mr. Gutierrez sexually assaulted A.R. when she was approximately six years old and the Court of Appeals' review was cursory.

A. Standard of Review.

This court employs an erroneous exercise of discretion standard when reviewing a circuit court's admission of other acts evidence. *State v. Sullivan*, 216 Wis.2d 768, 780, 576 N.W.2d 30 (Wis. 1998). An appellate court will affirm a circuit court's ruling if it finds that the circuit court "examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." *Id. at 780-81.*

The circuit court must articulate its reasoning for admitting or excluding the other acts evidence. *Sullivan*, 216 Wis.2d at 774. A circuit court's failure to explain its rationale constitutes an erroneous exercise of discretion. *Id at 781.* If a circuit court failed to articulate its reasoning, an

appellate court will independently review the record to determine whether it provides a reasonable basis for the circuit court's ruling. *Id.*

The State moved to allow testimony from A.R. that Mr. Gutierrez sexually assaulted her at age 6. *Rec. 33.* At the hearing, the Court initially ruled to exclude any prior acts of alleged sexual contact noting that ". . . the probative value of those acts is outweighed by what could be viewed as cumulative or collective effect against the Defendant who would, it would be almost impossible under the circumstances for him to raise any reasonable response to those allegations." *Rec. 110:31-32.*

After the State filed a Motion to Reconsider, the trial court reversed itself and allowed the testimony. *Rec. 40, 118:51.*

The trial court in this case did not adequately articulate its reasons for admitting the other acts evidence. In admitting the 6-year old allegation the trial court mentioned that its ruling was controlled by *Sullivan* and *State v. Davidson but* did not apply

the law to the specific facts of Gutierrez's cases. *Rec. 119:52-53.* The Court of Appeals reviewed the trial court's decision in a cursory fashion.

B. *Sullivan* Analysis

Wisconsin law precludes admitting evidence of prior bad acts to prove that a defendant had a propensity to commit the crime charged. Wis. Stat. §904.04 (2013-14). Other acts evidence is therefore generally disfavored. *State* v. *Harris*, 123 Wis.2d 231, 236, 365 N.W.2d 922 (Ct. App. 1985). This Court has pronounced that "[e]vidence of prior crimes or occurrence should be sparingly used by the prosecution and only when reasonably necessary." *Whitty* v. *State*, 34 Wis.2d 278, 297, 129 N.W.2d 557 Wis. 1967). Excluding other acts evidence "is based on the fear that an invitation to focus on an accused's character magnifies the risk that jurors will punish the accused for being a bad person regardless of his or her guilt of the crime charged." *Sullivan*, 216 Wis.2d at 783 (citing *Whitty*, 34 Wis.2d at 292). Therefore, when approached with a motion to admit other acts evidence,

a court must engage in a three-step analysis. *Sullivan*, 216 Wis.2d at 771. The analysis is as follows:

> (1) Is the other acts evidence offered for an acceptable purpose under Wis. Stat. §904.04(2)?
>
> (2) Is the other acts evidence relevant, considering the two facets or relevance set forth in Wis. Stat. §904.01?
>
> (3) Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence? *Id. at 772-73.*

Other acts evidence must satisfy all three prongs of the *Sullivan* analysis to be admissible. See *Id. at 783*. A court may not admit other acts evidence if it fails any of the *Sullivan* prongs. See *Id.*

The first step of the analysis asks if the evidence was admitted for a proper purpose, "such as to establish motive, opportunity, intent, preparations, plan, knowledge, identity, or absence of mistake or accident." *Sullivan*, 216 Wis.2d at 783.

When the defendant's motive for an alleged sexual

assault is an element of the charged crime, other acts evidence may be admitted for that purpose. *State v. Davidson*, 236 Wis.2d 537, 566, 613 N.W.2d 606 (Wis. 1999). Because sexual contact is defined as a type of "intentional touching," Wis. Stat. §948.01 (2013-14), motive is an element of the sexual assault crime charged in Mr. Gutierrez's case. Therefore, Mr. Gutierrez concedes that the other acts evidence was admitted for a proper purpose.

