STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2007AP2711-CR
(Walworth County Case No. 2005CF80)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONALD J. MCGUIRE,

Defendant-Appellant-Petitioner.

Appeal from the Judgment and the Final Order
Entered in the Circuit Court for Walworth County,
The Honorable James L. Carlson, Circuit Judge, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUES PRESENTED FOR REVIEW

1. Whether the statute of limitations' tolling provision for any time when the defendant "was not publicly a resident within the state," as applied to this case, violated either McGuire's rights to equal protection and due process or the privileges and immunity clauses of the United States Constitution.

The circuit court denied McGuire's pretrial and post-conviction motions raising these issues and the Court of Appeals affirmed.

2. Whether, given the 36-plus year delay in filing these charges, this prosecution violated McGuire's right to due process without regard to the statute of limitations.

The circuit court denied McGuire's pre-trial and post-conviction motions raising this claim and the Court of Appeals affirmed.

3. Whether reversal is appropriate in the interests of justice under Wis. Stat. §751.06 due to the prejudicial delay in filing these charges.

The lower courts did not address whether this Court should exercise its discretion under §751.06, but declined to exercise their own discretion under Wis. Stat. §§752.35 and 805.15(1).

4. Whether McGuire was denied the effective assistance of counsel based on trial counsel's

a. failure to investigate and call Elita Bender to testify; and

b. failure to investigate Robert Goldberg and to call Goldberg and/or his sister Barbara Davidson, to testify.

Following an evidentiary hearing, the circuit court denied McGuire's motion for post-conviction relief based on this ground and the Court of Appeals affirmed.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Court having granted review in this matter, this case meets the requirements for oral argument and publication.

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BRIEF OF DEFENDANT-APPELLANT-PETITIONER

STATEMENT OF THE CASE

On February 7, 2005, the state filed a two-count criminal complaint against Fr. Donald J. McGuire, alleging that he had taken "indecent liberties" with two children in Fontana, Wisconsin between the fall of 1966 and the end of December, 1968 (R1). *See* Wis. Stat. §944.11(2) (1965).

V.H.B. was a student at Loyola Acadamy in Illinois at the time and McGuire was a Jesuit and teacher at the school. According to V.H.B., he and McGuire traveled to V.H.B's uncle's cottage in Fontana, Wisconsin and, while there, McGuire rubbed his hands across V.H.B.'s genitals over his clothes. S.P.C. similarly alleged that, while he was a student at Loyola Academy, he and McGuire traveled to the same cottage in Fontana, Wisconsin and, while there, participated in mutual masturbation. At the time of the alleged offenses, V.H.B. and S.P.C. each was 14 or 15 years old. (R1). The state subsequently added three additional counts of indecent liberties involving V.H.B. (R9; R10).

The jury convicted McGuire (R37, R40-R49), and the circuit court sentenced him to seven years incarceration and 20 years of probation (R64:93-95, 99-100; R65). The court stayed the prison term pending post-conviction proceedings (R64:102).

McGuire's post-conviction motion pursuant to Wis. Stat. §809.30(2)(h) alleged, *inter alia*, that the nearly 40-year delay in filing the charges violated both the applicable statute of limitations and his constitutional rights. That motion also challenged the improper admission of evidence and raised issues regarding newly discovered evidence and ineffectiveness of trial counsel. (R87-R89).

Following an evidentiary hearing (R96), the Circuit Court, Honorable James L. Carlson presiding, denied McGuire's motion (R96:172-88, 211-16; R99; App. 14, 16-38).

On May 20, 2009, the Court of Appeals affirmed McGuire's conviction and the denial of his post-conviction motion (App. 1-13).

The Court granted McGuire's petition for review on September 10, 2009. On October 8, 2009, the Court extended the time for filing this brief to October 28, 2009.

STATEMENT OF FACTS

Donald McGuire was a Jesuit priest who, during the late 1960s, taught at an all-boys Catholic school in Wilmette, Illinois called the Loyola Academy (R41:11). Loyola Academy was not a boarding school (R40:25, 196-97). The residence hall for Jesuits, in which each had his own room, was separate from the school (R40:26-28). Depending on the witness, students either never were allowed in the residence hall or were only allowed under exceptional circumstances (R40:27; R41:38; R42:167-69, 179-80).

During his time at Loyola Academy, McGuire lived on the third floor, initially with Mike English, Fr. James Burr, and Fr. John Beall, and later with Fr. William P. Renke and Fr. Bob Humbert and others (R42:161-62, 249-51). The doors had louvers and sounds easily could be heard from the hall or next door (R42:260, 264).

V.H.B. (DOB 12/17/52 (R40:16)) nonetheless testified that, after starting at Loyola Academy in 1966, he secretly lived in McGuire's room during the week, sleeping naked with him in McGuire's single bed, from Fall, 1966 through Spring, 1968 (R40:25-27, 32-34, 41, 45-47). V.H.B claimed the two participated regularly in nude body rubs in McGuire's room (R40:43-45, 47).

McGuire became the priest for V.H.B's family, coming to their home and, according to V.H.B., even visiting the cottage of V.H.B.'s uncle, Dr. Harry Bender, in Fontana, Wisconsin several times between Spring, 1967 and Spring, 1968 (R40:48-51, 62-68). V.H.B. claimed that, although they slept in the same bedroom in Fontana, they did no body rubs there. However V.H.B. claimed that McGuire would give him "horsebites" in which he would grab V.H.B.'s inner thigh and then brush past his genitals over his clothes (R40:63-67). Although he initially denied any nude touching in Wisconsin (R40:175-76), V.H.B. also claimed at trial that McGuire once placed his hand down V.H.B.'s pants in Fontana and squeezed his genitals as a way to wake him. (R40:65-67).

V.H.B. told no one about the alleged assaults except his sister Regina, who he told in the late 1980s or early 1990s, and his late wife (R40:145-46). After receiving a letter in August, 2003, regarding S.P.C.'s claims, V.H.B. contacted S.P.C.'s attorney to initiate a lawsuit (R40:71-73, 127-36; R39:Exh. 22).

Although he allegedly stayed in McGuire's room at Loyola Academy on 200 to 240 nights, V.H.B. never knew McGuire's room number, never had to defecate while there and, although a number of other Jesuits lived on the same floor, they never caught him and he only remembered seeing one of them. (R40:33, 81, 103-04, 106-08, 165, 216).

S.P.C. was born in 1954 and entered Loyola Academy in August, 1968 (R41:54, 56). S.P.C. claimed that he stayed in McGuire's room and bed from October, 1968 through his freshman year and during the Fall of 1969 (R41:62-63, 68, 110-111). According to S.P.C.,

back rubs soon progressed to mutual masturbation as well as oral sex (R41:68-71, 111-12).

S.P.C. traveled with McGuire to a retreat in Eagle River, Wisconsin and to Europe. He also claimed he traveled to Fontana, Wisconsin with McGuire between Thanksgiving and Christmas, 1968. (R41:79-85, 139). S.P.C. claimed that McGuire drove him to Fontana in a Jesuit fleet car for a "relaxation weekend," and they participated in mutual masturbation there (R41:92-95, 107-10). S.P.C. never went to Fontana as a child either before or after that trip (R41:127).

