UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

JOSHUA S. GEHDE,

Petitioner,

v. Case No. 3:21-cv-809-jdp

CHRIS BUESGEN,

Respondent.

AMENDED PETITION FOR A WRIT OF HABEAS CORPUS
PURSUANT TO 28 U.S.C. § 2254
BY A PERSON IN STATE CUSTODY

FEDERAL DEFENDER SERVICES
OF WISCONSIN, INC.

Joshua Steven Gehde (DOC No. 569838), by counsel, hereby petitions the Court for a writ of habeas corpus under 28 U.S.C. § 2254. Consistent with the Court's Order, dated June 9, 2022, he submits the following amended petition. *See* Text-Only Order, June 9, 2022.[1]

I. Procedural History

A. Subject of this Petition

Gehde currently is in the custody of Respondent under a state court criminal judgment imposed by the Dane County Circuit Court, in Madison, Wisconsin, in Case No. 2016CF000927. Ex. A at 1877. He pleaded not guilty and went to trial on one count of first-degree reckless homicide (as a repeater) based on allegations that he had physically harmed his girlfriend's daughter, Sophia, and caused her death. *See id.* at 1. He was convicted on December 21, 2017, and sentenced to 35 years' imprisonment (20 years' initial confinement, 15 years' extended supervision) on March 8, 2018. *Id.* at 1877. Gehde testified in his own defense. His attorneys at the trial level were Vincent Rust (State Public Defender's Office, 149 6th St. S., La Crosse, Wisconsin 54601-4153) and Kathleen A. Pakes (State Public Defender's Office, 17 S. Fairchild St., Fifth Floor, PO Box 7923, Madison, Wisconsin, 53707-792).

[1] This Amended Petition contains all the information requested in the standard form for § 2254 actions (AO 241). Documents in support of this petition are attached as Exhibit A and Bates stamped for ease of reference; all pin cites reference the Bates-stamped pagination. Dsocuments already part of the federal record are cited as "R.___:____," with the first number identifying the docket number and second number providing a pin cite. Dates were verified using the Wisconsin CCAP system. *See Wisconsin Court System: Supreme Court & Court of Appeals Access*, https://wscca.wicourts.gov (last visited July 21, 2022); *Wisconsin Circuit Court Access*, https://wcca.wicourts.gov (last visited July 21, 2022).

B. Direct State Appeal of Conviction

Gehde timely filed his notice of intent to pursue post-conviction relief on March 13, 2018. After a change of appointed counsel, he timely filed his post-conviction motion in the Dane County Circuit Court on May 24, 2019. Ex. A at 1879, 1883–1909. He raised three claims of ineffective assistance of counsel based on counsels': (1) presentation of conflicting and inconsistent theories of defense, specifically regarding the cause of Sophia's death; (2) failure to object to the word "abuse" (and similar language) as part of a medical diagnosis; and (3) failure to call a witness with testimony favorable to the defense. *Id.* at 1883. The Circuit Court held a hearing on that motion on August 26, 2019, at which Gehde did not testify. *Id.* at 1945–46. The Circuit Court denied relief at the hearing and entered a written order reflecting its decision on August 27, 2019. *Id.* at 2053–58, 2060.

Gehde appealed to the Wisconsin Court of Appeals on September 13, 2019. In his direct appeal, he raised a single claim of ineffective assistance of trial counsel, based on trial counsels' presentation of two inconsistent theories of defense, specifically regarding the cause of Sophia's death. The Wisconsin Court of Appeals affirmed the circuit court's judgment on the merits on November 19, 2020. *Id.* at 2108.

Gehde sought further review before the Wisconsin Supreme Court on December 17, 2020. He again raised a claim of ineffective assistance of trial counsel arising from trial counsels' presentation of two inconsistent theories of defense, specifically as to the cause

of Sophia's death. His petition for review was denied on February 24, 2021. *Id.* at 2116. He did not file a petition for a writ of certiorari in the United States Supreme Court.

Gehde's post-conviction/appellate counsel was Michael Covey (Covey Law Office, PO Box 1771, Madison, Wisconsin 53701-1771). Covey represented Gehde during post-conviction proceedings before the Dane County Circuit Court, as well as before the Wisconsin Court of Appeals and Wisconsin Supreme Court.

C. Current Federal Proceedings

Gehde, proceeding *pro se*, timely filed a federal habeas petition, pursuant to 28 U.S.C. § 2254, on December 1, 2020. *See* R.1 (signed and mailed Dec. 1, 2021; docketed Dec. 23, 2021). He challenged his 2017 conviction on the ground that his trial counsel were ineffective by presenting inconsistent theories of defense, specifically as to the cause of Sophia's death. *Id.* at 6.

On June 3, 2022, this Court screened the petition pursuant to Rule 4 of the Rules Governing § 2254 Cases and determined that it lacked sufficient factual allegations. *See* R.2:2. The Court directed Gehde to file an amended petition. *Id.* At the time of the Court's Order, Federal Defender Services of Wisconsin, Inc. (FDSW), had begun reviewing Gehde's case for potential representation and asked the Court to extend the deadline by which to file an amended petition, should FDSW take on Gehde's case. R.3. The Court granted that request and extended the deadline to July 26, 2022. *See* Text-Only Order, June 9, 2022. FDSW, through Jessica Arden Ettinger, entered an appearance on Gehde's behalf on July 7, 2022. R.5. Gehde, through counsel, now files this amended petition.