The second step of the *Sullivan* analysis asks whether the other acts evidence is relevant. *Sullivan*, 216 Wis.2d at 785. Relevance has two facets. *Id.* The first facet of relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the case. *Id.* The substantive law determines the elements of the crime charged and therefore the "facts and links in the chain of inferences that are of consequence to the case." *Id. at 785-86.* Because motive is an element of the crime of sexual assault, other acts evidence that speaks to motive is of consequence to the case and is

relevant. Therefore, the other acts evidence in this case satisfies the first facet of relevance.

The second facet of relevance is whether the evidence has probative value. *Sullivan*, 216 Wis.2d at 786. Probative value is found in the similarity between the charged offense and the other acts allegation. *Id. at 787*. The greater the "similarity, complexity, and distinctiveness" of the events, the greater the probative value of the other acts evidence. *Id.* The number of similar events required, depends on the "complexity and relative frequency" of the events rather than the total number. *Id. at 787-88.*

Mr. Gutierrez was on trial for three incidents of sexual assault: in his home, while delivering scrap metal, and in a garage. The *Sullivan* court ruled that §904.04 "permits the admission of other acts evidence if its relevance does not hinge on an accused's propensity to commit the act charged." *Sullivan*, 216 Wis.2d at 783. Whether A.R. was allegedly assaulted approximately six years prior to those three incidents

do not make the charged assaults any more or less probable, but rather only shows that Mr. Gutierrez may have had a propensity toward sexual assaults. This is clearly an impermissible purpose. *Whitty v. State*, 34 Wis.2d 278, 291-92, 149 N.W.2d 557 (Wis. 1967). Therefore, the other acts evidence is not probative.

Finally, *Sullivan* requires an analysis to determine whether the probative value of the other acts evidence is substantially outweighed by danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. *Sullivan*, 216 Wis.2d at 772-73.

> Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case. *Id. at 78-90.*

The trial court acknowledged the prejudice in admitting the 6-year-old allegation. At the first

motion hearing, the trial court ruled to exclude discussion of "any specific acts of alleged sexual contact." *Rec. 110:31.* The court ruled that "the probative value of those acts [would be] outweighed by what could be viewed as cumulative or collective effect" against Mr. Gutierrez. *Rec. 110:32.* The court also acknowledged that if the 6-year-old allegation were admitted it would be "almost impossible" for Mr. Gutierrez "to raise any reasonable response" to the allegation. *Rec. 110:32.* At the second motion hearing, the court did not address why the same prejudice concerns were no longer present.

The trial court's original concerns were realized by Mr. Gutierrez, at trial. A.R. testified as follows:

> Q. Do you remember the first time?
>
> A. I remember that when I was little, we were living in apartments. I was doing something wrong and I was, he told me in the closet. He told me if I wanted candy, and I said yes, and then like he picked me up on the laundry thing, the

> washer thing or dryer and like he like started doing something so I started to like cry, and that's it. *Rec. 109: 154.*

A.R. could not identify the city or even the state that she claimed this happened in. *Rec. 109:181.*

These vague accusations made it impossible for Mr. Gutierrez to respond in any rational way. It's a vague time frame and the allegations are nebulous and confusing, at best. The alleged other acts incident occurred when A.R. was "approximately" six.

In addition to inability to respond to the other acts allegation, the State's prejudicial use of the other acts evidence at trial outweighed its probative value. First, the State's use of the other acts evidence misled the jury. In closing arguments, the prosecutor stated, "this has been what [A.R.] has known since she was six years old. *Rec. 118:114.*

While juries are advised against relying on counsels' opening and closing statements, the *Sullivan* court recognized the potential for prejudice in light of a prosecutor's repeated references to the admitted

other acts evidence. See *Sullivan*, 216 Wis.2d at 792. In Mr. Gutierrez's case, the prosecutor's repeated references to the approximate 6-year-old allegation made the sexual assaults seem as though they had been happening continuously since A.R. was six years old.