S.P.C. made a vague report to Fr. Schlax and, after a meeting with S.P.C.'s father, Fr. Renke, Fr. Beall, and Fr. Humbert, S.P.C. was transferred to a different school (R41:113-16,165,168-71). Fr. Renke's notes of that meeting reflect allegations of a kiss and baby oil rubs, but that it never went any further than that, that the first time S.P.C. was away from home with McGuire was for the Eagle River retreat the week before Christmas, 1968, and that nothing happened during that retreat (R41:179-89; R39:Exh.44).

S.P.C.'s father and brother Tim, the only family members he claims to have told about the alleged misconduct, died in 1989 or 1990 (R41:63, 121-22). S.P.C. first contacted a civil attorney to sue over his claims in June, 2003 (R41:125-26, 192-98).

Fr. Schlax confirmed that S.P.C. had complained about McGuire, but could not remember when, whether S.P.C. provided any specifics, or what happened during the meeting resulting in S.P.C.'s transfer to a different school (R42:124-25, 129-35).

Shortly before S.P.C.'s allegations against McGuire in 1969, S.P.C. was caught stealing money from an honor-type concession stand and was reprimanded by McGuire (R42:234-42).

V.H.B. and S.P.C. claimed not to know each other before August, 2003 (R40:39,72,131; R41:91), and that, although they spent hours talking by phone after that point, they never exchanged details regarding the layout of McGuire's room or the Fontana cottage

(R40:39-40, 129-33; R41:100-03, 105, 203-10). Although both claimed to have seen McGuire naked numerous times, neither initially recalled that he had a prominent port-wine stain on his shoulder (R40:223-28; R42:33-34; R42:252-56; R39:Exh.35). Also, although both claimed that McGuire was circumcised (R41:69; R42:35), he in fact is not (R42:257-58, 294).

SUMMARY OF ARGUMENT

The allegations in this matter concern incidents that supposedly took place between 1967 and 1968, some 36 years or more before the criminal complaint was filed in February, 2005 (R1). The complainants did not even report their allegations to the police until the fall of 2003, after seeking to file a civil suit (R40:136-39; R41:125-26). As a result of this delay, McGuire was denied the testimony of almost all of the witnesses who would be able to corroborate his defense that the complainants' allegations here were not truthful.

The charges here are possible only because Wisconsin's usual six-year statute of limitations is tolled while the defendant is outside the state. Wis. Stat. §939.74; *see* ***State v. MacArthur***, 2008 WI 72, 310 Wis.2d 550, 750 N.W.2d 910. The question remains, however, whether the unlimited tolling provided by that statute is constitutional where, as here, it undermines the accused's ability to present a defense. Although this Court rejected a *facial* challenge to the tolling provision in ***State v. Sher***, 149 Wis.2d 1, 437 N.W.2d 878 (1989), where the two years of tolling was *de minimus*, the Court has never addressed the constitutional validity of the tolling provision *as applied* to a delay anywhere close to the 36-year delay here. For the reasons stated in Section I,A, *infra,* the unlimited tolling provided by §939.74(3), as applied to the facts in this case, denies McGuire his rights under the Privileges and Immunities Clauses, as well as equal protection and due process.

Of similar import is the related question of when the delay in filing particular charges, although within the applicable statute of limitations, nonetheless violates due process. Although this Court addressed that issue in ***State v. Wilson***, 149 Wis.2d 878, 440 N.W.2d

534 (1989), and followed ***Wilson*** without further analysis in ***MacArthur***, *supra*, the due process standard announced in ***Wilson*** (requiring both resulting prejudice and an improper prosecutorial motive) conflicts with due process requirements in analogous situations, undermines the right to present a defense, and is not required by the United States Supreme Court authority on which it relies. *See* Section I,B, *infra*.

Even if this Court should find that the prejudicial delay here does not require reversal on constitutional grounds, reversal remains appropriate in the interests of justice under Wis. Stat. §751.06 on the grounds that, due to the effects of the 36-year delay in filing these charges, the real controversy was not and could not be tried. *See* Section I,C, *infra*.

Finally, for the reasons stated in Section II, *infra*, trial counsel's failure to conduct a reasonable investigation denied McGuire important defense evidence and the right to the effective assistance of counsel.

ARGUMENT

I.

THE 36-PLUS-YEAR DELAY IN BRINGING THESE CHARGES PREJUDICED MCGUIRE'S DEFENSE AND JUSTIFIES DISMISSAL

Rarely, outside of homicide cases, is a defendant called upon to account for his actions and defend against charges that allegedly occurred nearly four decades earlier. The obstacles to preparing and presenting such a defense are enormous. *See* ***Stogner v. California***, 539 U.S. 607, 631 (2003) (delay "can plague child abuse cases, where recollection after so many years may be uncertain, and 'recovered' memories faulty . . .." (citation omitted)).

The vast majority of witnesses who would have corroborated McGuire's defense and rebutted the complainants' assertions are dead. Renke, Humbert, and Beal, who shared the third floor of the Jesuit living quarters at Loyola Academy with McGuire (R41:161-62), and who would have confirmed the layout of McGuire's room and the fact

that the complainants could not have lived there with him undetected, are dead (R41:13, 35). They also attended the meetings involving S.P.C. resulting in his transfer to a different school, and would have been able to confirm what S.P.C. actually said and the fact that a search of McGuire's room rebutted S.P.C's allegations (R41:115).

Dr. Harry Bender, who owned the cottage in Fontana and would have confirmed that he never gave McGuire keys to the cottage or allowed McGuire to use it when he was not there, *see* Section II,B,1, *infra*, is also dead (R40:18, 184-85). The Loyola Academy records detailing such things as the use of fleet vehicles and the dates and reasons for Jesuit absences from the school, records that would have rebutted the complainants' allegations regarding events at Fontana, have been destroyed (R41:228-29). John Gooch, who helped McGuire at the school and whom the complainants claimed knew of their involvement with McGuire but who in fact would confirm the absence of such involvement, apparently is dead (R88). Likewise dead or unavailable are V.H.B.'s grandparents, mother, and wife and S.P.C.'s father and brother (R40:18, 145-46, 186; R41:63, 121-22).

The substantial delay, and resulting prejudice to McGuire's ability to present an adequate defense, justifies dismissal on any of three grounds. First, although the six-year limitations period under Wis. Stat. §939.74(1) (1966-69) controls in cases such as this, ***State v. MacArthur***, 2008 WI 72, 310 Wis.2d 550, 750 N.W.2d 910, the provision tolling that period while the defendant is out of state is unconstitutional as applied to McGuire, violating due process and equal protection and the privileges and immunities clauses of the federal constitution. Second, prosecution of McGuire violates due process even if not otherwise barred by the statute of limitations. And third, vacation of the conviction is appropriate in the interests of justice under Wis. Stat. §751.06 because, given the substantial delay and the resulting prejudice to McGuire's ability to present a defense, the real controversy was not and cannot be fully tried.