II. Grounds for Relief

Gehde now petitions the Court for relief on eleven grounds, set forth for ease of reference in the index below and then pleaded in full on the pages that follow:

Ground	*Description*
1	Ineffective assistance of trial counsel – presentation of inconsistent defense theories on Sophia's cause of death
2	Ineffective assistance of trial counsel – failure to call a favorable witness at trial
3	Ineffective assistance of trial counsel – failure to request funds to have physical evidence, including but not limited to the dura and brain tissue samples, tested and analyzed
4	Ineffective assistance of trial counsel – failure to investigate, consult with, and hire other necessary experts
5	*Brady* violation – failure to disclose professional misconduct of lead Detective Maya Krajcinovic
6	*Brady* violation and ineffective assistance of trial counsel – State's failure to disclose that Christopher Beverly had recanted his story and trial counsel's failure to move to exclude Beverly as a witness
7	Ineffective assistance of appellate counsel – failure to appeal ineffective-assistance-of-trial-counsel claim arising from trial counsel's failure to call a favorable defense witness
8	Ineffective assistance of appellate counsel – failure to bring an ineffective-assistance-of-trial-counsel claim arising from trial counsel's failure to request funds to have physical evidence tested and analyzed
9	Ineffective assistance of appellate counsel – failure to bring an ineffective-assistance-of-trial-counsel claim arising from failure to investigate, consult with, and hire other necessary experts
10	Ineffective assistance of appellate counsel – failure to investigate and bring a *Brady* claim re Detective Maya Krajcinovic's professional misconduct
11	Ineffective assistance of appellate counsel – failure to investigate and bring a *Brady* claim re Beverly's recanted story and an ineffective-assistance-of-trial-counsel claim arising from failure to move to exclude Beverly as a witness

GROUND ONE: Trial counsel Vincent Rust and Kathy Pakes were ineffective within the meaning of the Sixth Amendment when they presented inconsistent theories of defense to the jury, prejudicing the outcome of the case. *See Strickland v. Washington*, 466 U.S. 668 (1984); *e.g.*, *Myers v. Neal*, 975 F.3d 611 (7th Cir. 2020); *United States ex rel. Hampton v. Leibach*, 347 F.3d 219 (7th Cir. 2003). Gehde incorporates into this Ground the facts alleged in all other paragraphs.

Supporting Facts: Trial counsel Kathleen Pakes and Vincent Rust promised the jury that the defense experts would testify that Sophia choked to death, but they presented testimony that Sophia died from a cause *other* than choking. In his opening statement, Attorney Rust promised: "The experts are gonna explain this stuff to you. . . . The mechanism that's shutting down her brain is choking, not a brain injury." Ex. A at 118. But, instead, the jury heard three defense expert witnesses contradict one another as to Sophia's cause of death. Dr. Carl Wigren opined that Sophia died from "a childhood stroke." *Id.* at 1171. Dr. Scheller opined that she died from "consequences of a seizure." *Id.* at 1275. And Dr. Hutchins opined that Sophia died from hypoxic ischemic encephalopathy (HIE), brought on by "either a choking episode or a seizure associated with a clot in the brain." *Id.* at 1433–35.

That broken promise mattered. The cause of Sophia's death was one of the three elements of the State's case and the central element in dispute. *See* Wis. Stat. § 940.02(1); Ex. A at 1745 (first element of first-degree reckless homicide is that "the defendant caused the death of [Sophia]" and "cause means that the defendant's act was a substantial factor

in producing the death"). The State presented no direct evidence that Gehde ever harmed Sophia. Instead, its case depended on expert testimony that Sophia's medical condition was the result of recent non-accidental trauma and the inference that Gehde caused that trauma because he was the last person with Sophia. Consequently, credible and consistent evidence that Sophia died of natural causes directly undermined the State's case against Gehde and, in fact, was dispositive of his innocence.

The broken promise of the defense's opening statement also was avoidable. It was not due to "unforeseeable events," but rather, a lack of communication between the two defense counsel, a failure to prepare, and a faulty opening statement. *See Hampton*, 347 F.3d at 257. The defense team never discussed the theory of defense before trial. Ex. A at 1961–62. Attorney Pakes was responsible for finding defense experts, and Attorney Rust met with them only briefly before he made his opening statement. *Id.* at 1965–67. Indeed, at the time he gave his opening statement, Attorney Rust still "wasn't sure at the time what the theory [of the case] was." *Id.* at 1969. And, even after telling the jury that "the mechanism that's shutting down [Sophia's] brain is choking," Attorney Rust did not give Attorney Pakes guidance on her cross examination of the State's experts, did not give her input on the direct examination of the defense experts, and did not even know what questions she planned to ask the defense experts. *Id.* at 118, 1971–72.

The defense team performed unreasonably—and deficiently, within the meaning of *Strickland*—by not making good on the opening-statement promise. "Prevailing professional norms" obligated the defense, *inter alia*, to "work diligently to develop . . .

an investigative and legal defense strategy, including a theory of the case"; to "prepare in advance for court proceedings"; and to give an opening statement that is "confined to a fair statement of the case from defense counsel's perspective, and discussion of evidence that defense counsel reasonably believes in good faith will be available, offered, and admitted." 466 U.S. at 688 (first quote); Am. Bar. Ass'n, *Standards for Criminal Justice: The Defense Function* 4-3.7(c), 4-4.6(a), 4-7.5(b) (4th ed. 2017), https://tinyurl.com/2p9h724a (subsequent quotes). Instead of meeting these expectations, defense counsel did not develop a cohesive strategy, did not prepare in advance by coordinating with one another, and did not give an opening statement that contained a fair statement of what the jury would hear. Rather, counsel promised the jury that it would learn that Sophia choked to death, and then delivered *three* separate explanations for her death—none of which was choking.

Trial counsels' deficient performance prejudiced Gehde. Having created an expectation that the jury would hear evidence from multiple experts that Sophia tragically choked to death (and, therefore, was not murdered), the defense's failure to present a consistent theory as to how Sophia died "could only have undercut the credibility of the defense with the jury" on the most important issue in the case. *Hampton*, 347 F.3d at 259; *accord Myers*, 975 F.3d at 621 ("Making false promises about evidence in an opening statement is a surefire way for defense counsel to harm his credibility with the jury."). The defense's broken promise "supplied the jury with reason to believe that there was *no* evidence contradicting the State's case, and thus to doubt the validity of

[Gehde's] defense." *See Hampton*, 347 F.3d at 260 (emphasis added). There is a reasonable probability that, but for counsel's unprofessional errors of failing to coordinate and presenting inconsistent theories of defense, the jury would have doubted that Gehde caused Sophia's death and would not have returned a guilty verdict of first-degree reckless homicide.

Exhaustion: Gehde has exhausted his state remedies on Ground One.

GROUND TWO: Trial counsel Kathleen Pakes and Vincent Rust were ineffective within the meaning of the Sixth Amendment for failing to call a known witness favorable to the defense, Taylor Skenandore. *See Strickland*, 466 U.S. 668; *Dunn v. Jess*, 981 F.3d 582 (7th Cir. 2020); *Washington v. Smith*, 219 F.3d 620 (7th Cir. 2000). Gehde incorporates into this Ground the facts alleged in all other paragraphs.

