No. 19-3227

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

RONNIE L. FAMOUS,

Petitioner-Appellant,

v.

LARRY FUCHS,

Respondent-Appellee.

ON APPEAL FROM AN ORDER DISMISSING FAMOUS' HABEAS PETITION AS UNTIMELY ENTERED IN THE UNITED STATES EASTERN DISTRICT OF WISCONSIN, THE HONORABLE WILLIAM C. GRIESBACH, PRESIDING

BRIEF OF RESPONDENT-APPELLEE

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JURISDICTIONAL STATEMENT

Petitioner-Appellant Ronnie L. Famous' jurisdictional statement is complete and correct.

STATEMENT OF THE ISSUES

1) Did the district court properly exercise its discretion in granting Warden Fuchs' motion to dismiss Famous' habeas petition as untimely because Famous did not carry his burden of showing that his circumstances are extraordinary and that he was diligent such that he was entitled to equitable tolling for the nearly ten years it took Famous to file his original habeas petition?

2) Did the Wisconsin courts reasonably apply existing United States Supreme Court precedent to deny Famous' claims of ineffective assistance of trial and appellate counsel after providing Famous with multiple chances to develop the factual basis for his claims, but he repeatedly declined to do so?

This Court should answer "yes" to both questions.

INTRODUCTION

Famous seeks a return to the district court for an evidentiary hearing under 28 U.S.C. § 2254(e)(2) and *Williams v. Taylor*, 529 U.S. 420, 432 (2000), so that he may further develop the facts regarding his claim that his petition should have been equitably tolled for more than a decade, and to further

develop his claims regarding his allegations on ineffective assistance of trial and appellate counsel for the failure to raise an alleged alibi witness issue.

This Court should deny Famous' request on both counts. First, Famous failed to carry his burden before the district court to show that he was entitled to the extraordinary remedy of equitably tolling his habeas petition for nearly *ten years*, where it was his burden to show that he was diligently pursuing his rights and that some extraordinary, external impediment prevented him from timely filing his habeas petition. And while Famous' submissions to the district court show that he apparently did not receive his legal file from his appellate counsel until June 2005, Famous' decision to then farm out preparation of his legal materials to another inmate for more than two years does not constitute an extraordinary impediment but a conscious choice on Famous' part. Moreover, while Famous demonstrated that he has at times had some mental health issues, he did not demonstrate that those issues prevented him from timely filing his habeas petition, and therefore the district court properly exercised its discretion to deny Famous' request for nearly a decade of equitable tolling.

Second, as to his ineffective assistance of trial and appellate counsel claims, Famous is not entitled to an evidentiary hearing before the district court because the failure to develop a factual record regarding both claims was solely Famous' fault. It was Famous who litigated his postconviction and

appellate proceedings in which he expressly declined to call his trial counsel to testify and further declined to call any of his alibi witnesses after the circuit court and State presented Famous with several chances to do so. Thus, because the failure to develop a factual basis in state court for Famous' claims may fairly and solely be attributed to him, under 28 U.S.C. § 2254(e)(2), Famous is not entitled to an evidentiary hearing before the district court.

This Court should affirm the district court's order dismissing Famous' petition as untimely.

STATEMENT OF THE CASE

In May 1998, Famous was charged with four counts of first-degree sexual assault of a child and one count of exposing a child to harmful material. (Dkt. 50-2:1–2; 50-3:23.)[1] Famous, then 39 years old, was charged for his conduct with the victim, a 10-year-old girl in early May 1998. (Dkt. 50-2:3.)

Famous' trial took place on November 4 and 5, 1998. (SA 101, 256.) In its opening statement, the State explained that, at the time of the assaults, the victim and her mother were visiting Famous at a duplex that he shared with his parents and sister in Racine. (SA 123.) The victim's aunt was dating Famous' brother at the time, and the victim, her mother, her two-year-old

[1] "Dkt." record citations refer to the district court. "Doc 19" refers to the brief and required short appendix attached to Famous' brief. The page number references are at the top of the pdf. "SA" refers to Fuchs' separate appendix.

sister, and the victim's aunt all came over to Famous's house. (SA 123.) Famous lived in the upstairs part, while his family lived downstairs. (SA 123.) The State explained that, while the victim's mother and aunt were out later that evening, Famous barricaded the victim inside his upstairs room while the victim was tending to her crying baby sister, showed her an explicit adult film, and then sexually assaulted the victim before her younger brothers began banging on the door. (SA 125–26.)

In his opening statement, Famous' trial counsel, Attorney William Demark, told the jury that Famous denied the charges and noted that there were no eyewitnesses to the crime even though "anywhere from eight to ten, twelve different people" were in the duplex that night. (SA 132.) Attorney Demark listed Elizabeth Green (Famous' mother), her husband (since deceased) David Famous, Famous' brother, as well as Lynette Famous and Carolyn Famous, Famous' sisters. (SA 132.) Of the people Attorney Demark mentioned as being present, Demark indicated that he intended to call only Elizabeth Green and David Famous. (SA 132–33.)

The victim testified first. (SA 136.) The victim testified that her mother, aunt, and aunt's daughter Candace Streeter all left Famous' duplex to go get some items from the victim's grandmothers house in Kenosha. (SA 141–42.) While her mother was gone, the victim testified that she went to comfort her crying six-month-old sister in Famous' bedroom. (SA 145.) The victim testified

that Famous followed her into his room, shut the door, and barricaded it with a dresser drawer. (SA 146.) Famous then put a TV and VCR on top of the dresser and showed the victim a "nasty" video in which "grown-up[ ]" girls and boys were "doing it to each other and stuff." (SA 147.) The victim recalled seeing a "black and silver thing" that was being "st[uck] [ ] in [a] girl's behind." (SA 148.)

After Famous showed the victim the video, she testified that he sat down on the bed next to her and pulled down his pants. (SA 150.) Famous then told the victim to "put [her] hand on" his "private spot," meaning his penis. (SA 151.) Famous instructed the victim to "[r]ub" his private spot, and the victim then observed "clear stuff [that] came out of it." (SA 152.) Famous then touched the victim's chest and her "private spot" with his hand. (SA 153-54.) The victim testified that she told Famous that it "hurt," but Famous said she should be quiet or Famous would "make it hurt worse[ ]." (SA 155.) Finally, the victim said that Famous made her get on her knees and "tried to put his private spot in my mouth," but the victim's two younger brothers began "banging on the door" and Famous pulled his pants back up and told the victim to do the same. (SA 155–156.)

On cross-examination, Attorney Demark primarily questioned the victim about the feasibility of moving the dresser and TV and VCR set around. (SA 165–171.) Attorney Demark asked the victim who she recalled seeing that day,

and she listed Carolyn and Rosie Famous, Elizabeth Green, and her since-deceased husband at Famous' duplex. (SA 159–169.) Attorney Demark also got the victim to admit that Famous' bedroom had a linoleum floor such that "when you move the furniture it makes a noise." (SA 171.)