Second, the State's use of the other acts evidence at trial contradicted the evidence's supposed relevance and purpose. At trial, the State failed to explicitly indicate any similarities between the charged crimes and the prior alleged incident, and at no point during the trial did the State compare the charged crimes with the 6-year-old incident. Indeed, the State only used the other acts evidence at trial to show that A.R. had been sexually assaulted before, and that the assaults began when she was six-years-old. *Rec. 118:154-155.*

It has been stated that despite unfair prejudice, a cautionary instruction "can go far to cure any adverse effect attendant with the admission of the other acts evidence." *Sullivan*, 216 Wis.2d at 791. The instruction in this case directed the jury to consider

the other acts evidence only for the purposes on context/background and motive. *Rec. 118:91-92.* While the instruction in this case did not track all permissible purposes as in *Sullivan*, 216 Wis.2d at 780, 791, it was still improperly vague.

The instruction allowed the jury to consider the other acts evidence to provide a more complete presentation of the evidence relating to the offense charged. *Rec. 118:91-92.* The context the State created by admitting evidence of an alleged incident that occurred six years prior to the charged crimes is extremely broad and vague. The corrective instruction allowing the consideration of evidence for the purpose of context therefore did not cure the prejudicial effect of the admitted evidence.

C. The erroneous admission of other acts evidence was harmful.

If an appellate court finds that a circuit court erroneously admitted other acts evidence, it must then address whether that error was harmless or prejudicial. *Sullivan*, 216 Wis.2d at 773. The test for harmless error is whether there is a reasonable

possibility that the error contributed to the conviction. *Id. at 792.* The burden of proving that the error was harmless is on the beneficiary of the error (the State). *Id.* The State must show that there is no reasonable possibility that the error contributed to the conviction.

The *Sullivan* court acknowledged the influence of other acts evidence in light of a weak case. The court found, "In light of the complainants' inconsistent statement, any evidence that tended to support one version over the other necessarily influenced the jury." *Sullivan*, 216 Wis.2d at 793. Here, the State clearly demonstrated that the other acts evidence corroborated A.R.'s allegations. Despite the fact that the November incident allegedly took place while the entire family was in the home sleeping, the State failed to present any of the other five Gutierrez children to testify that they heard A.R. and their stepfather that night. Despite Mr. Gutierrez's testimony that he has herpes, the State failed to present evidence that A.R. has herpes as well.

Therefore, based on the above, Mr. Gutierrez respectfully requests that the court reverse the Court of Appeals on this issue and remand for further proceedings.

III. Mr. Gutierrez is entitled to a new trial where the trial court denied his post-conviction motion claims of impartial jury and ineffective assistance of counsel.

A. Mr. Gutierrez is entitled to a new trial, where he was denied his constitutional right to a fair and impartial jury.

The Court of Appeals did not reach this issue because they concluded that Mr. Gutierrez was entitled to a new trial and the record would likely change on retrial. *Gutierrez*, 9, FN 8.

Counsel moved to excuse the juror, but the court did not rule on the request. Counsel never renewed the motion.

During voir dire, defense counsel addressed the jury panel. He reiterated the allegations and inquired as to whether prospective jurors could be impartial. He stated:

> **Mr. Haase**: Now, as you heard, there are allegations of sexual assault. Anyone here

> who feels just because of the type of crime charged that you don't think that you could sit here, listen to this, and be fair and impartial to Mr. Gutierrez? *Rec. 116:67.*

It is apparent from the transcript that three jurors raised their hands. Two jurors were questioned with one of them being dismissed from the panel. Attorney Haase indicated that he had no other questions and then the Court reminded him of the third juror that had raised her hand. The record reveals the following:

Mr. Haase:	Ms. Golz.
Juror Golz:	I don't know if I could be impartial. I work with kids. I drive school bus, so I deal with kids all the time, and I just, I don't know if I can be impartial.
Mr. Haase:	Your honor, I have no more questions. I would ask she be excused.
The Court:	Ms. Vanden Brandon.
Ms. Vanden Brandon:	I just think we need a little more certainty if possible.
The Court:	There was a question before that we didn't

explore that we can depending on whether that's necessary or not. We can adjourn briefly to address. So Mr. Haase, was that all of your questions on that topic or all of your questions total?