Supporting facts: Trial counsel were aware that the police had interviewed Skenandore, who would testify that she had seen Gehde and Sophia at Reindahl Park on the morning of April 12, 2016—just as Gehde claimed. Whether the jury credited Gehde's account of the events that morning was very important to the defense, because Gehde was the only person with Sophia at the time she died. As such, whether he had spent time with Sophia at Reindahl Park on that morning was a central component of the jury's credibility assessment—it affected not only whether he had an opportunity to commit the crime, but also whether the jury believed he had done so. In other words, if the jury believed Gehde's narrative about what had happened in the hours preceding Sophia's death, including that he had taken her to Reindahl Park, then it would acquit.

Recognizing this, the State treated Gehde and Sophia's disputed presence in the park as a litmus test for whether Gehde was lying, generally. In its opening statement, the State hammered home that Gehde must be lying about what happened to Sophia because his estimated timeline of that morning was imperfect; "The bottom line is there's no time that morning for an hour-long trip to the park," the State told the jury. *See* Ex. A at 92. The State elicited testimony from Detective Helgren that he and Detective

Krajcinovic had looked for but not found any "credible" eyewitnesses who could confirm that Gehde and Sophia were in the park. *Id.* at 597. When cross-examining Gehde, Attorney Moeser went so far as to ask: "what in your – the discovery materials here suggests that you went to the park earlier than 10:20?" And Gehde responded that the State had produced discovery reflecting that the detectives had "talked to a female at the park" that saw him with Sophia. *Id.* at 1645, 1668–69. Attorney Moeser then asked Gehde—in front of the jury—whether the defense team would be calling that witness as part of its case-in-chief, to which Gehde responded that he did not even know the person's name. *Id.* at 1645–46. When Gehde insisted that the discovery contained evidence corroborating his timeline of being in the park on the morning of April 12, 2016, the State moved to strike his answer. *Id.* And in its closing statement, the State argued that Gehde "probably didn't go there [to the park] at all." *See id.* at 1761.

Despite the importance of corroborating Gehde's account of that morning, and despite knowing there was a witness (Skenandore) who could place Gehde and Sophia in the park on the morning in question, the defense team never attempted to call Skenandore as a witness. Although it was apparent to counsel as the trial progressed that they needed to corroborate Gehde's story, they never issued a subpoena for Skenandore. *Id.* at 1975–76, 2001, 2022. There was no strategic reason for not calling Skenandore. *Id.* at 1976. Rather, counsel did not even discuss the issue with one another. *Id.* at 1977, 2025.

Trial counsels' failure to call Skenandore as a witness was objectively unreasonable in light of "prevailing professional norms" at the time. *See Strickland*, 466

U.S. at 688. Those norms obligated the defense, *inter alia*, to investigate the case, develop a strategy, and be prepared to pivot and shift strategies as the case developed. *See Standards for Criminal Justice: The Defense Function* 4-3.7(c), 4-4.1(a); *see also Dunn*, 981 F.3d at 593 (trial counsel was ineffective where he "had no Plan B" after his "unlikely strategy blew up"); *Woolley v. Rednour*, 702 F.3d 411, 423 (7th Cir. 2012) (counsel performed deficiently where he "remained nearly passive in the face of damning" testimony and did not "retain an expert witness, ask for a continuance, or move to bar [the State witness's] testimony"). Although the defense team knew that corroborating Gehde's timeline and account of events was central to his defense and that Skenandore could do just that, the defense team sat on their hands.

There is a reasonable probability of a different outcome in this case but-for counsel's unprofessional error of failing to call Skenandore as a witness. If the jury had heard Skenandore's testimony, then it is likely that at least one juror would have doubted the State's claim that Gehde was lying. And, in light of the weight the State placed on the eyewitness sighting of Gehde at the park, that corroborating testimony would have had broad-reaching effects. It would have caused the jury to place greater weight on Gehde's timeline of events. In turn, it would have cast doubt on whether Gehde had an opportunity to commit the crime alleged. And there is a reasonable probability that it would have caused at least one juror to doubt whether he committed the crime at all.

Exhaustion: Gehde has not yet exhausted his state remedies on Ground Two.

GROUND THREE: Trial counsel Kathleen Pakes and Vincent Rust were ineffective within the meaning of the Sixth Amendment for failing to request funds to have an expert test, analyze, and otherwise investigate physical evidence, including but not limited to sections taken from Sophia's dura and brain tissue. *See Hinton v. Alabama*, 571 U.S. 263 (2014) (per curiam); *Strickland*, 466 U.S. 668. Gehde incorporates into this Ground the facts alleged in all other paragraphs.

Supporting facts: Trial counsel were aware that the timing of Sophia's injuries was a central component of this trial. Indeed, to convict, the State had to convince the jury beyond reasonable doubt that Sophia was injured on the morning of April 12, 2016, when Gehde was her sole caretaker. Consequently, evidence that Sophia's injuries were older than the morning of April 12, 2016, was evidence critical to Gehde's defense.

Trial counsel also were aware that there was ambiguity over when Sophia's injuries occurred. The State's witnesses emphasized that Sophia had suffered injuries that were close in time to her admission to the hospital. *See, e.g.*, Ex. A at 652, 660–61, 772–74. Yet, one of the defense's expert witnesses, Dr. Carl Wigren, explained that the defense team could have sampled the physical evidence, particularly the dura tissue, to determine the age of the blood clots on Sophia's brain and, from that testing, better understand when her injuries occurred. *Id.* at 1214–16. In fact, he had requested that the State Public Defender's Office allow him to examine the physical evidence that the State had preserved—specifically, the dura tissue. *Id.* at 1214–15. By testing the dura tissue, the defense team "could have actually looked at the clots" on Sophia's brain and "could have

aged them." *Id.* However, the defense team never requested the funds necessary for this testing (or other investigation) to happen. *See id.* at 2142–43 (¶ 7).