Next, the victim's cousin Lachina Streeter testified. (SA 181.) Lachina testified that she overheard a conversation between the victim and her sisters in which the victim said that Famous "lock[ed] her in the room." (SA 184.) Lachina said that she first told her mom about the victim's statement, who then told the victim's mother. (SA 184.)

The victim's mother testified she, her children, and her sister went over to Famous' duplex. (SA 187.) The victim's mother said David, Carolyn, Rosie and Lynette Famous were there, as well as Elizabeth Green and her since-deceased husband. (SA 187.) The victim's mother confirmed that she, her sister, and Candace Streeter drove to Kenosha. (SA 189.) The victim's mother testified that, "about five days" later, after her niece Lachina came "running up" to her to say you had "better listen to what your daughter has to say." (SA 191.) The victim's mother said she called the police the same day, and the victim was then interviewed twice by police. (SA 191–92.)

Racine Investigator Michael Payne testified about his interview with the victim. (SA 196.) Investigator Payne interviewed the victim on May 13, 1998, five days after the assault. (SA 198.) Investigator Payne testified that he asked

the victim to go over her account of the assault twice, and that she was "consistent" in both of her accounts. (SA 200.) When asked to describe the explicit video that Famous had shown her, the victim again recalled seeing a "silver and black" thing that a "man was pushing . . . into a girl's bootie," and drew a picture of the item for Payne. (SA 202.) Significantly, when Investigator Payne executed a search warrant of Famous' room, he found twelve adult films in Famous' room, including one that was already "cued up" to "the scene that [the victim] was describing or the object she was describing . . . that came up on screen." (SA 205.) The State introduced a portion of that video for the jury to view in comparison to the victim's drawing. (SA 205–06.) On cross-examination, Attorney Demark got Investigator Payne to admit that the victim did not mention viewing a videotape or that Famous had ejaculated in her first statement, and otherwise challenged several smaller inconsistencies in her language between both statements. (SA 208–13.)

Finally, the State called Special Agent Michael Vendola from the Wisconsin Department of Justice to testify as an expert witness regarding the explicit video Famous showed the victim and how it could be used to normalize sex acts to a child like the victim. (SA 221–25.)

At the end of the first day of trial, and outside of the jury's presence, the State rested its case. (SA 226.) Attorney Demark made a motion to dismiss the State's case based upon insufficient evidence. (SA 227–28.) Taking the

"credible evidence that's in the record and view[ing] that credible evidence in a light most favorable to the State," the circuit court denied Attorney Demark's motion to dismiss. (SA 228–31.)

Immediately thereafter, Famous made a statement that he "want[ed] to represent [him]self for the fact that my counsel is ineffective." (SA 231.) Famous explained he was "making that request for the simple fact that [Attorney Demark is] ineffective in a way that all the allegations that you just said were credible; we got stuff to the contrary in terms of transcripts and police reports that say otherwise that was not brung [sic] out." (SA 231.) Famous therefore claimed that the "only way that this material is going to be b[r]ought out to the jury is if I present it to the jury to have chance to talk to them, and I would like the record to reflect that's my reason for wanting to represent myself." (SA 231–32.) Attorney Demark responded that Famous had "expressed to me concern that I haven't probably pointed out inconsistencies in the statements and he's indicated that he wanted those transcripts and police reports to be given to the jury." (SA 232.) Demark said he advised Famous that he did not "think that was a good idea, and all I can say is that the inconsistencies that I perceive to be of significance have been pointed out either through the testimony of [the victim] or [Investigator Payne]." (SA 232.)

Famous continued in his request to proceed pro se, stating that he had "asked for an expert witness of my own to point out certain things that I believe

would discredit what they [sic] expert witness said. I got witnesses that I would like to call. I'd like to take the stand to show that basically what has been said is lies . . . I got certain things that [the victim] said that my attorney don't want to bring out which would show that certain things couldn't happen." (SA 233.) Famous went on to detail how difficult it would be to move the dresser and TV and VCR at once, and how the victim could not have thrown away his ejaculate in a "handkerchief" in the kitchen as she claimed because Famous has "a wastepaper basket" in his room. (SA 233–34.) Finally, Famous claimed that Attorney Demark should have cross-examined the victim's mother about their alleged relationship, with Famous claiming that the two "had sex all the time." (SA 234.)

The circuit court engaged Famous in a colloquy to help determine whether Famous could proceed pro se. (SA 235–37.) Using those answers, the court proceeded to evaluate Attorney Demark's performance thus far based on Famous' claims. (SA 239–40.) The court noted that Attorney Demark had cross-examined Investigator Payne regarding several inconsistencies in the victim's statements, including a case in which Payne seemed to suggest that Famous pulled the victim's pants down when she did not say that. (SA 239.) The court cited several other areas of impeachment by Attorney Demark, including a "set[ting] the stage" for Famous' and other witnesses' possible testimony later on during the defense's case. (SA 241.)

The court ultimately denied Famous' request to proceed pro se, finding that Famous was not "acting knowingly and voluntarily in stating that he wishes to waive his right to counsel" and that Famous was "not aware of the seriousness of the charges made against him." (SA 245–46.) The court further explained that if Famous did take the stand as he indicated, Famous would "be able to make such statements as he wishes. Even if his attorney disagreed, it's the one area where the client, the defendant, can trump in a sense or can override the wishes of an attorney." (SA 245–46.) Finally, the court noted that "in terms of [Attorney Demark's] representation that's occurred already, there has been an effort to confront. There's been impeachment, [the] primary officer involved acknowledged that he made an error. The [victim's] mother was asked questions. She's acknowledged certain things that may turn out later to be impeachment type material." (SA 247–48.) Therefore, the court concluded that it was "not able to determine" that Demark was ineffective, finding that it was "not able to determine in any way that that has occurred." (SA 248.)

When the parties reconvened the following morning before the beginning of the defense's case, Attorney Demark explained that "as the case was called this morning I was speaking with Mr. Famous. If I could have perhaps five to ten minutes . . . in light of obviously the events at the end of the day yesterday he and I are trying to determine just where we're at. I think we're able to proceed as lawyer and client at this time. I would just like to speak with

[Famous] about his testimony which I expect that he will be giving." (SA 267.) Attorney Demark noted that he had given Famous a "written memorandum which he has had an opportunity to review detailing pretty much where we're at . . . and explaining to him his testimony and what I would like to review with him and explain to him about the district attorney's cross-examination and general witness instruction." (SA 267.)

The circuit court responded that the "answer to your request even without getting input from the district attorney is yes and it's not limited to a few minutes. The legal standard would be as much as time as you need." (SA 267.) After a period of time passed, Attorney Demark stated that he and Famous had "had ample opportunity I think and we are prepared to proceed." (SA 269.) Famous did not make any statement to the contrary. (SA 269.)