A. Because the Tolling Provisions Cannot Constitutionally Apply to McGuire, the Charges Were Barred by the Six-Year Statute of Limitations

"[O]nce a statute of limitations has run, the party relying on the statute has a vested property right in the statute-of-limitations defense." ***State v. Haines***, 2003 WI 39, ¶13, 261 Wis.2d 139, 661 N.W.2d 72. The statute of limitations applicable here provided that "prosecution for a felony must be commenced within 6 years . . . after the commission thereof." Wis. Stat. §939.74(1) (1965 to 1988); *see* ***MacArthur***, *supra*. The six-year period was tolled, however, during the time when "the actor was not publicly a resident within this state." Wis. Stat. §939.74(3) (1965 to 1988).

Many more than six years passed between the dates of the alleged offenses in 1966-68 and the filing of charges here in 2005. The prosecution thus is barred unless the tolling provision legally applies to save it.

As applied to this case, in which the 36-plus year delay in filing the charges has undermined his ability to present a complete defense, the tolling under §939.74(3) violates McGuire's rights to equal protection and due process under the state and federal constitutions, U.S. Const. amend. XIV; Wis. Const. Art. I, §§1, 8, as well as the privileges and immunities clauses of the United States Constitution, U.S. Const. Art. IV, §2; U.S. Const. amend. XIV.

Although the Court of Appeals concluded that McGuire's constitutional claims were controlled by prior decisions of this Court (App. 3-6), the constitutionality of a state statute presents a question of law reviewed *de novo*. ***State v. Cole,*** 2003 WI 112, ¶13, 264 Wis.2d 520, 665 N.W.2d 328.

1. As applied here, the tolling provision of Wis. Stat. §939.74(3) violates the Privileges and Immunities Clauses of the United States Constitution

The privileges and immunities clause of the United States Constitution provides: "The citizens of each state shall be entitled to the

privileges and immunities of citizens in the several states." U.S. Const. Art. IV, §2. *See also* U.S. Const. amend. XIV. The purpose of the clause is to place the citizens of each state upon the same footing with citizens of other states, to inhibit discriminating legislation against all citizens by other states and to secure the citizens in other states the equal protection of their laws. ***Taylor v. Conta***, 106 Wis.2d 321, 328, 316 N.W.2d 814 (1982). However, this protection is not absolute and because nonresidents may present special problems for the administration of state laws, a state need not treat nonresidents in precisely the same manner as residents. ***Id***. at 329.

In ***Taylor***, this Court adopted a three-part test for addressing a privileges and immunities claim. The Court must (1) consider whether the statute disadvantages nonresidents as opposed to residents, ***id***. at 331, (2) determine whether the discrimination violates a fundamental right, *id*. at 335, and, if so, (3) assess whether the means employed have a substantial relationship to legitimate state objectives, ***id***. at 341. *See also* ***State v. Sher***, 149 Wis.2d 1, 11, 437 N.W.2d 878 (1989).

In ***Sher***, the Court rejected a facial challenge to §939.74(3). The Court acknowledged that §939.74(3) "'disadvantages' the public nonresident as compared to the public resident" because, "[a]fter six years, the state is prohibited from bringing a criminal action against a public resident of Wisconsin," but "[a] public nonresident . . . does not enjoy the same benefit." ***Id***. at 12. However, the Court rejected Sher's argument that the protection provided by the statute of limitations is a fundamental right. ***Id***. at 12-13, *citing, e.g.*, ***Bendix Autolite Corp. v. Midwesco Enterprises***, 486 U.S. 888 (1988) ("statute of limitations defenses are not a fundamental right . . .."). Finally, ***Sher*** held that "the provision is substantially related to several legitimate state objectives: the identification of criminals, the detection of crimes, and the apprehension of criminals." 149 Wis.2d at 13-14.

Because ***Sher*** decided a facial challenge to the tolling provision, while McGuire raises an "as applied" challenge, ***Sher*** is not controlling.

See ***Cole***, ¶46 (distinguishing "facial" from "as applied" challenge).[1] Although ***Sher*** properly held that the tolling provisions of §939.74(3) disadvantages the public nonresident as opposed to the resident, the remainder of that Court's analysis is readily distinguishable here.

Whereas Sher was charged a mere two years after the statute of limitations otherwise would have run, McGuire was charged 36-plus years after the offenses were alleged to have occurred. Thus, although denial of the statute of limitations defense itself was all that Sher could claim as a consequence of the *de minimus* tolling in his case, the 30 years of tolling have denied McGuire much of his right to present a defense.

A statute of limitations "is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past." ***United States v. Marion***, 404 U.S. 307, 323 (1971). "These statutes provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." ***Id***. at 322. However, such statutes "guard against possible as distinguished from actual prejudice resulting from the passage of time between crime and arrest or charge." ***Id***.

The right to present a defense, on the other hand, focuses on actual prejudice and is unquestionably fundamental. *E.g.*, ***United States v. Scheffer***, 523 U.S. 303, 326-27 (1998) (noting that the Court has repeatedly stated that few rights 'are more fundamental than that of an accused to present witnesses in his own defense,'" and that the right

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[1] The state below sought to describe ***Sher*** as denying an "as applied" challenge to the tolling provision on privileges and immunities grounds. State's Court of Appeals Brief at 1-9. However, although Sher labeled his claim an "as applied" challenge, the state identified it as a facial challenge, 149 Wis.2d at 10-11, and the Court addressed it as such. ***Id***. at 11-15. The quotes cited by the state for the contrary assertion address a *separate* issue of statutory interpretation concerning whether a literal reading of the statute would create an "absurd result" given the facts of the case. *See* ***id***. at 6-7 (distinguishing the issues presented), 17 (addressing separate issue).

to present a defense "'is a fundamental element of due process of law.'" (citations and footnotes omitted)).

The Court's rejection of Sher's facial challenge on the grounds that there is a "substantial reason for discrimination" between residents and nonresidents under §939.74(3) likewise is readily distinguishable in this "as applied" challenge. As explained in ***Sher***, "[t]here must be 'something to indicate that [nonresidents] constitute a peculiar source of the evil at which the (discriminatory) statute is aimed' for there to be a substantial reason for that discrimination." 149 Wis.2d at 13 (citation omitted). The means thus "'must be "closely tailored" to achieve the objective,'" and the test is "'whether the means employed bear a substantial relation to legitimate state objectives.'" ***Id***. (citation omitted).

> The substantial reason for the discrimination test falls between the minimum scrutiny (rational relation to a legitimate state interest) and the strict scrutiny (necessary relation to a compelling state interest) tests . . ..

Id. at 13-14 (citation and internal quotation marks deleted).