Trial counsels' failure to request funds to test physical evidence in this case was objectively unreasonable in light of "prevailing professional norms" at the time. *See Strickland*, 466 U.S. at 688. Those norms obligated the defense, *inter alia*, to "consider what procedural and investigative steps to take . . . and not simply follow rote procedures learned from prior matters"; to "explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter[and] consequences of the criminal proceedings"; and "evaluat[e] . . . the prosecution's evidence (including possible re-testing or re-evaluation of physical, forensic, and expert evidence) and consider[] inconsistencies, potential avenues of impeachment of prosecution witnesses, and other possible suspects and alternative theories as the evidence may raise." *Standards for Criminal Justice: The Defense Function* 4-3.7(f), 4-4.1(c). And, in cases of indigent defendants, "counsel should seek resources from the court" in order "to pay for necessary investigation." *Id.* 4-4.1(e). Here, the defense team knew that the timing and age of Sophia's injuries were critical to Gehde's defense. It knew (from its own expert) that testing the physical evidence could provide important, material information about the age of the blood clots on Sophia's brain and support his defense. And yet, neither trial counsel investigated further or requested the funds necessary to investigate further.

That deficient performance prejudiced Gehde. On information and belief, had counsel tested the physical evidence, it would have supported Gehde's defense by

placing the timing of Sophia's injuries earlier than the hours during which she was in his care on April 12, 2016. This would have undermined the State's theory and created reasonable doubt as to whether he caused her death. In the absence of such evidence, the defense team had little to combat the State's claim that the injuries occurred when Sophia was in his care, which affected the jury's view of the State's evidence. Accordingly, but-for counsel's deficient performance, there is a reasonable probability of a different outcome.

Exhaustion: Gehde has not yet exhausted his state remedies on Ground Three.

GROUND FOUR: Trial counsel Kathleen Pakes and Vincent Rust were ineffective within the meaning of the Sixth Amendment for failing to investigate and consult experts with specialized knowledge on issues central to the case, including (*but not limited to*):

(A) an expert who could speak to Sophia's bone structure, bone density, the absence of fractures on Sophia's body, and whether the absence of such injuries was consistent with the State's theory of Sophia's cause of death;

(B) an expert who could speak to alopecia, Sophia's hair loss, and whether the small patches of hair that were missing and had begun to grow back on her head corroborated the State's theory of Sophia's cause of death; and

(C) an expert who could speak to iatrogenic injuries and whether the injuries Sophia suffered are more consistent with medical intervention and life-saving professional efforts or with the State's theory of Sophia's cause of death.

See Hinton, 571 U.S. 263; *Strickland*, 466 U.S. 668; *e.g.*, *Anderson v. United States*, 981 F.3d 565 (7th Cir. 2020). Gehde incorporates into this Ground the facts alleged in all other paragraphs.

Supporting facts: Trial counsel were aware of at least three subjects for which consultation with experts was necessary to understand the injuries Sophia suffered and to prepare Gehde's defense against allegations that he caused those injuries. They were aware that Sophia had low levels of Vitamin D (bordering on a deficiency) but no bone fractures, which was inconsistent with the State's theory that Gehde had inflicted multiple blows to Sophia's head. They also knew that Sophia had alopecia (hair loss) that had been labeled potentially "traumatic" and which the State would claim was the result of abuse. And they knew that medical professionals had provided emergency care to

Sophia that could have caused many of the bruises later found on her body—bruises that the State would claim were inflicted by Gehde. Nonetheless, the trial team never consulted with experts who had specialized knowledge in these areas and could provide testimony helpful to the defense or otherwise guide their investigation and trial preparation. *See* Ex. A at 2142 (¶¶ 5–6).

Trial counsels' failure to consult with experts who could speak to these issues was objectively unreasonable in light of "prevailing professional norms" at the time. *See Strickland*, 466 U.S. at 688. Those norms obligated the defense, *inter alia*, to "determine whether the client's interests would be served by engaging fact investigators, forensic, accounting or other experts, or other professional witnesses[.]" *Standards for Criminal Justice: The Defense Function* 4-4.1(d). The defense team knew that fractures, hair loss, and bruising were three issues that would be hotly contested at trial, as all three were relevant to how Sophia died. *See* Ex. A at 2142–43 (¶¶ 5–7). Yet, the defense took no steps to consult with, hire, and/or present testimony from experts specialized in these areas who could offer opinions helpful to the defense's case. *Id.* Given what the defense team knew at the time, its failure to investigate further by consulting additional relevant experts was unreasonable.

That deficient performance prejudiced Gehde. On information and belief, had counsel consulted with experts in these areas, they would have been able to present testimony that was favorable to Gehde's defense—namely, that the State's theory of how Sophia died (blunt force trauma) was inconsistent with her lack of bone fractures and

Vitamin D deficiency; that there was no evidence that Gehde ripped out her hair; and that at least some of the bruising on Sophia's body was caused by iatrogenic injury (injuries caused by medical intervention). Instead, the jury heard a State witness explain away Sophia's lack of bone fractures as being consistent with kids having "highly elastic" bones. *See id.* at 850. It heard a State witness describe Sophia's alopecia as "a recent traumatic injury" that supported a homicide diagnosis. *Id.* at 776; *see also id.* at 982–83, 1002–03. And it heard a State witness attribute Sophia's jawline bruises to being part of the abusive head trauma she suffered, as opposed to being caused innocently by emergency services personnel or other medical professionals (or even Gehde performing CPR before their arrival). *See id.* at 967, 1002–03, 1030. Had the jury heard testimony from defense experts specialized in these areas, then the record would have contained evidence that contradicted the State's theory that Sophia's skeletal survey, alopecia, and bruising were either not inconsistent with or affirmatively supported its homicide diagnosis. In turn, there is a reasonable probability that at least one juror would have doubted Gehde's guilt and the outcome in this case would have been different.

Exhaustion: Gehde has not yet exhausted his state remedies on Ground Four.

GROUND FIVE: The State of Wisconsin violated *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny when it failed to disclose to Gehde's defense team that the lead investigator on the case, Detective Maya Krajcinovic, had committed professional misconduct concerning the integrity of an investigation during the time that Gehde's case was proceeding. Gehde incorporates into this Ground the facts alleged in all other paragraphs.