Attorney Demark indicated that he would be calling David Famous, Canyata Famous and Elizabeth Green to testify before Famous' expected testimony, and that those witnesses were "the only [ones] we plan on calling." (SA 264.) Elizabeth Green, Famous' mother, testified that she was present at the duplex on May 5, 1998, where she and her since-deceased husband lived downstairs. (SA 272.) Green testified that she was downstairs at approximately 6:30 p.m. that night and "there wasn't nothing [sic] going on." (SA 272.) Green said that there were "some children" there and they were "running and playing." (SA 273.)

Attorney Demark asked Green about the floors in Famous' bedroom, and she too testified that they were linoleum. (SA 274.) Green had some difficulty understanding Attorney Demark's questions but testified that she "didn't hear no movement around" like from Famous moving the dresser to block the door to his bedroom. (SA 275–76.) Finally, Green testified that she bought paper goods for the house at Aldi's, and she appeared to testify that she bought Aldi's brand tissues with lotion in them. (SA 276–79.)

David, one of Famous' brothers, testified. (SA 280.) David Famous testified that in May 1998 he was also living downstairs in the duplex in Racine with his mother and father. (SA 280–81.) David Famous testified that his mother Green bought "generic" tissues at Aldi's, and that they did not have lotion in them. (SA 281.) David Famous testified that, on night of the assault, Lynette, Carolyn, and Rochelle Famous were present, as well as the victim's mother and her children. (SA 282–83.) David Famous explained that the home's TV was 19 inches wide and "deep," and that carrying that TV and a VCR together was "possible" but "I wouldn't advise it" because "you'd have to tip everything back, so that way if you tried to open a door or tried to get through the door the VCR would eventually slide off." (SA 283–84.)

David Famous testified that he was with Famous earlier in the day, that he took Famous to get a part to fix Famous' car, and eventually "came back" to the duplex "later." (SA 285.) Finally, like Green, David Famous testified that

he was both "quite sure" and also "pretty much" sure that you would be able to hear the sound of moving furniture in Famous' room "because the house is old." (SA 286.) On cross-examination, the State got David Famous to admit he was not at the house after 7:00 p.m., and that he had been convicted of a crime six times. (SA 286–87.)

Canyata Bell Famous, Famous' niece and Carolyn Famous' daughter, testified that she gave the victim and her siblings a ride home on May 5, 1998, and that the victim's demeanor seemed "[f]ine" and "[h]appy," and that the victim was not crying and did not appear to be upset "in any way." (SA 289–90.)

Finally, Famous testified. (SA 291.) Famous testified that, in May 1998, he and the victim's mother had been dating for about a year. (SA 293, 297.) On the day of the assault, Famous testified there were people "in and out" of the duplex "all day." (SA 294.) Famous specifically listed David Famous, Lynette Famous, Carolyn Famous, Famous' "stepfather's son . . . along with his girlfriend, Lisa Nelson," Famous' sister Linda, her children, and the victim's mother and her children as being present. (SA 294–95.)

When asked to describe the TV and VCR that the victim testified about, Famous said it was "basically like my brother David described. . . it's a big 19 inch with a big back that comes out." (SA 299.) Famous testified that the TV and VCR were normally kept in the living room because his sister Rosie

watched it there. (SA 299.) Famous admitted that he "occasionally" brought the TV and VCR set into his room, and that he carried the items in when he did so. (SA 300.) Famous also admitted it was "possible" to carry the TV and VCR into his room together as the victim had described, but he said he would not recommend it because "the VCR will fall off because you gotta use your other hand to get the door open . . . and you gotta wiggle through the little kitchen space and it's just best to carry it by itself, plus it's heavy." (SA 300–01.)

Attorney Demark specifically asked Famous if he carried the TV and VCR into his room as the victim described, and Famous responded that "[n]ormally when [the victim] and the rest of the kids are around they look at the videos out there most of the time. And no, on that day the TV was in the living room in the entertainment system." (SA 301.) When asked if Famous showed the victim the video as she testified, Famous said he had "[n]ever ever showed [the victim] an adult or any other kid a video." (SA 302.) Similarly, when asked if he was ever alone in his room with the victim, Famous testified "Nope, the only time [the victim] was in the room on that day with the door closed was she was in there with her mother . . . and due to they [sic] reason she was talking to her or whatever. Never with the door closed while I was there." (SA 302.)

Famous also denied moving the TV and VCR, explaining "that's a lie or not true." (SA303.) He testified that he did bring the TV and VCR into his room and place it on top of a dresser as the victim testified, but he claimed that he only did so in another place where the only "wall socket" was located. (SA 304.) Famous testified that he would not have moved the dresser in front of the door as the victim said because to do so he would have to "rearrange my whole room." (SA 305.) Attorney Demark then had Famous draw a diagram of his room and its contents for the jury. (SA 305–06.)

On cross-examination, Famous also testified that the TV stayed in the living room "[m]ost of the time" when children were over because the victim and the other children wanted something to do "and that's usually watch TV." (SA 313.) Attorney Demark had no redirect. (SA 313.) The defense rested, and the State declined to call any rebuttal witnesses. (SA 319.)

As relevant here, in closing, Attorney Demark argued that the victim may have made up the allegations against Famous because her mother and Famous were "having a sexual affair" and the victim "just means she wants to be back with her father" instead. (SA 346.) Attorney Demark also discussed the victim's inconsistencies in her first and second statements, noting that she did not mention Famous ejaculating or viewing an adult film in the first statement. (SA 345.) Attorney Demark argued that those things could have been prompted by Investigator Payne. (SA 345–46.) Further, Demark noted

that the victim testified that she dispensed with Famous' ejaculate into a tissue with lotion in it, but Famous' mother and brother testified that they did not have that kind of tissue in the duplex. (SA 348.) Finally, Demark focused on the feasibility of Famous moving the TV and VCR set upstairs as the victim testified without anyone downstairs hearing it. (SA 349–50.)

The jury found Famous guilty of four counts of first-degree sexual assault of a child and one count of exposing a child to harmful material. (SA 385.)

After sentencing, Famous pursued postconviction relief, and Attorney Mark Rosen was appointed to represent him. (Dkt. 50-4:2.) On January 7, 2000, Attorney Rosen filed a postconviction motion which included several claims of ineffective assistance of trial counsel as well as an argument that Famous was improperly sentenced under a persistent repeater penalty enhancer. (Dkt. 50-3:21; 50-4:2.) The circuit court rejected Famous' ineffective assistance of counsel arguments but agreed with Famous' sentencing argument, and, therefore, on January 21, 2001, the court held a resentencing hearing. (Dkt. 50-4:2.) At that hearing, several witnesses spoke on Famous' behalf, including Lynette Famous, who said that for Famous' trial who were credible evidence" because they were "in the house" but were not called to testify. (SA 458.)