None of the state interests proffered in ***Sher*** in support of the facial sufficiency of the tolling provision has any relevance in this "as applied" case. The ***Sher*** Court held that the tolling provision in §939.74(3) is substantially related to the state's interests in "the identification of criminals, the detection of crimes, and the apprehension of criminals." 149 Wis.2d at 14. Yet, the investigation of this offense would have been not one whit easier had McGuire been publicly resident in this state as the complainants did not even report the alleged offenses until 34 years after they supposedly occurred. McGuire was publicly resident out-of-state and was easy to find through the Jesuits. He did not flee justice. The alleged victims, moreover, were likewise outside the state throughout most of the intervening time.

Nor did McGuire's absence from the state interfere with his apprehension, as he cooperated in the investigation over an 18-month period and voluntarily appeared once charges were filed (R2:5). Also,

while the investigating officers had to rely on out-of-state authorities, that was due almost entirely to the fact that the vast majority of the complainants' allegations concerned acts that allegedly took place in Illinois. Given these facts, McGuire's whereabouts between 1969 and 2005 could have no effect on the state's ability to investigate or prosecute this matter.

The limitless tolling of the statute of limitations under §939.74(3) thus bears no relation to *any* legitimate state interest on the facts of this case, let alone the substantial relation required to survive a privileges and immunities challenge. If McGuire were a resident in Wisconsin, clearly this prosecution could not proceed – just as it can not proceed in Illinois for the acts alleged at trial to have occurred there (R42:101-02). Yet, his residency outside the state had no impact on the reporting, investigation, or prosecution of these matters. As applied in this case, therefore, §939.74(3) violates the privileges and immunities clauses, and the charges accordingly must be dismissed.

2. As applied in this case, the tolling provision of Wis. Stat. §939.74(3) violates McGuire's rights to equal protection and due process

Because application of the tolling provision to McGuire undermines his right to present a defense due to his non-residence, that provision violates equal protection under the state and federal constitutions. *See* U.S. Const. amend. XIV, §1; Wis. Const. Art. I, §1. Because application of the tolling provision based on McGuire's non-residency bears no rational relationship to the purposes of that provision, it also denies him due process. *See* U.S. Const. amend. XIV, §1; Wis. Const. Art. I, §8.

a. Equal Protection

The first step in an equal protection challenge is to determine the applicable test. ***State v. Lynch***, 2006 WI App 231, ¶¶12-13, 297 Wis.2d 51, 724 N.W.2d 656. Strict scrutiny applies when the statute or classification "'impermissibly interferes with the exercise of a fundamental right or operates to a peculiar disadvantage of a suspect class.'" ***Id***. Accordingly, the state must prove that the classification is

narrowly tailored to "promote a compelling government interest." ***Id***. In other cases, a statute falls if its classifications bear "'no rational relationship to a legitimate government interest.'" ***Id***. ¶13 (citations omitted).

By allowing limitless delay in bringing these charges – totaling more than 36 years – merely because McGuire was not a resident of Wisconsin, §939.74(3) undermined McGuire's fundamental right to present a defense, a detriment to which Wisconsin residents are not subjected. *See* Section I,A,1, *supra*. As applied here, therefore, the discrimination must be subjected to strict scrutiny.

The state cannot meet its burden of showing that the tolling provision "is precisely tailored to promote a compelling governmental interest." ***Lynch***, *supra*. For the reasons discussed in Section I,A,1, *supra*, however the competing interests may fall when addressing the facial constitutionality of such a tolling provision, *see* ***Sher***, 437 N.W.2d at 883-84, the same balance does not hold in the "as applied" claim here. Because the impingement on the defendant's right to present a defense increases over time, while the connection between the state's interests and the defendant's presence in the state becomes more attenuated, limitless tolling is not "precisely tailored" to promote the state interests. This is especially true where, as here, none of the asserted state interests in the tolling provision has any rational application. Section I,A,1, *supra*.

Also, although legitimate, ***Sher***, 437 N.W.2d at 882, the state's interests in making it easier to investigate crimes, locate offenders, and apprehend them simply are not compelling interests. *E.g.*, ***Pleau v. State***, 255 Wis. 362, 38 N.W.2d 496, 498 (1949) (A hardship of the prosecution "does not justify disregard of the rights of the defendant in order to overcome the state's difficulty").

Even under the rational basis test, discriminating against non-residents serves no rational purpose when, as here, McGuire's non-resident status had no effect on the state's ability to investigate the alleged offenses or to apprehend him. *See* ***Zobel v. Williams***, 457 U.S.

55 (1982) (statutory scheme which distinguished among citizens based on the length of residency violated the Equal Protection Clause under rational basis test).

b. Due Process

Application of the tolling provision on the facts of this case also violates due process. Due process "requires that the means chosen by the legislature bear a reasonable and rational relationship to the purpose or object of the enactment...." ***State v. Quintana***, 2007 WI App 29, ¶21, 299 Wis.2d 234, 729 N.W.2d 776 (citation and internal quotations omitted). As applied to McGuire, use of the tolling provision to allow prosecution 36 or more years after the alleged offenses rationally serves none of its asserted purposes. *See* Section I,A,1, *supra*. Whatever assistance the tolling provision may provide to law enforcement over the first few years attenuates over time. At the same time, the damage to the defendant's right to present a defense increases.

Here, the alleged offenses were not reported to authorities for more than 30 years after they allegedly took place. McGuire cooperated with the investigation and voluntarily surrendered himself for prosecution in Wisconsin. Accordingly, none of the three state objectives for the tolling provision noted in ***Sher*** is rationally furthered by tolling in this case. The *only* effect of the tolling provision is to allow prosecution under circumstances where the delay has eviscerated the defendant's ability to present a complete defense.

B. The Charges Were Barred by Due Process

Although "[t]he statute of limitations is the principal device . . . to protect against prejudice arising from a lapse of time between the date of an alleged offense and an arrest," it is not the only standard when considering the due process consequences of such a delay. ***State v. Wilson***, 149 Wis.2d 878, 440 N.W.2d 534, 544 (1989). *See, e.g.*, ***United States v. Gouveia***, 467 U.S. 180, 192 (1984). Under ***Wilson***, the defendant raising such a claim must establish both actual prejudice arising from the delay and that the delay resulted from an improper motive or purpose, such as to gain a tactical advantage over the

accused. 440 N.W.2d at 544.

The evidence of actual prejudice resulting from the 36-plus-year delay in this matter is overwhelming given the number of critical witnesses who have died and the destruction of critical evidence discussed *supra*. These are exactly the types of resulting prejudice from delay foreseen by the Supreme Court in ***Stogner v. California***, 539 U.S. 607, 631 (2003). *See, e.g.*, ***Manning v. Bowersox***, 310 F.3d 571, 578 (8th Cir. 2002) (death of three witnesses during 6½ year delay, constituted actual prejudice as defendant would have been better prepared had these witnesses been available for questioning); ***United States v. Alderman***, 423 F. Supp. 847, 857-58 (D. Md. 1976) (finding actual prejudice where defendant produced affidavit of three witnesses who could not remember critical events because of lengthy delay); ***State v. Lee***, 602 S.E.2d 113 (S.C. App. 2004) (destruction of records and witnesses' memory loss during 12-year delay constituted actual prejudice, because it impaired the right to effective cross-examination); ***State v. Luck***, 472 N.E.2d 1097, 1104-05 (Ohio 1984) (finding actual prejudice from loss of witness who could have corroborated defendant's self-defense theory and minimized impact of state's case).