Supporting facts: Detective Maya Krajcinovic was the lead investigator in the criminal case against Gehde. She was extensively involved in this case—she interviewed witnesses, drafted memoranda of interviews, communicated with at least one doctor who treated Sophia, interviewed Gehde, investigated potential eyewitnesses, etc. The State identified Detective Krajcinovic as a potential prosecution witness. Ex. A at 15. As an exception to the circuit court's sequestration order, Detective Krajcinovic was permitted to sit at counsel's table throughout the trial. *Id.* However, the State declined to call her as a witness. Trial in this matter concluded on December 21, 2017.

Undersigned counsel has reason to believe that, during the pendency of Gehde's case, Detective Krajcinovic made material misrepresentations in another investigation that caused the Madison Police Department to discipline her. On July 13, 2018, public news sources reported that Detective Krajcinovic had been suspended from her position in the City of Madison Police Department, as of May 2018, due to professional misconduct

concerning the integrity of an investigation she conducted in an unrelated case.[2] On August 4, 2018, Attorney Moeser circulated a memorandum to all Dane County Prosecutors that confirmed the same information. On information and belief, the professional misconduct for which Detective Krajcinovic was placed on administrative leave occurred on or about November 30, 2017—when Gehde's case was pending.

In light of the foregoing, on information and belief, the State violated Gehde's Fifth and Fourteenth Amendment rights. The government violates a defendant's federal constitutional rights if it withholds exculpatory or impeaching evidence that is material to the defense. No member of the State prosecution team informed the defense that Detective Krajcinovic had made a material misrepresentation that affected the integrity of an investigation, or that she was under investigation for professional misconduct, during the pendency of Gehde's case. That information was favorable and important for the defense team to have, because, *inter alia*, it undermines the integrity of the State's investigation, led by Detective Krajcinovic, in the case against Gehde. It was particularly important given the circuit court's ruling that Detective Krajcinovic's prior citation for professional misconduct could be used to impeach her credibility, despite its age, if it became relevant—such as if there were *new* disclosures of misconduct. Ex. A at 48–49.

Had the defense team been told about Detective Krajcinovic's more recent professional misconduct, there is a reasonable probability of a different outcome in this

[2] Ed Trevelen, *Rising Sun prostitution case ends quietly with dismissal and plea to a county ticket*, APNEWS, July 13, 2018, https://tinyurl.com/4uzwju7v.

case. With that information in hand, the defense would have called Detective Krajcinovic as a witness and, through its questioning, caused the jury to doubt the integrity of the investigation she conducted—including (*but not limited to*) the extent of the investigation into witnesses who could confirm Gehde's timeline of events on the morning of April 12, 2016. *See id.* at 2139–40 (¶ 7). A lead detective's predilection to fabricate facts would have cast a pall over the State's case. And it puts the whole case in such a different light as to undermine confidence in the verdict.

Exhaustion: Gehde has not yet exhausted his state remedies on Ground Five.

GROUND SIX: Gehde's Fifth, Sixth, and Fourteenth Amendment rights were violated in connection with jailhouse informant Christopher Beverly's testimony. These violations include (*but are not limited to*) the following:

(A) The State of Wisconsin violated *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny when it failed to disclose to Gehde's defense team that Beverly had told the State, approximately three months before trial, that he (Beverly) had falsely reported Gehde's purported confession and that Beverly refused to testify against Gehde.

(B) Trial counsel Vincent Rust and Kathy Pakes were constitutionally ineffective, under *Strickland v. Washington*, 466 U.S. 668 (1984), when they failed to move to exclude Beverly as a witness.

Gehde incorporates into this Ground the facts alleged in all other paragraphs.

Supporting facts: Christopher Beverly's testimony played a central role in Gehde's case. The State told the jury in its opening statement that Beverly would testify that, while he and Gehde were housed together at Waupun Correctional Institution, Gehde confessed to the crime in this case. Specifically, the State represented to the jury that Gehde had told Beverly that he (Gehde) "went hulk on Sophia and beat her, how he stuck his hand down her throat and choked her." Ex. A at 97. The State called Beverly on the second day of trial. Beverly testified, however, that he "was led on by" the State's detectives to fabricate a story about Gehde. *Id.* at 514. This resulted in the State reading aloud to the jury Beverly's statements to the police (as documented in Detective Krajcinovic's January 2017 report). *Id.* at 511–20. Thus, the jury heard a false narrative, purportedly from Gehde's mouth, about how Gehde committed the crime. The State read numerous inflammatory statements that Gehde purportedly made to Beverly, including

(*but not limited to*) statements that "he'd beat the girl's head in" "in the apartment where he lived with Kyra" and "told people he choked the girl because he had to cover his tracks because she was beaten so severely." *Id.* at 516–17. On cross-examination, Beverly confirmed that he lied to the police and that he personally believed Gehde was innocent. *Id.* at 523–24. And on redirect, he testified that he had informed the police *before trial* that he "wasn't gonna testify against Joshua Gehde." *Id.* at 524. The defense objected to the entire line of questioning, but that objection was overruled. *Id.* at 507, 520. In closing argument, the State repeated Gehde's purported statements to Beverly and urged the jury to find that Gehde had confessed to the crime, despite Beverly's sworn testimony that he (Beverly) had lied to the police in reporting that confession. *Id.* at 1767–68.

On information and belief, the State knew that Beverly had recanted his original statement to the police before he took the stand but elected not to disclose that information to the defense team, in violation of Gehde's Fifth and Fourteenth Amendment rights. In an interview just days before trial, Beverly informed the defense team's investigator that he had spoken to the State's detectives (Detectives Krajcinovic and Helgren) in January 2017, and he had had a second meeting with just Detective Krajcinovic roughly three months before trial. Beverly also told the defense investigator that, during the second meeting, he (Beverly) told Detective Krajcinovic that he was hesitant to testify. The State did not produce a report of that second interview or otherwise disclose its contents to the defense. During the conversation with the defense investigator, Beverly contradicted certain statements in the January 2017 police report

and opined that Gehde was innocent. On information and belief, during the second interview with just Detective Krajcinovic present, Beverly made clear that the statements attributed to him in the January 2017 report (regarding Gehde's purported confession) were not true and told Detective Krajcinovic that he would deny those prior statements if forced to testify. Without conveying that information to the defense, the State then called Beverly as a witness—knowing that he had recanted his earlier story and would do so again under oath—solely to impeach him with the statements authored by the detectives.