After being resentenced, Famous pursued a direct appeal in appeal number 2000AP422-CR with Attorney Rosen. (SA 441.) Famous's brief raised

five arguments: 1) trial counsel was ineffective because he did not file a pretrial motion alleging that the four counts of sexual assault were multiplicitous; (2) trial counsel was ineffective assistance because he did not file a pretrial motion contending that the sexual assault counts should have been charged as a single count under Wis. Stat. § 948.025(1) rather than as four individual counts under Wis. Stat. § 948.02(1); "(3) whether the evidence was sufficient to support his conviction for the sexual assault charge set forth in count two of the information; (4) whether the trial court erroneously exercised its discretion by admitting a sexually explicit videotape into evidence; and (5) whether the trial court erroneously exercised its discretion by permitting a police investigator to testify as to the effects of showing sexually explicit material to children." (Dkt. 50-2:2.)

In a decision dated September 19, 2001, the Wisconsin Court of Appeals rejected Famous's arguments and affirmed the order denying his motion for postconviction relief and his judgment of conviction. (Dkt. 50-2:1–2.) Famous petitioned the Wisconsin Supreme Court for review. (Dkt. 50-3:21.) By order dated November 27, 2001, the court denied Famous's petition. (Dkt. 50-3 :21.)

Famous took no other state court action until July 17, 2006, when he filed a motion for sentence modification with the circuit court based on his alleged assistance to law enforcement, which the court denied on December 12, 2006. (Dkt. 50-4:3.) Famous took no other state court action until June 18,

2007, when he filed a petition for writ of habeas corpus in the Wisconsin Supreme Court, which it denied *ex parte* on August 14, 2007. (Doc. 20:133A.)

On June 16, 2008, Famous attempted to file a state habeas petition in Racine County Circuit Court. (Dkt. 53-1:35–43.) On June 23, 2008, the court rejected his petition because of several deficiencies in Famous' filing. (Dkt. 53-1:35.)

On March 16, 2009, Famous filed a pro se petition for state habeas corpus relief in appeal number 2009AP649-W. (Dkt. 50-3:18.) Famous's petition claimed his trial counsel and appellate counsel were ineffective because they did not raise a challenge to the circuit court's resentencing determination. (Dkt. 50-4:4.) By order dated May 5, 2009, the Wisconsin Court of Appeals denied Famous's petition *ex parte*. (Dkt. 50-4:1–2, 4.) Famous petitioned the Wisconsin Supreme Court for review, but the court denied his petition by order dated August 17, 2009. (Dkt. 50-3:18.)

On August 6, 2013, Famous filed a Wis. Stat. § 974.06 motion in circuit court, raising new claims of ineffective assistance of appellate and postconviction counsel. (Dkt. 40:7.) As relevant here, for the first time, Famous's motion alleged that his trial counsel was ineffective for failing to present Rosie Kelley and Lynette Famous to refute the victim's testimony. (Dkt. 50-5:2.) The circuit court denied Famous's motion, and he appealed in appeal number 2014AP290. (Dkt. 50-5:2–3.) The Wisconsin Court of Appeals

affirmed the bulk of the denial of Famous's motion, but, remanded the matter for an evidentiary hearing on whether postconviction counsel was ineffective for failing to raise the ineffective assistance of trial counsel who did not call two witnesses to testify on Famous's behalf. (Dkt. 50-5:3.)

On February 23, 2016, the circuit court held a status conference regarding Famous's motion. (SA 395.) At that hearing, the State indicated that Attorney Demark was "retired from the practice of law. [But] I believe he is still in the area, and I believe I could find him for an evidentiary hearing. And I would . . . certainly make those efforts." (SA 398–99.) The circuit court asked Famous if he would be calling "any witnesses or just to question Mr. DeMark?" (SA 399.) Famous responded that the "only issue the appeal [sic] court directed you to review was the ineffective assistance of appellate counsel, Mark Rosen, for failing to assert the ineffective assistance of Mr. DeMark for failure to call the witnesses. This *Machner* hearing is supposed to be for appellate counsel, not trial counsel." (SA 399.) Thus, the circuit court directed the State to subpoena Attorney Rosen to testify. (SA 404.) The court also reiterated that Famous' claim was "solely as to ineffective assistance of appellate counsel?" to which Famous replied, "That's correct." (SA 406.) The court again asked if there were any other witnesses Famous would be calling, and Famous replied "probably not." (SA 406.)

On March 21, 2016, the court held a motion hearing. (SA 417.) Famous said that he wanted to subpoena Lynette[2] Famous because she allegedly "brought it to . . . [Attorney] Rosen's attention that she wasn't called as a witness, and I thought I might need her to testify to that fact." (SA 424.) The court asked if Famous was "in touch" with Lynette and if he could ask her to be present for the hearing, and Famous said, "Yeah, I can do that." (SA 425.)

On April 15, 2016, the circuit court held an evidentiary hearing at which Famous was able to question Attorney Rosen. (SA 431.) At the beginning of the hearing, the circuit court clarified that, at the previous hearing, "we determined that it would be the testimony of Mr. Rosen that we would be taking today. Right?" (SA 434.) Famous said, "that's correct, Your Honor." (SA 434.) However, when asked if Famous intended to call any witnesses, Famous claimed that, when he asked to "call certain witnesses, such as Mr. DeMark and my other two material fact witnesses, you told me that wasn't necessary." (SA 435.) The court responded that the "record will reflect that there was a discussion as to the scope of the hearing that the issue of Mr. DeMark's performance for which the witnesses would be Mr. DeMark and your other facts witnesses was not the issue here but, rather, that the issue was ineffective assistance of appellate counsel." (SA 435.) Famous responded that

[2] Famous also mentioned Charles Famous, but it appears he was deceased by the time of the hearing. (SA 425.)

that was "[e]xactly" right, concluding that he and the court "came to [an] agreement that Mr. Rosen would be the only witness today." (SA 435–36.)

Attorney Rosen testified that he had been practicing for over twenty years, primarily in appellate criminal defense. (SA 440.) Attorney Rosen said that he recalled meeting with Famous at Green Bay Correctional in August 1999 and discussing the multiplicity and resentencing/"three-strikes" law challenge that Famous wanted Attorney Rosen to raise on appeal. (SA 442–43.) Under questioning by Famous, Attorney Rosen recalled Famous "mentioned something about the Streeters" and Rosen found a "memo I had to my private investigator from 2002, something about investigating the Streeters . . . I'm sure I got that information from you. But . . . I don't remember anything coming out of that in terms of fruitful defense or appellate postconviction issues. (SA 446.) And when asked if Attorney Rosen recalled exchanging letters with Famous, Attorney Rosen testified that the "last note I had was maybe 2002, 2003, or something like that." (SA 444.)