However, given that the complainants did not even report their allegations to the legal authorities in Wisconsin until 2003, 34 years or more after the alleged offenses, McGuire cannot establish that the delay resulted from some improper *prosecutorial* motive.

With all due respect, this Court misconstrued the authorities upon which it relied for its improper motive requirement in ***Wilson*** and previously in ***State v. Rivest***, 106 Wis.2d 406, 418, 316 N.W.2d 395 (1982).[2] Except in extraordinary circumstances, due process focuses on the fairness of the trial rather than the bad faith of the prosecutor. *E.g.*,

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[2] Concededly, this Court is not alone in misconstruing Supreme Court authority on this question. In fact, a majority of the federal courts likewise have done so. ***Jones v. Angelone***, 94 F.3d 900, 904 (4th Cir. 1996) (noting that the federal circuits, other than the Fourth and Ninth Circuits, require a showing of improper prosecutorial motive or purpost); *see, e.g.*, ***United States v. Sowa***, 34 F.3d 447, 451 (7th Cir. 1994).

Brady v. Maryland, 373 U.S. 83, 87 (1963) (prosecutor's failure to disclose exculpatory evidence "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"). The principle of due process

> is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.

Id. at 87.

A careful reading of the authorities upon which the ***Wilson*** and ***Rivest*** Courts relied, moreover, reveals that the United States Supreme Court never intended to require a showing of improper prosecutorial motive in every case. The ***Wilson*** majority cited ***United States v. Lovasco***, 431 U.S. 783 (1977), ***United States v. Marion***, 404 U.S. 307 (1971), and ***United States v. Gouveia***, 467 U.S. 180 (1984), as standing for that proposition. ***Wilson***, 440 N.W.2d at 544. None supports it.

The narrow issue in ***Gouveia*** was whether the respondents were entitled to appointed counsel while they were in administrative segregation preceding initiation of formal adversarial judicial proceedings. While discussing why the Sixth Amendment right to counsel does not attach prior to the initiation of formal proceedings, the Court noted in dictum that "the Fifth Amendment requires the dismissal of an indictment . . . if the defendant can prove the Government delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense." ***Gouveia***, 467 U.S. at 192. However, the Court did not clarify this dicta, which merely reflects "the established outer contours of unconstitutional preindictment delay." ***Howell v. Barker***, 904 F.2d 889, 894 (4th Cir. 1990). There are, after all, any number of other prosecutorial actions that would violate due process.

The ***Gouveia*** Court cites ***Lovasco*** and ***Marion*** in support of the remark quoted above. However, neither of these cases suggests that the *only* way a defendant can establish a due process claim is to prove

improper motive or purpose. In fact, both decisions expressly state that they are *not* so holding.

In ***Marion***, the appellees claimed that their due process and speedy trial rights were violated due to the prosecutor's negligence or indifference in investigating the case and presenting it to a grand jury. ***Marion***, 404 U.S. at 310. In rejecting their contentions, the Supreme Court found that their due process claims were speculative and premature because actual prejudice had not been shown. ***Id***. at 326. The court expressly refused to "determine when and in what circumstances actual prejudice resulting from preaccusation delays requires the dismissal of the prosecution." ***Id***. at 324. ***Marion*** thus likewise does not support the proposition that the only way a defendant can establish a due process claim is by proving improper prosecutorial motive or purpose.

Lovasco also does not stand for that proposition. In ***Lovasco***, the Court rejected a claim that a pre-indictment delay of 17 months resulting from an on-going investigation violated due process. ***Lovasco***, 431 U.S. at 785-86, 796-97. The Court distinguished delay for legitimate investigation from delay intended to prejudice the defense, ***id***. at 790-96, but again did not hold that improper motive was necessary to violate due process. Indeed, the ***Lovasco*** Court reaffirmed its prior statements in ***Marion*** that the due process inquiry must be flexible and depend on the particular circumstances of each case, and again refused to "determine in the abstract the circumstances in which preaccusation delay would require dismissing prosecutions." ***Lovasco***, 431 U.S. at 796-97.

The "improper motive or purpose" language in the cases discussed thus simply provides a non-exclusive example of the type of facts where a due process claim would most certainly succeed, not an immutable requirement for establishing a due process violation based on delay.

The holding in ***Wilson*** thus is not supported by the authorities it cites. *See e.g.*, ***Howell v. Barker***, 904 F.2d 889 (4th Cir. 1990); ***State ex***

rel. Knotts v. Facemire, 678 S.E.2d 847, 855 (W.Va. 2009); ***State v. Knickerbocker***, 880 A.2d 419, 423 (N.H. 2005). *See also* ***Wilson***, 149 Wis.2d at 546-48 (Heffernan, Ch.J. dissenting).

The question remains, however, what standard should be applied in assessing due process challenges to precharging delay. ***Lovasco*** provides the answer:

> ***Marion*** makes clear that proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused.

431 U.S. at 790. The ultimate question is whether "compelling respondent to stand trial" under the circumstances presented "violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions' . . . and which define 'the community's sense of fair play and decency." *Id.* (citations omitted). *See, e.g.*, ***Howell***, 904 F.2d at 895; ***Knotts***, 678 S.E.2d at 856; ***State v. Brazell***, 480 S.E.2d 64,68-69 (S.C. 1997); *accord* ***Knickerbocker***, 880 A.2d at 423 (applying same standard under state constitution).

Applying this standard to the substantial actual prejudice to McGuire's ability to mount a defense given the 36-year delay in filing the charges here, we see first that there is no legitimate reason for the delay. Although the state was not aware of the complainants' allegations for most of this time, the relevant question under ***Lovasco*** is not whether the state's actions prior to filing the charges violates fundamental conceptions of justice and fair play, but whether "compelling respondent to stand trial" in light of the delay and resulting prejudice does so. 431 U.S. at 790.

Nor can it be said that the complainants' delay in reporting the alleged abuse to police for more than 30 years in any way justifies the resulting prejudice to McGuire's right to defend himself. S.P.C. claimed that he had told his father as early as 1970 (*see* R41:114-17, 168-71) and V.H.B. claims to have told his late wife at some point and told his sister in the late 1980's or early 1990's (R40:145-46). Yet,

neither contacted the police until after they sought to sue for money in 2003 (R40:71-73, 127-36; R41:125-26, 192-98), by which time "it was estimated that ...more than half a billion dollars had been paid in jury awards, settlements and legal fees" in Catholic sex abuse cases. Donald B. Cozzens, *The Changing Face of the Priesthood: a Reflection on the Priest's Crisis of Soul*, 125 (Liturgical Press 2000).