The effect was dramatic. Once Beverly rejected the accuracy of his original story, the State effectively was able to read to the jury Gehde's purported jailhouse confession—which was highly prejudicial—in the form of prior inconsistent statements by Beverly. Relatedly, the State also was permitted to ask Detective Helgren, on the third day of trial, about the statements Beverly purportedly made to him during the January 2017 interview—repeating the highly prejudicial statements that Beverly had just confirmed, under oath, were untrue and entrenching the false narrative of how Sophia died. *Id.* at 604–07.

Had the defense team been advised that Beverly had told the State that the statements attributed to him were false, there is a reasonable probability of a different outcome in this case. With that information in hand, the defense team could (and would) have moved to exclude Beverly's testimony altogether. And if Beverly did not testify, then there would have been no basis to read the purported prior inconsistent statements

to the jury or to permit Detective Helgren to testify to Beverly's statements without violating Gehde's Sixth Amendment rights. In the absence of Beverly's testimony (as presented through the State reading into the record his rejected statements), the jury would never have heard the false narrative of how Sophia supposedly was injured. Instead, it would have been left with a circumstantial case turning on competing expert testimony explaining Sophia's cause of death. Thus, in the absence of Beverly's testimony, there is a reasonable probability that at least one juror would have concluded that there was reasonable doubt as to Gehde's guilt.

At the same time, based on the information they did have, defense counsel should have moved pre-trial to exclude Beverly as a witness. As just discussed, the defense team did not know that Beverly had told the State that his original story (from the January 2017 interview) was false and that he now refused to testify against Gehde. But it did know that Beverly was wavering in his account of at least some of the statements attributed to him in the January 2017 police report and that Beverly believed Gehde was innocent of the crime charged. This information alone gave the defense grounds to move to exclude Beverly's testimony in light of its unreliability and any probative value being substantially outweighed by the danger of unfair prejudice and misleading the jury. *See* Wis. State. § 904.03.

Trial counsels' failure to move to exclude Beverly as a witness was objectively unreasonable in light of "prevailing professional norms" at the time. *See Strickland*, 466 U.S. at 688. Those norms obligated the defense, *inter alia*, to conscientiously consider what

motions to file based on the facts presented. *See Standards for Criminal Justice: The Defense Function* 4-1.9(e), 4-3.7(f). Defense counsel knew that Beverly was likely to deny having made at least some of the statements contained in the January 2017 police report. Defense counsel knew that that denial would allow the State to question Beverly about purportedly prior inconsistent statements contained in the January 2017 police report. And counsel knew, therefore, that the jury would hear those highly inflammatory statements, despite their falsity, and that that line of questioning would hurt Gehde's case tremendously. Given these facts, every reasonable attorney would have moved to exclude Beverly as a witness. Yet, trial counsel here made no effort to do so.

That deficient performance prejudiced Gehde. Had counsel moved to exclude Beverly's testimony, there is a reasonable likelihood that the motion would have been granted and that the jury never would have heard Gehde's purported confession to the crime in this case. The State's case then would have been based solely on disputed medical expert testimony. It follows that, by excluding Beverly's testimony, at least one juror would have harbored reasonable doubt as to Gehde's guilt. Accordingly, but-for counsel's deficient performance, there is a reasonable probability of a different outcome in this case.

Exhaustion: Gehde has not yet exhausted his state remedies on Ground Six.

GROUND SEVEN: Appellate counsel Michael Covey was ineffective within the meaning of the Sixth Amendment for failing to pursue on direct appeal an ineffective-assistance-of-counsel claim arising from trial counsel's failure to investigate a witness favorable to the defense. *See Strickland*, 466 U.S. 668; *e.g.*, *Ramirez v. Tegels*, 963 F.3d 604 (7th Cir. 2020). Gehde incorporates into this Ground the facts alleged in all other paragraphs.

Supporting facts: Attorney Covey raised three claims of ineffective assistance of trial counsel in Gehde's post-conviction motion. Relevant here, he argued that trial counsel were ineffective because they failed to call a witness at trial who could have corroborated Gehde's claim that he and Sophia went to Reindahl Park on the morning that Sophia died, thereby bolstering Gehde's credibility. Ex. A at 1896–99, 1906–08. The circuit court granted Attorney Covey's request for a *Machner* hearing on this claim, and Attorney Covey subpoenaed Taylor Skenandore to testify. At the hearing, Attorney Covey successfully elicited testimony from Skenandore that she had told the police that she saw Gehde and Sophia at Reindahl Park on the morning of April 12, 2016. *Id.* at 1950–51. She identified them using photographs taken from security camera footage. *Id.* at 1952–55. And she confirmed that, as of the hearing, she still remembered seeing those two together in the park that morning. *Id.* at 1955–56. Skenandore estimated that she saw Gehde and Sophia at Reindahl Park on the morning of April 12, 2016, within an hour of when Gehde had approximated that he was at the park. *Id.* at 1958.

Attorney Covey performed deficiently by failing to pursue this claim on direct appeal. It was an "obvious" claim, because Gehde's credibility concerning the timeline of events on the morning of Sophia's death—and, in turn, whether he would have had an opportunity to commit the heinous acts of which he was accused—were of central concern. Recognizing this, Attorney Covey appropriately raised this claim in the post-conviction motion. And he elicited helpful testimony at the hearing from Skenandore. Nonetheless, he then abandoned the claim as not "viable." *Id.* at 2146 (¶ 7). An attorney exercising reasonable professional judgment would have continued to pursue that claim on direct appeal. It was "clearly stronger" than the inconsistent-defenses claim.

That deficient performance prejudiced Gehde. This abandoned claim "had a better than fighting chance at the time" to persuade the Wisconsin courts that, had the defense team called Skenandore at trial, at least one juror would have doubted Gehde's guilt. *See Ramirez*, 963 F.3d at 617. But the Wisconsin courts did not have an opportunity to address this issue during the direct review of Gehde's conviction because Attorney Covey did not raise the claim. Thus, there is at least a reasonable probability that raising that claim would have made a difference in the outcome of Gehde's appeal. *See id.* at 618.