Mr. Haase: I think it's all my questions on that topic. *Rec. 116:69.*

No other voir dire was done with Juror Golz. Both sides proceeded to make their peremptory strikes and Juror Golz remained on the jury, serving as one of the twelve that convicted Mr. Gutierrez.

Where a juror openly admits bias and his or her partiality was never questioned, that juror is subjectively biased as a matter of law. *State. V. Carter*, 250 Wis.2d 851, 641 N.W.2d 517 (2002). The similarities between *Carter* and Mr. Gutierrez's case are striking. In *Carter*, also a sexual assault case, a juror was asked whether having a relative who had been sexually assaulted would influence or affect his ability to be fair and impartial. The juror answered "yes." Some situational questions were then asked but

no follow up relative to his potential bias. He was not struck and served on the jury that convicted the defendant.

The Court of Appeals noted the three types of juror bias-statutory, objective and subjective:

We intend the term "subjective bias" to describe bias that is revealed through the words and the demeanor of the prospective juror. While the term "subjective" is not meant to convey precisely the same sense of bias as did the term "actual," the two terms are closely related. As did actual bias, subjective bias refers to the bias that is revealed by the prospective juror on voir dire: it refers to the prospective juror's state of mind. *State v. Faucher*, 227 Wis.2d 700, 717, 596 N.W.2d 770 (1999).

Here, Juror Golz's response demonstrates that she was subjectively biased. She said, "I don't know if I could be impartial." She further explained why and then restated "I don't know if I can be impartial." The fact that this juror remained on the jury and participated in deliberations overwhelmingly indicates

an unreliable outcome in the verdicts. A guilty verdict without twelve impartial jurors renders the outcome unreliable and fundamentally unfair. *State v. Ramos*, 211 Wis.2d 12, 564 N.W.2d 328 (1997). On this alone, Mr. Gutierrez is entitled to a new trial.

B. Trial counsel was ineffective for failing to remove the partial juror.

Defense counsel was ineffective in allowing the juror to remain on the panel. Every defendant has a Sixth Amendment right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984), Article I, §7 Wisconsin Constitution. "In order to establish a violation of this fundamental right, a defendant must prove two things: (1) that his or her lawyer's performance was deficient, and, if so, (2) that the deficient performance prejudiced the defense." *State v. Fritz*, 212 Wis.2d 284, 569 N.W.2d 48 (1997), citing *Strickland*, 466 U.S. at 687.

Here, Counsel's performance was clearly deficient. When questioned, he could not state any reason or strategy for allowing her to remain on the jury. In fact, he had no recollection of Juror Golz,

the voir dire as it pertained to her or why he did not use a preemptory strike. *Rec. 120:8-10.* Although Strickland requires that a defendant demonstrate that Counsel's representation fell below an objective standard of reasonableness considering all the circumstance, a reviewing Court should not construct a strategic defense which Counsel does not offer. *Harris v. Reed*, 894 F.2d 871, 878 (7th Cir. 1990).

Here, Counsel failed to question the juror further, despite her repeated claim that she didn't know if she could be impartial. He did not ensure that she was stricken for cause or ask the Court for a specific ruling. Lastly, he did not use a preemptory challenge to remove her from the jury. Any reasonable counsel, having heard the response of the juror, would have pursued all three options and trial counsel's failure falls well below the standard of reasonableness.

Further, as in *Carter*, Mr. Gutierrez was unduly prejudiced by trial counsel's failure. As in this case, trial counsel in *Carter* failed to further

question the juror, have him stricken for cause and failed to use a preemptory challenge. This denied Mr. Gutierrez of a fair trial with twelve unbiased jurors.