The state has suggested no valid justification for the complainants' decision to delay reporting their allegations for more than three decades. The Legislature's decision to bar prosecution in sexual assault cases under the current statutes once the complainant turns 45, Wis. Stat. §939.74(2)(c), embodies the dual public policy in this state that, although courts should accommodate somewhat the tendency of sexual assault victims to delay reporting, there comes a point beyond which it is unfair to prosecute a person even for the crime of child sexual assault. *See, e.g.*, ***Marion***, 404 U.S. at 322-23 (discussing beneficial purposes of statutes of limitations). By setting the outer boundary of that accommodation at age 45 for offenses committed, as alleged here, after one's 13th birthday, the Legislature has determined that longer delays are unjustified, even when it is only the possibility of prejudice to the defendant that is at issue. The determination that delays beyond age 45 are inherently unreasonable should apply no less where, as here, the prejudice is actual rather than merely potential.

Each of the complainants in this matter was well past 45 years old when the criminal complaint was filed. V.H.B. was born on December 17, 1952 (R40:16), making him 52 years old when the complaint was filed. S.P.C. was born in 1954 (R41:54), making him 50 at the time the charges were filed.

The complainants' delay effectively nullified any defense to their stale claims since the witnesses and physical evidence necessary to rebut them no longer existed. Balancing the overwhelming prejudice to McGuire's defense against the minimal to nonexistent valid justification for the delay, compelling McGuire to stand trial necessarily violated our fundamental conceptions of justice and fair play. ***Lovasco***, 431 U.S. at 790. Due process accordingly mandates dismissal. *E.g.*,

Howell, *supra*.

C. The Prejudicial Delay Justifies Reversal in the Interests of Justice

The 36-year delay in bringing these charges so undermined McGuire's ability to defend himself that reversal and dismissal also is appropriate in the interests of justice under Wis. Stat. §751.06 because this delay resulted in the real controversy not being fully tried. *See* ***Vollmer v. Luety***, 156 Wis.2d 1, 456 N.W.2d 797 (1990). The Court's discretionary authority to reverse in the interests of justice furthers its obligation to do justice in an individual case. ***Id***., 456 N.W.2d at 803.

This Court may exercise its discretion under §751.06 without regard to whether the lower courts misused their discretion under Wis. Stat. §§752.35 and 805.15(1). ***Stivarius v. DiVall***, 121 Wis.2d 145, 358 N.W.2d 530, 534 & n.5 (1984).

Reversal in the interests of justice is justified on grounds that the real controversy was not tried when, as here, "the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case." ***State v. Hicks***, 202 Wis.2d 150, 549 N.W.2d 435, 440 (1996).

The central issue in this case concerned the credibility of the state's witnesses. As previously discussed, most of the witnesses and the evidence necessary to assess the truth in this matter no longer exist. Other witnesses have suffered exactly the type of memory loss one would expect regarding events alleged to have taken place nearly 40 years ago. Given the complainants' delay in bringing these charges, we therefore can never know whether those charges are based in fact, in fantasy, or in fraud. That delay, through no fault of the defense (or of the state, for that matter), nonetheless has substantially undermined McGuire's ability to defend himself.

As the circuit court recognized throughout these proceedings, this is an extraordinary case. The delay between the alleged offenses and the charges was extraordinary. The substantial loss of evidence critical to the defense has been extraordinary. And the resulting harm

to McGuire's ability to present a defense has been extraordinary. The remedy must be extraordinary as well – reversal and dismissal in the interests of justice.

In ***State v. Cuyler***, 110 Wis.2d 133, 327 N.W.2d 662 (1983), this Court concluded that the exclusion of two witnesses for the defendant's character for truthfulness in a sexual assault case mandated reversal in the interests of justice, noting that

> "[t]he administration of justice is and should be a search for the truth," and . . . the jury cannot search for truth if it cannot consider relevant and admissible evidence on a critical issue in the case.

327 N.W.2d at 667 (citation omitted); *see* ***id***. ("The exclusion of this evidence adversely affected the defendant since credibility is a determinative issue in this case").

It is impossible to state that the real controversy has been fully tried given that the vast majority of relevant evidence no longer exists. As in ***Cuyler***, the absence of many such critical witnesses here demands the same result - reversal in the interests of justice.

Unlike in ***Cuyler***, however, a new trial will not cure the defect. Given the complainants' delay in pursuing their claims, the evidence was not merely excluded; it is lost forever. The delay accordingly has prevented the real controversy from *ever* being fully and fairly tried.

The remedies provided by §751.06 upon reversal are not limited to a new trial. Rather, the Court also may "direct the entry of the proper judgment or remit the case to the trial court for the entry of the proper judgment. . ., and direct . . . the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice." Wis. Stat. §751.06.

This Court, therefore, should exercise its discretion to order reversal under §751.06. *See* ***Vollmer***, 456 N.W.2d at 805-06 and cases cited therein. Moreover, because the delay has destroyed any chance that the real controversy can be fully and fairly tried, the Court should exercise its authority under §751.06 to make whatever orders are

"necessary to accomplish the ends of justice," by directing the circuit court to dismiss the charges against McGuire.

II.

MCGUIRE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL

McGuire was denied the effective assistance of counsel at trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution. There was no legitimate tactical basis for the identified failures of McGuire's trial counsel, Gerald Boyle, such failures were unreasonable under prevailing professional norms, and McGuire's defense was prejudiced by them.

A. Standard for Ineffectiveness

A defendant alleging ineffective assistance of counsel first "must show that 'counsel's representation fell below an objective standard of reasonableness.'" ***State v. Johnson***, 133 Wis.2d 207, 217, 395 N.W.2d 176, 181 (1986), *quoting* ***Strickland v. Washington***, 466 U.S. 668, 688 (1984). It is not necessary, of course, to demonstrate total incompetence of counsel; a single serious error may justify reversal. ***Kimmelman v. Morrison***, 477 U.S. 365, 383 (1986); *see* ***United States v. Cronic***, 466 U.S. 648, 657 n.20 (1984).

The deficiency prong of the ***Strickland*** test is met when counsel's performance was the result of oversight rather than a reasoned defense strategy. *See* ***Wiggins v. Smith***, 539 U.S. 510, 534 (2003); ***State v. Moffett***, 147 Wis.2d 343, 353, 433 N.W.2d 572, 576 (1989). An attorney's intentional decisions also must meet the standard of reasonableness based upon the information at hand. *E.g.*, ***Kellogg v. Scurr***, 741 F.2d 1099, 1102 (8th Cir. 1984) (even tactics "must stand the scrutiny of common sense"); *see* ***State v. Felton***, 110 Wis.2d 485, 329 N.W.2d 161, 169 (1983) (a reviewing court "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 judgment").

Second, a defendant generally must show that counsel's deficient performance prejudiced his defense. "The defendant is not required [under ***Strickland***] to show 'that counsel's deficient conduct more likely than not altered the outcome of the case.'" ***Moffett***, 433 N.W.2d at 576, *quoting* ***Strickland***, 466 U.S. at 693. Rather, "[t]he question on review is whether there is a reasonable probability that a jury viewing the evidence untainted by counsel's errors would have had a reasonable doubt respecting guilt." ***Moffett***, 433 N.W.2d at 577 (citation omitted).