Exhaustion: Gehde has not yet exhausted his state remedies on Ground Seven.

GROUND EIGHT: Appellate counsel Michael Covey was ineffective within the meaning of the Sixth Amendment by failing to raise the ineffective assistance of trial counsel claim identified in Ground Three, arising from trial counsel's failure to request funds to test and otherwise investigate physical evidence pertinent to Gehde's defense. *See Strickland*, 466 U.S. 668; *e.g.*, *Ramirez*, 963 F.3d 604. Gehde incorporates into this Ground the facts alleged in all other paragraphs.

Supporting facts: Attorney Covey reviewed Gehde's case file extensively, including (*but not limited to*) the trial transcripts and autopsy report. *See* Ex. A at 2147 (¶ 4). Accordingly, he was aware of Dr. Wigren's statements, described above, that testing the physical evidence in this case could have assisted the defense in pinpointing when Sophia sustained her injuries—and in combatting the State's claim that she was physically abused and that Gehde was the only one who could have harmed her. Attorney Covey also knew that the physical evidence in this case has been preserved and remains available for testing. *See id.* at 1882. On information and belief, had Attorney Covey done the investigation required to bring this claim, then he would have learned that the physical evidence supported an injury timeline inconsistent with the State's theory that Gehde caused Sophia's death while she was in his care on the morning of April 12, 2016.

Attorney Covey performed deficiently by failing to raise a *Strickland* claim premised on trial counsel's failure to request sufficient funds to test the physical evidence. In light of clearly established case law, it was an "obvious" claim. And, on information

and belief, further investigation would have demonstrated that it was "clearly stronger" than the inconsistent-defenses claim he raised and pursued on direct appeal.

That deficient performance prejudiced Gehde. This claim "had a better than fighting chance at the time" to persuade the Wisconsin courts that, had the defense team tested the physical evidence, at least one juror would have doubted Gehde's guilt. *See Ramirez*, 963 F.3d at 617. But the Wisconsin courts did not have an opportunity to address this issue during the direct review of Gehde's conviction because Attorney Covey did not raise the claim. Thus, there is at least a reasonable probability that raising that claim would have made a difference in the outcome of Gehde's appeal. *See id.* at 618.

Exhaustion: Gehde has not yet exhausted his state remedies on Ground Eight.

GROUND NINE: Appellate counsel Michael Covey was ineffective within the meaning of the Sixth Amendment for failing to raise the ineffective assistance of trial counsel claim identified in Ground Four, arising from trial counsel's failure to consult with other necessary experts. *See Strickland*, 466 U.S. 668; *e.g.*, *Ramirez*, 963 F.3d 604. Gehde incorporates into this Ground the facts alleged in all other paragraphs.

Supporting facts: Attorney Covey reviewed Gehde's case file extensively, including (*but not limited to*) the trial transcripts and autopsy report. Ex. A at 2147 (¶ 4). Accordingly, he was aware of the central role that fractures, alopecia, and bruising played at trial. He also knew that none of the three defense experts specialized in issues of bone density, hair loss, or iatrogenic injuries, or how any of those three topics relates to abusive head trauma. On information and belief, although Attorney Covey considered how the issues of bone fractures and hair loss affected Gehde's case, he did not consult any expert specialized in these areas before determining that he would not pursue a *Strickland* claim premised on the defense team's failure to hire such experts. And he did not consider the issue of iatrogenic injuries, let alone consult an expert on that topic in connection with Gehde's case. *See id.* at 2147–48 (¶¶ 5–7).

Attorney Covey performed deficiently by failing to raise a *Strickland* claim premised on trial counsel's failure to consult experts necessary to preparing Gehde's defense. On information and belief, had he investigated further, Attorney Covey would have learned that additional experts had information favorable to Gehde that the defense team could have marshalled in his favor (and to contradict the State's theory). In light of

clearly established case law at the time, it was an "obvious" claim to raise. And, on information and belief, further investigation would have demonstrated that it was "clearly stronger" than the inconsistent-defenses claim Attorney Covey did raise and pursue on direct appeal.

That deficient performance prejudiced Gehde. This claim "had a better than fighting chance at the time" to persuade the Wisconsin courts that, had the defense team consulted with and presented additional expert testimony, at least one juror would have doubted Gehde's guilt. *See Ramirez*, 963 F.3d at 617. But the Wisconsin courts did not have an opportunity to address this issue during the direct review of Gehde's conviction because Attorney Covey did not raise the claim. Thus, there is at least a reasonable probability that raising that claim would have made a difference in the outcome of Gehde's appeal. *See id.* at 618.

Exhaustion: Gehde has not yet exhausted his state remedies on Ground Nine.

GROUND TEN: Appellate counsel Michael Covey was ineffective within the meaning of the Sixth Amendment for failing to raise the *Brady* claim identified in Ground Five, concerning the State's failure to disclose Detective Maya Krajcinovic's professional misconduct. *See Strickland*, 466 U.S. 668; *e.g.*, *Ramirez*, 963 F.3d 604. Gehde incorporates into this Ground the facts alleged in all other paragraphs.

Supporting facts: Attorney Covey was aware of the potential *Brady* issue concerning Detective Maya Krajcinovic's professional misconduct in mid-July 2018, but he took no steps to investigate further. Ex. A at 2140 (¶ 8), 2144–45 (¶¶ 3–5). Attorney Covey could not make an informed strategic decision about which claims to pursue in post-conviction proceedings and on direct appeal absent undertaking that investigation. *See Strickland*, 466 U.S.at 691–92. And there was no strategic reason not to investigate the potential *Brady* claim. On information and belief, as alleged in Ground Five, on information and belief, a viable *Brady* claim exists.

Attorney Covey performed deficiently by failing to raise a *Brady* claim premised on the State's failure to disclose Detective Krajcinovic's professional misconduct. On information and belief, had he investigated further, Attorney Covey would have learned that that misconduct occurred while Gehde's case was pending and that, had they known about it, trial counsel would have called Detective Krajcinovic to the stand and used her testimony to call into question the integrity of the investigation in Gehde's case. In light of clearly established case law, it was an "obvious" claim to raise. And, on information and belief, further investigation would have demonstrated that it was "clearly stronger"

than the inconsistent-defenses claim Attorney Covey did raise and pursue on direct appeal.