Attorney Rosen authenticated a July 20, 2000 letter from Rosen to Famous in which Attorney Rosen said he was "preparing [Famous'] appellate brief." (SA 450.) Famous also asked Attorney Rosen about a letter dated September 24, 2000, in which Famous told Rosen that Famous did not "see all of the ineffective [assistance] of trial counsel issues I asked you to bring . . . such as trial counsel's failure to call my three alibi witnesses Carolyn

Famous, Rosie Kelly and Lynette Famous." (SA 451–52.) Attorney Rosen testified that he did not "remember the three alibi witnesses. I [did] remember [discussing the three strikes and multiplicity challenges Famous asked Rosen to raise on appeal] because I presented them. I don't remember discussing the three alibi witnesses . . . I did hire an investigator . . . [but] I have no specific recollection of what happened with that or anything of that nature." (SA 452.)

Famous then produced a transcript of what the parties determined was most likely Famous's January 21, 2001 resentencing hearing at which Lynette Famous testified as a character witness for Famous. (SA 458.) Attorney Rosen testified that he did not "remember this happening," and noted that it "appear[ed] the decision telling [the alibi witnesses] not to testify at trial was [Attorney] DeMark's decision, not mine, because clearly I didn't handle that. I don't remember Ms. Lynette Famous and David Famous or Carolyn Famous testifying at this . . . hearing." (SA 458–59.)

Famous asked Attorney Rosen about what steps he took to investigate his alibi witnesses. (SA 462–63.) Attorney Rosen testified that he recalled hiring an investigator, but, because of the length of time since then, Rosen could not "recall what that person did or didn't do." (SA 463.) Rosen explained that his "standard course is, when I do a post-conviction motion, is I want to make sure that I have all the investigation done before I do it because you're really not supposed to file these things one after - - multiple times. You file one,

have all your ducks in order, have the investigation done, and then go forward." (SA 463.) Thus, because Famous was asking about some testimony at his resentencing hearing after his direct appeal, Attorney Rosen testified that "everything would have been done by then in terms of investigation. And if I felt that it was appropriate, I would have raised [the alibi witness issue]." (SA 463.)

On cross-examination by the State, Attorney Rosen agreed that if the "issues that are being raised here today . . . had been discussed" between Famous and Rosen, Attorney Rosen "would have raised them at the same time you raised the other ineffective [assistance of counsel] argument." (SA 467.) Finally, when asked by the court if Famous had "asserted that his lawyer lied to him about the witnesses in retaliation for seeking to have . . . [Attorney] DeMark[ ] discharged during the trial," Attorney Rosen testified that he did not recall any discussion like that. (SA 475.) In addition, Rosen testified that, if Famous had raised the retaliation issue with him, Attorney Rosen would have "dispatched" his investigator to look into it further. (SA 475–76.)

Famous called no other witnesses to testify. (SA 476.) Famous did testify on his own behalf, stating that he told Attorney Rosen about the alibi witness issue and that Attorney Rosen's response was that "he would investigate the issue, and he would be filing the issues that I asked him to bring up." (SA 479.) In his argument to the court, Famous claimed that Attorney Demark told his

alibi witnesses not to testify at trial, "that he d[id not] want to call them because they would hurt my . . . testimony." (SA 494.) The circuit court interjected that there was no support for this claim "in the record." (SA 495.)

The circuit court denied Famous's motion, finding that he failed to demonstrate that Attorney Rosen's performance was deficient. (SA 499.) It found that Famous "did indeed raise [the alibi witness issue] with Mr. Rosen" and that Rosen hired an investigator to look into the issue. (SA 498.) However, the court reasoned that Attorney Rosen "determined that this was not a viable issue to bring to the Court of Appeals. And I'm not going to be in the position . . . of second-guessing a decision made by appellate counsel." (SA 498.)

Further, the court "assumed that the refusal to call the witnesses was in retaliation for Mr. Famous having sought counsel's discharge and Mr. Famous was prejudiced then that failure would rise to the level of constitutionally ineffective assistance." (SA 499.) However, the court found that the "record of sworn testimony does not establish that there was retaliation involved, nor that Mr. Famous advised Mr. Rosen that there was some retaliation involved." (SA 498–99.) The court noted that this "is a very sparse record and a very old case," but, it was "satisfied that [Attorney Rosen] met with Mr. Famous, discussed the legal issues at length with Mr. Famous, did his own investigation, and made a determination as to what issues would be the best issues to raise." (SA 499.) The court therefore concluded that Famous had not

shown that Attorney Rosen performed deficiently because the alleged retaliation and alibi was not "clearly stronger than the issues that [Attorney Rosen] did present," and it denied Famous's motion. (SA 499.)

Famous appealed the circuit court's order in case 2016AP1175. (Dkt. 50-5.) In a decision dated August 1, 2018, the Wisconsin Court of Appeals affirmed the circuit court's denial of Famous' motion. (Dkt. 50-5:1.) In most pertinent part, the court concluded that Famous "failed to establish that postconviction counsel performed deficiently. The circuit court believed postconviction counsel's testimony that if Famous had told him that trial counsel engaged in retaliation and misrepresented that the alibi witnesses refused to testify, postconviction counsel would have investigated this claim." (Dkt. 50-1:5.) The Wisconsin Court of Appeals accepted the circuit court's "implicit finding that Famous did not tell postconviction counsel about trial counsel's purported retaliatory refusal to call witnesses is not clearly erroneous," noting that "[o]n this sparse record, Famous has not established postconviction counsel's deficiency. Further, we agree with the circuit court that Famous has failed to establish that the newly asserted claim is clearly stronger than those actually presented by postconviction/appellate counsel." (Dkt. 50-1:6.)

Finally, the court agreed with the circuit court's approach to Famous' evidentiary hearing, holding that: "[t]he circuit court properly limited the testimony to the issue of whether there was a reason sufficient to overcome the

procedural bar, namely, the ineffective assistance of postconviction counsel. *See* WIS. STAT. § 885.10 (the court may authorize the issuance of a subpoena on behalf of an indigent defendant only when deemed 'proper and necessary')." (Dkt. 50-5:6.) The court observed that, "[a]fter hearing arguments from the State and from Famous about the other three witnesses, the circuit court decided it would first take the testimony of postconviction counsel and then determine if other witness testimony was necessary. Famous several times agreed to this approach on the record" and that "[a]fter the *Machner* hearing, the circuit court determined that regardless of what testimony trial counsel and the two fact witnesses might offer, Famous had failed to demonstrate that postconviction counsel's failure to raise the subject claim constituted deficient performance." (Dkt. 50-5:6–7.) Thus, "[i]n other words, the circuit court found that postconviction counsel's conduct did not constitute a sufficient reason for failing to raise the issue earlier. We see no error." (Dkt. 50-5:6–7.) Famous filed a petition for review with the Wisconsin Supreme Court, but the court denied his petition by order dated November 13, 2018. (Dkt. 50-3:2.)