This court should revers and remand this matter to the circuit court.

C. Mr. Gutierrez was denied his right to effective assistance of counsel when trial counsel failed to call as a witness, Andrea Gutierrez who would have testified that A.R. recanted her allegations.

Andrea Gutierrez is David Gutierrez's mother. *Rec. 120:34.* It is undisputed that she made contact with Mr. Gutierrez's trial counsel, prior to trial, and told him that A.R. had confessed to her that she had made up the allegations against Mr. Gutierrez. At the December 9, 2016 post-conviction motion hearing, Ms. Gutierrez testified as follows:

> Q: Okay. Thank you. So now I want you to tell me about that conversation. Who brought up the subject?
>
> A: She brought it up because she was crying, and I said Amber, why are you crying? And she said because I want my dad and my mom.
>
> I said you want your dad? Well, he is

in jail. According to what you said he molested you and then I said Amber, tell the truth. Did he molest you in any way?

He deserves to be in jail if he touched you inappropriately. It's your testimony put him there. I cannot help you. She said I want my dad, I want my dad. I said I cannot help you.

I said I cannot do that. You have to tell including you have to tell your therapist. You have to let her know. And she also told me I have already told her, but they told me Amber, you already stated your facts and that's it.

They don't' listen to me, Grandma. They don't listen to me she said. I said well, there is nothing I can do, honey, because they said that you, that he molested you. If he did not.

I was angry, Grandma. Can you understand, Grandma, I was sad. Can you understand that? I was angry because I wanted to go to the party. Dad and mom not let me, they grounded me.

I said what party? (Unintelligible) and there is nothing wrong with her. I just wanted to go to party.

Q: So she told you that she made this up because she was angry at Mr. Gutierrez?

A: At my mom and at dad because they both said Amber, you are not going. You are grounded because you went to that

> party without our permission. You had permission to be in your house with your aunt, not going to any parties. That's what she state. *Rec. 120:37-38.*

Mr. Gutierrez asserts that the failure to elicit this testimony was deficient and Mr. Gutierrez was prejudiced by the failure as stated by the Supreme Court in *Strickland V. Washington*, 466 U.S. 668 (1984).

A. Trial counsel was deficient.

There is no question that trial counsel was aware of this important testimony before trial. He was also aware that the evidence was essential to the defense. He had previously stated in court that "... from the defense point of view, we feel it is extremely important information to our case. *Rec. 114:4.*

The testimony was easily attainable. The witness was present for the trial and anticipated offering her testimony. *Rec. 120:42.*

Despite the above, Counsel did not call her as a witness and offered the following explanation:

> Q: Now, Andrea was not a witness at

trial. Why did you decide not to call her as a witness?

A: Well, several reason. Obviously, I didn't make that decision until it became our turn to present our case in chief.
So it was going back and forth through my mind, but some of the things that came to my mind is that this was obviously a case about credibility. Does the jury want to believe Amber, or does the jury want to believe David.

So when I thought about his mother testifying, things came to my mind like she cannot be specific about when this statement that Amber told her when that happened. She couldn't tell me when it happened.

She couldn't tell me why Amber was there. She couldn't tell me who brought her there. No reason as to why when she was originally told by Amber of the story, why she didn't immediately report it. Why it took so long to get that information to me.

So I had concerns about that because I had nothing to verify. It was only her and Amber. Also in talking with Mrs. Gutierrez, a very nice lady, very religious lady, but I guess I would describe it as a loose cannon.