That deficient performance prejudiced Gehde. This claim "had a better than fighting chance at the time" to persuade the Wisconsin courts that, had the State disclosed Detective Krajcinovic's misconduct to the defense team, at least one juror would have doubted Gehde's guilt. *See Ramirez*, 963 F.3d at 617. But the Wisconsin courts did not have an opportunity to address this issue during the direct review of Gehde's conviction because Attorney Covey did not raise the claim. Thus, there is at least a reasonable probability that raising that claim would have made a difference in the outcome of Gehde's appeal. *See id.* at 618.

Exhaustion: Gehde has not yet exhausted his state remedies on Ground Ten.

GROUND ELEVEN: Appellate counsel Michael Covey was ineffective within the meaning of the Sixth Amendment for failing to raise the claims identified in Ground Six, concerning jailhouse informant Beverly. *See Strickland*, 466 U.S. 668; *e.g.*, *Ramirez*, 963 F.3d 604. Gehde incorporates into this Ground the facts alleged in all other paragraphs.

Supporting facts: On information and belief, Attorney Covey was aware of the potential *Brady* issue concerning Beverly's recanted story, as well as the potential *Strickland* issue concerning trial counsel's failure to move pre-trial to exclude Beverly as a witness, because he reviewed Gehde's case file extensively. *See* Ex. A at 2147 (¶ 4). Yet, he took no steps to investigate further. Attorney Covey could not make an informed strategic decision about which claims to pursue in post-conviction proceedings and on direct appeal absent undertaking that investigation. *See Strickland*, 466 U.S.at 691–92. And there was no strategic reason not to investigate these potential *Brady* and *Strickland* claims. As alleged in Ground Six, on information and belief, viable *Brady* and *Strickland* claims exist.

Attorney Covey performed deficiently by failing to raise a *Brady* claim premised on the State's failure to disclose Beverly's recanted story and a *Strickland* claim premised on trial counsel's failure to move to exclude Beverly as a witness. On information and belief, had he investigated further, Attorney Covey would have learned that, months before trial, the State knew Beverly had falsely reported Gehde's purported confession and refused to testify to its accuracy, yet the State failed to disclose this information to the defense, in violation of Gehde's rights under the Fifth and Fourteenth Amendments.

Further, had he investigated further, Attorney Covey would have learned that, despite the State withholding that information, the defense team still knew enough to warrant filing a pre-trial motion to exclude Beverly's testimony and that counsel violated Gehde's Sixth Amendment rights by failing to do so. In light of clearly established case law, each was an "obvious" claim to raise. And, on information and belief, further investigation would have demonstrated that each claim was "clearly stronger" than the inconsistent-defenses claim Attorney Covey did raise and pursue on direct appeal.

That deficient performance prejudiced Gehde. These claims "had a better than fighting chance at the time" to persuade the Wisconsin courts that, had the State disclosed Beverly's recantation to the defense team and/or had trial counsel moved to exclude Beverly's testimony, at least one juror would have doubted Gehde's guilt. *See Ramirez*, 963 F.3d at 617. But the Wisconsin courts did not have an opportunity to address either issue during the direct review of Gehde's conviction because Attorney Covey did not raise either claim. There is at least a reasonable probability that raising these claims related to Beverly would have made a difference in the outcome of Gehde's appeal. *See id.* at 618.

Exhaustion: Gehde has not yet exhausted his state remedies on Ground Eleven.

III. Request for Relief

This petition contains exhausted and unexhausted claims, which affects the immediate relief that Gehde seeks. In light of the mixed nature of this petition, he respectfully requests that the Court administratively stay these proceedings so that he may exhaust his state remedies on Grounds Two through Eleven. *See Rhines v. Weber*, 544 U.S. 269, 276 (2005) (district courts have discretion to administratively stay "mixed" habeas petitions); *see, e.g.*, *Rizvi v. Hepp*, No. 20-cv-1768, 2021 WL 3056886, at *1 (E.D. Wis. July 20, 2021) (granting stay so that petitioner could exhaust two claims). Given the lengthy investigation required in this complex case, Gehde respectfully suggests that the Court order him to file a status report on or before January 23, 2023, proposing a deadline by which its investigation will be complete and a motion will be filed in state court.

In the event of further proceedings in this Court, Gehde seeks relief on the merits. He requests that this Court set a briefing schedule and ultimately grant the writ of habeas corpus under 28 U.S.C. § 2254. With respect to his claims of ineffective assistance of appellate counsel, granting the writ would require that Gehde be provided the opportunity for a new appeal or be immediately released. With respect to his other claims, granting the writ would require that the State vacate the judgment of conviction in Dane County, Case No. 2016CF000972, and either retry him consistent with his federal constitutional rights or dismiss the charges against him with prejudice.

Dated at Madison, Wisconsin, this 22nd day of July, 2022.

Respectfully submitted,

Joshua S. Gehde, *Petitioner*

/s/ Jessica Arden Ettinger
Jessica Arden Ettinger
FEDERAL DEFENDER SERVICES
OF WISCONSIN, INC.
22 East Mifflin Street, Suite 1000
Madison, Wisconsin 53703
Tel: 608-260-9900
Fax: 608-260-9901
jessica_ettinger@fd.org

Counsel for Petitioner

CERTIFICATE OF SERVICE

On this 22nd day of July, 2022, I caused the foregoing document to be electronically filed with the Clerk of the Court for the United States District Court for the Western District of Wisconsin by using the Court's CM/ECF system, which will serve electronic notification of this filing on all counsel of record.

In addition, undersigned counsel e-mailed a copy of this petition to the Wisconsin Department of Justice at its listed e-mail address (federalordersca@doj.state.wi.us), with carbon copy to Daniel O'Brien (obriendj@doj.state.wi.us), an attorney in the Department who previously litigated this case on behalf of the State before the Wisconsin appellate courts.

Respectfully submitted,

/s/ Jessica Arden Ettinger
Jessica Arden Ettinger
FEDERAL DEFENDER SERVICES
OF WISCONSIN, INC.
22 East Mifflin Street, Suite 1000
Madison, Wisconsin 53703
Tel: 608-260-9900
Fax: 608-260-9901
jessica_ettinger@fd.org
Counsel for Petitioner