Federal court proceedings: Famous' 2010 original petition, 2011 motion for stay and abeyance, and 2019 amended petition. On August 17, 2010, Famous filed his first habeas petition with the Eastern District Court of Wisconsin. (Dkt. 1:1; 44:1.) But, in early 2011, Famous successfully sought a stay and abeyance to allow him to return to state court to exhaust some claims

regarding trial and postconviction counsel's effectiveness. (Dkt. 22.) The district court therefore closed the case administratively on January 31, 2011. (Dkt. 44:1.)

Although he litigated several postconviction motions in state court in 2009, 2013, and 2016, Famous took no further action on his habeas petition until February 13, 2019, when, after receiving several extensions of time in which to file an amended petition from the district court, Famous filed an amended petition for habeas corpus. (Dkt. 40.) The petition included previously unexhausted claims from Famous' 2013 Wis. Stat. § 974.06 motion involving the alibi witnesses. (Dkt. 40:8.)

On February 15, 2019, the district court screened Famous' amended petition and ordered Warden Fuchs to answer or otherwise respond to the amended petition. (Dkt. 44.) On April 15, 2019, Warden Fuchs filed a motion to dismiss Famous's petition as untimely. (Dkt. 49; 50.) On June 4, 2019, Famous filed a response opposing Warden Fuchs' motion. (Dkt. 53.) On June 20, 2019, Famous also filed a motion "verification of need for mental health records." (Dkt. 54 (all caps omitted).) On August 1, 2019, Warden Fuchs filed a reply brief in support of the motion to dismiss. (Dkt. 58.)

In a decision dated October 10, 2019, the district court granted the Warden Fuch's motion to dismiss. (Dkt. 65.) The court found that Famous' petition was untimely, reasoning that because Famous did not file a certiorari

petition seeking United States Supreme Court review, Famous' conviction became final and his one-year statute of limitation under 28 U.S.C. § 2244(d)(1)(A) began running on February 25, 2002, ninety days after the Wisconsin Supreme Court denied Famous' petition for review. (Dkt. 65:3.) Thus, Famous had until February 25, 2003, one year later, to timely file a habeas petition, but Famous did not file his initial habeas petition until August 17, 2010, nearly seven and a half years later. (Dkt. 65:3.)

The District Court also rejected Famous' arguments that his time period should be tolled. (Dkt. 65:3.) First, regarding Famous' actual innocence claim, the court found that the affidavits from Rosie Kelly, Lynette Famous, Charles Famous, and Candice Streeter did "not have the credibility necessary to open the actual innocence gateway." (Dkt. 65:4.) The court noted that Famous' actual innocence claim required him to show "new and reliable 'evidence of innocence so strong that a court cannot have confidence in the outcome of the trial'" and that it is "more likely than not that no reasonable juror would have found [Famous] guilty beyond a reasonable doubt." (Dkt. 65:4 (citing *Schlup v. Delo*, 513 U.S. 298, 316 (1995)).)

The court found that none of the alibi witness evidence met this demanding standard. First, the court observed that Famous' alibi evidence were all from "family members, [a] house mate, and [a] friend who have a motivation to lie" on Famous' behalf rather than any new, disinterested

witnesses who had "no evident motive to lie." (Dkt. 65:5 (quoting *House v. Bell*, 547 U.S. 518, 552 (2006)).) Moreover, the district court considered the timing of the alibi evidence which "bear[s] on the probable reliability of that evidence." (Dkt. 65:5.) The court noted that Rosie Kelly and Lynette Famous' affidavits were "obtained fifteen years after the 1998 trial, and the affidavits of Petitioner's father [Charles Famous] and Candice Streeter were obtained two years after the victim allegedly told them that the Petitioner did not rape her. Petitioner has not explained the lateness of obtaining these affidavits." (Dkt. 65:5.) Therefore, Famous did not "me[et] the high hurdle that he must in order to establish actual innocence. Therefore, the court cannot excuse the untimeliness of the petition on this basis." (Dkt. 65:5.)

Moreover, the district court held that Famous "failed to establish that he ever told his attorney of his 'alibi witnesses.' [Attorney Rosen] testified that he filed a postconviction motion that resulted in resentencing, and then filed a direct appeal. [Attorney Rosen] stated that before filing the motion, he discussed the case with Petitioner and retained an investigator." (Dkt. 65:5–6.) Attorney Rosen "recounted several issues he discussed with Petitioner but testified he did not recall Petitioner telling him that his trial attorney had engaged in retaliatory conduct, told fact witnesses that their testimony would only harm Petitioner, or told him that the fact witnesses refused to testify." (Dkt. 65:5, 6.) Therefore, "[g]iven this history," the district court held that there

was "no reason to excuse Petitioner's procedural default on the ground of actual innocence." (Dkt. 65:6.)

Second, the court held that Famous' prison law library allegedly did not carry a copy of the AEDPA statutes so Famous was unaware of the time limits did not warrant equitable tolling. (Dkt. 65:7.) It reasoned that, because a "petitioner's ignorance of the law does not rise to the level of extraordinary circumstances necessary for equitable tolling," citing *Carpenter v. Douma*, 840 F.3d 867, 872 (7th Cir. 2016), and "ignorance of proper legal procedures are not extraordinary circumstances warranting . . . equitable tolling," *Arrieta v. Battaglia*, 461 F.3d 861, 867 (7th 2006), Famous did not need "complete discovery to fully develop the factual record that would demonstrate that the law library did not give him a copy of the AEDPA statute during his appeal process." (Dkt. 65:7.)

Third, the court rejected Famous' argument that Attorney Rosen's alleged ineffectiveness "prevented [Famous] from preparing and timely filing a habeas petition." (Dkt. 65:7.) Assuming that Famous did not receive his legal file from Attorney Rosen until June 28, 2005, the court noted that Famous "did not file his petition until August 17, 2010, over five years later." (Dkt. 65:7.) Thus, the court held that Famous "has not established that he diligently pursued his legal rights once he received his case file. Accordingly, any delay in receiving the file does not warrant equitable tolling." (Dkt. 65:7.)

Fourth, the court held that Famous' submissions regarding his mental health issues did not warrant equitable tolling, observing that the "medical records submitted by Petitioner do not support his claim of mental illness sufficient to invoke the doctrine of equitable tolling." (Dkt. 65:7–8.) The court noted that while a November 2013 "referral for on-site health services notes that the Petitioner has a 'long [history] of psychotic symptoms and delusional beliefs,'" a July 2009 report indicated that Famous' thought processes were "well-organized and did not show signs of loose associations, neologisms, or derailment that would be characteristic of thought disorder/psychosis," his "functioning is not noticeably impaired," and that Famous himself "does not believe he has any type of mental health issue." (Dkt. 65:8.) Thus, the court held that "[n]one of the medical records suggest that Petitioner was incapable of filing and preparing a habeas petition from 2002 through 2010. Stated differently, there is no evidence that Petitioner was incapable of acting upon his legal rights during the limitations period. (Dkt. 65:8.)