In addressing this issue, the Court normally must consider the totality of the circumstances. ***Strickland***, 466 U.S. at 695. If this test is satisfied, relief is required; no supplemental, abstract inquiry into the "fairness" of the proceedings is permissible. ***Williams v. Taylor***, 529 U.S. 362 (2000).

Once the facts are established, each prong of the analysis is reviewed *de novo*. ***State v. Cummings***, 199 Wis.2d 721, 546 N.W.2d 406, 416-17 (1996).

B. Trial counsel's performance was deficient

1. Failure to investigate and call Elita Bender to testify

On March 22, 2005, Inv. Jeff Recknagel spoke with Elita Bender, the wife of Dr. Harry Bender, who owned the Fontana cottage where the sexual assaults at issue in this matter allegedly took place. The state provided copies of Recknagel's report of that conversation, as well as a transcript of the tape recorded portion of it, to Attorney Gerald Boyle prior to trial. (R96:7). In that statement, Elita states, among other things, that there were only two sets of keys to her knowledge and that her husband was very possessive of the cottage and not the type of person to let someone use the cottage when he was not there. (R98:Exhs. 2 & 3).

Boyle assumed prior to trial that S.P.C. would testify that McGuire had a key to the cottage (R96:14). Boyle also knew that

V.H.B.'s aunt, Gertrude Bender, had claimed that McGuire had such a key (R96:11-12), evidence that would have corroborated S.P.C. on the critical question of opportunity. Boyle nonetheless neither spoke with Elita Bender nor had an investigator speak with her (R96:7-8).

Had Boyle bothered to speak with Elita, he would have learned that, although she did not marry V.H.B.'s uncle, Dr. Harry Bender, until 1971, she had dated him since the early 1960s (R96:115, 120). In the late 1960s, she went to the Fontana cottage with Dr. Bender whenever she could, but not every time he went, as she worked alternate Saturdays. (R96:122). She only saw McGuire at the cottage once and believes he did not spend the night (R96:123-26).

Through the entire time Elita knew Dr. Bender, he made no suggestion that McGuire was important to him or a close friend. (R96:126-27). However, she knew Dr. Bender to be very possessive of the cottage and did not know him to have lent out the cottage to anyone outside the family (R96:128, 131-32).

Under ***Strickland***, defense counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 690-91. Inaction by counsel is excused only if he made a "rational decision that investigation is unnecessary." ***Crisp v. Duckworth***, 743 F.2d 580, 583 (7th Cir. 1984); *see* ***Montgomery v. Petersen***, 846 F.2d 407, 412 (7th Cir. 1988) (non-strategic decision not to investigate is inadequate performance).

Given that all the offenses alleged in this matter supposedly took place at the Fontana cottage and that Dr. Bender is dead and cannot rebut the complainants' allegations, Boyle's failure to investigate what Elita Bender knew about the situation was wholly unreasonable. Boyle's initial explanation of that failure to McGuire was that, because Elita did not marry Dr. Bender until 1971, she could not have any relevant evidence regarding what happened two to three years earlier (R98:Exh.1). That excuse ignored the fact that Elita had been dating Dr. Bender since the early sixties (*see* R96:120). Relevant knowledge

of one's spouse does not begin with the exchange of vows.

At the post-conviction hearing, Boyle added a second rationale, stating that he had chosen to focus his defense exclusively on S.P.C.'s prior inconsistent statement that the first assault took place sometime after the date of the assault alleged in the charges here (R96:12-13). Although he assumed that S.P.C. would claim that McGuire had a key to the cottage, and thus the opportunity to commit the crime, and that Gertrude Bender may have been able to corroborate that claim, Boyle unilaterally decided that the key would not be an issue in the case. He apparently believed that it was better to leave S.P.C.'s testimony on this point undisputed to avoid the possibility that Gertrude would testify and corroborate it. (R96:13-17).

Although the lower courts deemed this explanation "reasonable" (R96:211-12; App. 7-8, 33-34), it plainly was not. Boyle's rationalization fails to suggest any rational basis for not at least *investigating* what Elita knew. A reasonable attorney does not merely stick his head in the sand, as Boyle did here, hoping that harmful evidence does not arise at trial. At the time Boyle chose not to investigate, he knew that S.P.C. would claim that McGuire had a key to the cottage, that Gertrude might corroborate that claim, and that such evidence would go a long way toward supporting S.P.C.'s allegations against McGuire. Boyle also knew that Elita Bender had provided information to the police indicating that S.P.C.'s and Gertrude's claims likely were not true (*see* R98:Exhs.2 & 3). Gertrude could testify regardless of anything Boyle might do, and his failure to at least prepare to rebut that testimony with known exculpatory information was patently irrational.

Boyle's failure to conduct a reasonable investigation into what Elita knew and when necessarily renders any decision not to call her to testify unreasonable. The issue is not whether counsel would or should have presented the evidence an investigation would have produced, but whether the failure to investigate was itself unreasonable. ***Wiggins***, 539 U.S. at 522-523. The failure to complete a reasonable investigation makes a fully informed strategic decision impossible. ***Id***. at 527-528; *see, e.g.,* ***Hall v. Washington***, 106 F.3d 742, 749 (7th Cir. 1997) (to be

upheld as reasonable, counsel's decision not to call particular witnesses must be made "only after some inquiry or investigation by defense counsel;" the "attorney must look into readily available sources of evidence").

Even if the absence of a reasonable investigation did not itself render the failure to call Elita to testify unreasonable, Boyle's various rationales for not calling her are themselves wholly unreasonable. The fact that the two were not married until 1971 does not suggest that Elita had no personal knowledge relevant to the case. Indeed, her post-conviction testimony reflects that she *did* have such personal knowledge. Without asking Elita if she had any knowledge of relevant events before 1971, however, Boyle was unable to make a fully-informed decision that either an investigation or Elita's testimony was unnecessary.

The possibility that V.H.B.'s mother might claim that McGuire was given a key to the cottage provides no rational basis for not calling Elita to testify. Ignoring the obvious bias issues, such allegations would be inadmissible hearsay. Even more critically, Boyle knew before presenting the defense case at trial that Gertrude Bender was very ill and unavailable to testify (R40:18), and that her unsworn, hearsay assertions to police would have been inadmissible under ***Crawford v. Washington***, 541 U.S. 36 (2004).

Far from part of a rational defense strategy, therefore, Boyle's failure to investigate exculpatory evidence potentially nullifying a critical prong of the state's case on the charge involving S.P.C., and his consequent failure to present that evidence at trial, was an irrational blunder. A reasonable attorney in Boyle's position, knowing what he did at the time, would not have made that mistake.

Because Boyle failed to conduct a reasonable investigation and likewise acted unreasonably in failing to present critical exculpatory evidence, his representation fell below an objective standard of reasonableness.