In talking with her, she loved to talk. And then you would ask a

> question, then she would just go off on something else. And some of the things said, I felt if that happened on the stand, that wouldn't have been beneficial to our case.
>
> There were, again, I thought that her on cross-examination especially, I thought her credibility would have been undermined. That wouldn't have been beneficial to our case. So that the basic reasons I did not call her. *Rec. 120:14-16.*

Trial counsel explained that Mrs. Gutierrez could not be specific about when A.R. recanted or the details about what A.R. said. The record demonstrates exactly the opposite. She testified that the conversation took place in her home in Brownsville, Texas, that it was a conversation that she had in person with A.R. that lasted about one-half hour. *Rec. 120:36.* She was also, very clearly, able to provide very specific testimony:

> Q: So she told you that she made this up because she was angry with Mr. Gutierrez?
>
> A: At mom and dad because they both said Amber, you are not going. You are grounded because you went to that party without our permission. You had permission to be in your house with

> your aunt, not going to any parties. That what she stated. *Rec. 120:38.*

Trial counsels only other explanation was his assertion that Mrs. Gutierrez tended to go off on other topics when she was asked a question. Although possibly true, all Counsel would have had to do is redirect her to the specific question. Her testimony at the post-conviction motion hearing is demonstrative. Even though some of her answers could be seen as rambling, when redirected she gave very specific and compelling testimony. Further, that testimony stood up to the State's cross-examination.

This case rested solely on the credibility of A.R. This testimony would have undeniably affected her credibility.

> Thus, when we look to a lawyer's conduct and measure it against this court's standard to determine effectiveness, we cannot ratify a lawyer's decision merely by labeling it, as did the trial court, "a matter of choice and of trial strategy." We must consider the law and the facts as they existed when trial counsel's conduct occurred. Trial counsel's decision must be based upon facts and law upon which an ordinarily prudent lawyer would have then relied. We will in fact second-guess a lawyer if the initial guess is one that demonstrates an

> irrational trial tactic or if it is the exercise of professional authority based upon caprice rather than upon judgment. *State v. Felton*, 110 Wis.2d 485, 503, 329 N.W.2d 161 (1983).

B. Mr. Gutierrez was prejudiced by trial counsel's ineffective performance.

> In order to demonstrate that counsel's deficient performance is constitutionality prejudicial, the defendant must show that "there is 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 the confidence in the outcome. *State v. Thiel*, 264 Wis.2d 571, 587, 665 N.W.2d 305 (2003) citing *Strickland*, 466 U.S. at 694 and *State v. Pitsch*, 124 Wis.2d 628, 642, 369 N.W.2d 711 (1985).

Here, as previously stated, these verdicts rested only on the testimony of A.R. There was no DNA. There was no supporting physical evidence. There was no corroborating testimony. There was no testimony or even suggestion from Mr. Gutierrez that he committed these offenses. As a result, the verdicts were entirely based upon the credibility of A.R. Mrs. Gutierrez's testimony went directly to A.R.'s credibility. It was evidence, from A.R. herself that would have directly contradicted A.R.'s

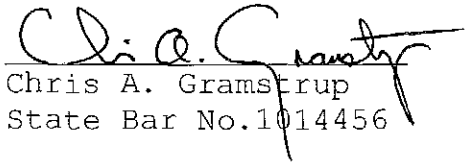
trial testimony which was the *only* evidence that supports the verdicts.

As a result, the confidence in the outcome of this trial is exceedingly undermined. Had trial counsel present this critical testimony there is a reasonable probability of a different outcome.

Conclusion

Based upon the argument above, the Defendant-Appellant, David Gutierrez, by his counsel, Chris A. Gramstrup, respectfully requests an Order remanding the matter back to circuit court for a new trial.

Dated: January 15, 2020



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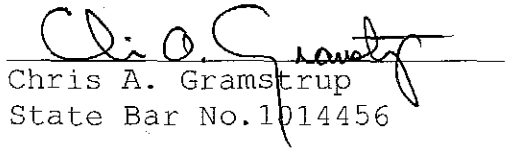
Certification

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief produced using a monospaced font. The length of the brief is 56 pages.

Dated: January 15, 2020



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Appendix Table of Contents

Appendix

Certification of Mailing

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Dated: January 15, 2020

Chris A. Gramstrup
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Appellant's Brief Appendix Certification

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 trial 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, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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