Finally, the district court rejected Famous' claim that his "inability to obtain his legal papers from his jailhouse lawyer" after the "jailhouse lawyer" was transferred to another prison warranted equitable tolling. (Dkt. 65:8–9.) The court observed that it is "well-established that an inmate's decision to enlist the help of a jailhouse lawyer does not warrant equitable tolling because inmates do not have a constitutional right to the assistance of counsel in

habeas proceedings." (Dkt. 65:8 (citing *Socha v. Boughton*, 763 F.3d 674, 685 (7th Cir. 2014)).)

On September 28, 2020, this Court granted Famous' motion for a certificate of appealability and ordered the parties to address "whether Famous's trial and appellate counsel were ineffective for failing to investigate and present alibi-witness testimony" and also "whether Famous is entitled to tolling of the one-year deadline for the filing of his petition, or whether the petition was otherwise timely." (Doc. 9.)

STANDARD OF REVIEW

This Court reviews *de novo* a district court's judgment granting or denying habeas relief. *Woolley v. Rednour*, 702 F.3d 411, 420 (7th Cir. 2012). But it reviews "with deference" "the decision of the last state court to address the merits of the petitioner's claim." *Pruitt v. Neal*, 788 F.3d 248, 264 (7th Cir. 2015).

This Court reviews a district court's decision to deny a petitioner equitable tolling under the deferential abuse of discretion standard. *Carpenter*, 840 F.3d at 870. Famous asserts that the review is de novo, (Doc. 19:26 (citing *Schmid v. McCauley*, 825 F.3d 348 (7th Cir. 2016)).) But *Schmidt* does not support de novo review here because in *Schmid* the district court not only "did not gather the evidence needed for decision," it also "*said nothing at all*" about "Schmid's claim of mental disability." *Schmid*, 825 F.3d at 350. Here, by contrast, there

can be no dispute that the district court addressed Famous' mental health in its ruling denying his equitable tolling. (Dkt. 65:8.)

SUMMARY OF ARGUMENT

To be entitled to equitable tolling before the district court, Famous was obligated to show both that extraordinary circumstances prevented him from timely filing his habeas petition, and that he was diligent in pursuing his legal rights toward later filing of that petition. Because Famous' submission to the district court did not establish that his circumstances were extraordinary, or that the impediments to his timely filing were external and not Famous' own choice, and do not show that Famous was diligent before the Wisconsin state courts in his efforts, the district court properly exercised its discretion to deny Famous equitable tolling. For the same reasons, Famous' request for an evidentiary hearing before the district court should also be denied.

Second, the Wisconsin Court of Appeals did not unreasonably apply clearly established federal law when it rejected Famous ineffective assistance of trial counsel claim and his derivative ineffective assistance of appellate counsel claim. The court properly applied Wisconsin law, due deference here in federal court, in determining that Famous did not show that Attorney Rosen performed deficiently during Famous' direct appeal in 2001. Further, although the record in state court as it exists defeats both of Famous' ineffective assistance of counsel claims, the failure to fully develop a factual basis for

Famous' claims by not calling Attorney Demark or any of Famous' alibi witnesses was Famous' alone. As such, he is not entitled to an evidentiary hearing in federal court because 28 U.S.C. § 2254(e)(2) because Famous "failed to develop the factual basis of a claim in State court proceedings." *Id.*

ARGUMENT

I. Before the district court, Famous failed to show that he is entitled to the extraordinary remedy of equitable tolling because Famous did not demonstrate that he was pursuing his rights diligently and that some extraordinary circumstances, not of his own making, prevented him from timely filing his petition.

A. Equitable tolling is an extraordinary remedy and the burden to establish it is on the petitioner, and the habeas petitioner is not entitled to an evidentiary hearing in federal court where they failed to develop the record in state court.

Equitable tolling. "In an attempt to curb the protracted nature of [habeas corpus] litigation," *Gendron v. United States*, 154 F.3d 672, 673 (7th Cir. 1998), the Antiterrorism and Effective Death Penalty Act (AEDPA), codified in part in 28 U.S.C. § 2244(d)(1), imposes a one-year statute of limitations for a state prisoner to seek federal habeas relief from "custody pursuant to the judgment of a State court." 28 U.S.C. § 2244(d)(1). Under section 2244(d)(1)(A), the one-year period runs from the date that the petitioner's conviction becomes "final." Famous's judgment of conviction became final when "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review" occurred. 28 U.S.C. § 2244(d)(1)(A).

The one-year limitation period is tolled (or suspended) after the conviction becomes final only for that period of time "during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending" in state court. 28 U.S.C. § 2244(d)(2); *Duncan v. Walker*, 533 U.S. 167, 181–82 (2001); *see, e.g.*, *Painter v. Iowa,* 247 F.3d 1255, 1256 (8th Cir. 2001). Wisconsin law controls in determining when the conviction becomes "final" and when any collateral postconviction challenge filed thereafter is "pending." *Gildon v. Bowen*, 384 F.3d 883, 887 (7th Cir. 2004). A postconviction motion under Wis. Stat. § 974.06 constitutes a collateral attack which tolls the one-year limitation period. *Graham v. Borgen*, 483 F.3d 475, 482–83 (7th Cir. 2007).

"In some circumstances, the doctrine of equitable tolling permits a federal habeas petitioner to overcome a breach of AEDPA's one-year limitations period." *Carpenter*, 840 F.3d at 870. "A petitioner 'is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.'" *Socha*, 763 F.3d at 683 (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)). "It is the petitioner's burden to establish both of these points." *Id.* "If the petitioner cannot demonstrate either of the two elements, then equitable tolling will not be applied." *Carpenter*, 840 F.3d at 870.

"Equitable tolling is rarely granted." *Lo v. Endicott*, 506 F.3d 572, 576 (7th Cir. 2007). To warrant the "rarely granted" and "extraordinary remedy" of equitable tolling, Famous would have to show that he was "reasonably diligent in pursuing his rights *throughout the limitations period* and until he finally filed his untimely habeas petition." *Carpenter*, 840 F.3d at 870 (citation omitted) (emphasis added). Further, Famous must make a concrete showing of his diligence because, as this Court has observed, "mere conclusory allegations of diligence are insufficient and reasonable effort throughout the limitations period is required." *Mayberry v. Dittmann*, 904 F3d 525, 531 (7th Cir. 2018) (citation omitted). This requirement "is met 'only where the circumstances that caused a litigant's delay are both extraordinary *and* beyond [his] control.'" *Carpenter*, 840 F.3d at 872 (alteration in original) (citation omitted). They must be "far beyond" the petitioner's control. *Id.* (citation omitted).

A petitioner's mental incompetence may toll the AEDPA statute of limitations but only if "the illness in fact prevents the sufferer from managing his affairs and thus from understanding his legal rights and acting upon them." *Miller v. Runyon*, 77 F.3d 189, 191 (7th Cir. 1996); *see also OBriecht v. Foster,* 727 F.3d 744, 751 (7th Cir. 2013.)