2. Failure to investigate Robert Goldberg and to call Robert and/or his sister, Barbara Davidson, to testify

Both complainants asserted at trial that they did not know each other before being put in contact by their civil attorney in 2003. (R40:39, 97, 131, 140; R41:91). Boyle was aware prior to trial, however, that Robert Goldberg knew otherwise (R96:23, 40). Although conceding that evidence that the complainants knew each other would be important (R96:27-28; R98:Exh.1:), Boyle chose not to investigate Goldberg's knowledge on that point (R98:23-27).

Had Boyle chosen to investigate, he would have learned that Goldberg had seen S.P.C. and V.H.B together several times in 1972 while having meals at John Gooch's home with Goldberg's mother and others, including, at least once, his sister, Barbara Davidson. (R96:50-51, 58, 66-67, 75-76). Although Goldberg's mother had died, Davidson was available and confirmed Goldberg's testimony (R96:55-56; 82-83, 89).

The only excuse cited for this failure was Boyle's perception that it might be dangerous to use testimony from Goldberg at trial because S.P.C. had once seen McGuire with Goldberg as a young teen on the Loyola University campus in 1971 or 1972 and Goldberg might corroborate S.P.C. on that point (R96:23-27). Contrary to the lower courts' conclusions (R96:213-14; App. 9, 35-36), however, Boyle's rationalization for not investigating Goldberg's knowledge makes no sense.

However valid Boyle's rationale may be for not calling Goldberg *to testify at trial*, that rationale cannot reasonably justify not even speaking with Goldberg before trial to learn the circumstances in which V.H.B.and S.P.C. knew each other. Based on the information Boyle had at the time, investigating Goldberg's knowledge would not have corroborated S.P.C. and might have provided important exculpatory information. Boyle's failure to investigate also deprived him of an opportunity to uncover others, like Barbara Davidson, who had seen S.P.C. and V.H.B. together but whose testimony would not present the

same risks he perceived in Goldberg's testimony.

Also, given that the danger of S.P.C.'s observation of Goldberg and McGuire together arose from the inference that McGuire might have molested Goldberg, the only way to rebut that inference, should it arise at trial, would be to demonstrate that he did not. Although McGuire told Boyle he had not molested Goldberg (R96:25) (a fact Goldberg confirmed at the post-conviction motion hearing (R96:52)), McGuire would not be testifying and a reasonable attorney would have known that some other rebuttal may be necessary. Boyle, however, chose ignorance over preparation for that possibility.

Boyle's decision not to call Goldberg was arguably reasonable, *except* that his failure to conduct a reasonable investigation itself rendered the decision not to have Goldberg testify itself unreasonable. ***Wiggins***, 539 U.S. at 522-523, 527-528; *e.g.,* ***Hall***, 106 F.3d at 749.

The failure to call Barbara Davidson makes even less sense. Because he did not conduct a reasonable investigation, Boyle did not know of Davidson or the fact that she also had seen V.H.B. and S.P.C. together during the summer of 1972 and that her testimony would not run even the minimal risks Boyle cited as reasons for not having Goldberg testify. Once again, Boyle's failure to conduct a reasonable investigation makes a fully informed strategic decision on whether the witness should testify impossible. ***Wiggins***, 539 U.S. at 522-523, 527-528; *e.g.,* ***Hall***, 106 F.3d at 749.

C. Trial Counsel's Deficient Performance Prejudiced McGuire's Defense at Trial

The cumulative effect of counsel's errors is that McGuire was denied a fair trial. The state's case was marginal at best, saddled by significant difficulties in the complainants' stories beyond even the significant delays in bringing their claims to the attention of legal authorities until after they chose to seek some financial benefit by suing McGuire and the Church. For instance, although they each claimed to have seen McGuire naked and to have given him body rubs on hundreds of occasions (R40:43-47, 224; R41:68-69), neither recalled

the pronounced port wine stain on McGuire's shoulder when they discussed their stories with the police (R40:223-28; R41:83; *see* R42:252-56). In fact, S.P.C. claimed never to have seen it (R42:33-34). Both likewise mistakenly recalled that McGuire had been circumcised, when in fact he had not. (R40:228-30; R41:69; R42:35, 257-58, 294). The two also admitted having participated in at least two telephone conversations, one three hours long, prior to the allegations being reported to Walworth County authorities, yet incredibly claimed that they did not discuss the specifics of their allegations. (R40:39-40, 129-33, 141-44; R41:99-103, 205-10). Both claimed to have spent hundreds of nights in McGuire's room at Loyola Academy and to have participated in various sexual activities there without being detected and without once having to leave the room to defecate. (R40:43-45, 103-05, 107-08, 110; R41:75, 110-12; R42:42-43).

Given these substantial defects in the state's case, evidence that undermines the complainants' allegations as substantially as does Elita Bender's cannot help but create a reasonable probability of a different result. V.H.B. claims to have traveled to the Fontana cottage a number of times with McGuire. Yet Elita, who was dating Dr. Bender and was there whenever she could be, only saw McGuire there once and does not believe he spent the night (R96:123-26).

S.P.C. claims that McGuire and Dr. Bender were such good friends that Dr. Bender lent him use of the cottage for a weekend. Yet, Elita would testify that, throughout the four decades she dated and was married to Dr. Bender, he never suggested that he was close friends with McGuire. Moreover, based on her personal observations during that time, Dr. Bender was very protective of the cottage and unwilling to have others outside the family use it in his absence (R96:128, 131-32). While it may be possible that her husband did something so out-of-character without her knowing, the question under ***Strickland*** is whether there is a reasonable probability of a different result. McGuire need not prove that a different result is more likely than not. ***Strickland***, 466 U.S. at 693.

Adding to this the testimony of Robert Goldberg and/or Barbara

Davidson to the effect that S.P.C. and V.H.B. in fact knew each other and spent time together at least as early as 1972 further marginalizes the state's case, demonstrating its witnesses' willingness to lie under oath about not knowing each other before they, supposedly independently, pursued their claims against McGuire in 2003. Their prior relationship also rebuts the state's argument that S.P.C could only know the layout of the cottage because McGuire had taken him there. It is one thing to argue, as Boyle did, that S.P.C.'s knowledge of the cottage must have come from his lengthy conversations with V.H.B. in 2003 (R44:100-01, 130-31); it is much more powerful to note that S.P.C. in fact had the opportunity to see the cottage firsthand with V.H.B. while the cottage still existed.

When combined with the existing difficulties with the complainants' testimony, therefore, the evidence that Boyle unreasonably chose not to discover raises additional reasons to doubt the state's case, creating a reasonable probability of a different result on retrial.

CONCLUSION

For these reasons, Donald McGuire respectfully asks that the Court reverse the judgment of conviction and direct, in order of priority, (1) that the charge against him be dismissed, or (2) that a new trial be granted.

Dated at Milwaukee, Wisconsin, October 28, 2009.

Respectfully submitted,

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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,689 words.

Robert R. Henak

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

Robert R. Henak

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CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 28th day of October, 2009, I caused 22 copies of the Brief and Appendix of Defendant-Appellant-Petitioner to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688.

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Robert R. Henak