Finally, ignorance of AEDPA and its statute of limitations is no defense. As this Court observed in *Arrieta*, "Mistakes of law or ignorance of proper legal procedures are not extraordinary circumstances warranting invocation of the

doctrine of equitable tolling." *Arrieta*, 461 F3d at 867. Indeed, AEDPA's statutory deadlines "would be meaningless if [lack of representation or a petitioner's lack of legal training] were enough to override the normal rules." *Socha*, 763 F.3d at 685.

Evidentiary hearings under 28 U.S.C. § 2254(e)(e)(2). The availability of an evidentiary hearing on habeas review is addressed in 28 U.S.C. § 2254(e)(2), which provides that no such hearing may be held "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings," subject to several narrow exceptions provided in § 2254(e)(2)(A) and (B).

B. Famous' claims, taken together, do not rise to the level of extraordinary circumstances to justify equitable tolling, Famous has not always been diligent in pursuing his claims, and the failure to develop the facts in state court was expressly his choice.

Famous argues that his prison law library's alleged failure to carry a copy of the AEDPA statutes warrants equitable tolling during the eight years between 2002 and 2010, and he seeks an evidentiary hearing before the district court to buttress his claim. (Doc. 19:26–33.) Famous is incorrect for two independent reasons.

First, Famous' case and filings before the district court are nothing like those of the petitioner in *Estremera v. United States*, 724 F.3d 773 (7th Cir. 2013), on which Famous relies. (Doc. 19:27.) Here, before the district court, Famous contended, without specification, that the "limitations period should

be tolled due the prison law library's failure to provide a copy of AEDPA." (Dkt. 53-1:15.) By contrast, in *Estremera*, the petitioner alleged that he was in segregation and was not allowed to use the library *at all* for the entire period for which he sought equitable tolling, which was a little less than one year. *Estremera*, 724 F.3d at 776. Thus, *Estremera* does not support Famous' claim that a law library's alleged failure to carry a copy of the AEDPA statute of limitations can qualify for tolling, nor can it therefore standard for the proposition that an evidentiary hearing is required in this case.

Second, assuming that Famous' law library did not contain a copy of the AEDPA statutes, the law is clear that a petitioner's "[l]ack of familiarity with the law . . . is not a circumstance that justifies equitable tolling." *Taylor v. Michael*, 724 F.3d 806, 811–12, (7th Cir. 2013). Indeed, as this Court observed in *Arrieta*, "permitting equitable tolling of a statute of limitation for every procedural or strategic mistake made by a litigant (or his attorney) would render such statutes of 'no value at all to persons or institutions sued by people who don't have good, or perhaps any, lawyers.'" *Arrieta*, 461 F.3d at 867 (citation omitted).

Next, Famous argues that Attorney Rosen's alleged withholding of Famous' legal materials[3] justifies equitable tolling. (Doc. 19:29–30.) Though the matter was disputed at the *Machner* hearing, the district court assumed that even if Famous did not receive his legal file until June 28, 2005, as he claimed, Famous was not reasonably diligent in filing his habeas petition because he did not do that under August 17, 2010, more than five years' later. (Dkt. 65:7.) It also bears noting that Famous did not file a "protective" petition as the petitioner who alleged he was having problems with his lawyer did in *Johnson v. McCaughtry*, 265 F.3d 559, 565 (7th Cir. 2001).

After receiving his file from Attorney Rosen, Famous decided to send his materials to another inmate, Shaheed Maydun. (Doc. 19:30.) Famous alleges that this time period, from July 2005 through April 2007, should be equitably tolled as well. (Doc. 19:30.)

The decision to farm out Famous' legal work to another inmate cannot be an extraordinary circumstance because it was not "far beyond [his] control.'" *Carpenter*, 840 F.3d at 872 (citation omitted). Because Famous has no right to counsel on a habeas corpus petition, he does not maintain a right to choose any "jailhouse lawyer" as his attorney. "Prisoners do not have a constitutional right

[3] Famous asserts that he sought his file for federal habeas corpus review (Doc. 19:18), but the documents do not discuss federal habeas corpus anywhere. (Dkt. 53-1:10–14.) Instead, it is just as plausible that the reference may be Famous' 2008 attempt to file a state habeas corpus action. (Dkt. 53-1:37–38.)

to the assistance of counsel in post-conviction collateral attacks" like habeas corpus. *Socha*, 763 F.3d at 685. "The [AEDPA] statutory deadlines would be meaningless if [this problem was] enough to override the normal rules." *Id.*

Indeed, other circuits have consistently held that an inmate's decision to enlist the help of a jailhouse lawyer does not warrant equitable tolling. *See United States v. Cicero*, 214 F.3d 199, 205 (D.C. Cir. 2000) ("[the petitioner] entrusted [the jailhouse lawyer] with his legal documents at his peril[,]"); *Paige v. United States*, 171 F.3d 559, 561 (8th Cir. 1999) (equitable tolling not available to prisoner whose petition, prepared by an inmate in a different prison, was delayed in mail.) Thus, Famous's decision to farm out his habeas petition to another inmate does not justify equitable tolling for the nearly two-year period of time from July 2005 through April 2007.

In response, Famous alleges that prison officers wrongly withheld his legal materials. (Doc. 19:30–31.) Again, Famous is mistaken. There is no evidence that prison officials improperly withheld Famous' legal file. Instead, the evidence Famous submitted to the district court showed that prison officials followed Wis. Admin. Code § DOC 309.155(5), which states that inmates may "provide legal services to other inmates except that institutions may regulate the time and place of such legal services" but also that "[*t*]*he department is not responsible for legal materials not provided by the department that are given to other inmates*." *Id.* (emphasis added). As prison

officials explained to Famous, "[s]taff will not transfer legal materials from one inmate to another . . . this would be in violation of the [prison's] handbook." (Dkt. 53-1:17.) Thus, just as this Court recognized in *Socha*, the mere allegation that prison officials were attempting to prevent a petitioner from filing a habeas petition alone is insufficient because "without some evidence that the officials who moved him to segregation or monitored his use of the library *knew* that they were impeding [Socha's'] efforts to file a petition, it is impossible to characterize those moves as expressly designed to prevent a timely petition." *Socha,* 763 F.3d at 683. As such, Famous' case is not like *Weddington v. Zatecky*, 721 F.3d 456 (7th. 2013), in which the petitioner alleged via affidavit that prison official confiscated all of his legal materials for over one year, and, when the materials were returned, the petitioner's habeas petition was missing. *Weddington*, 721 F.3d at 460.

Further, Famous did not show that he was reasonably diligent in his pursuits. For example, *Holland* involved a death row inmate who attempted to keep in contact with his court-appointed attorney throughout his state post-conviction proceedings. *Holland*, 560 U.S. at 635. Holland repeatedly sought assurance that his claims would be preserved, specifically for federal habeas review and that statutory deadlines would be met. *Id.* at 635–36. Holland also repeatedly wrote to the Florida Supreme Court and its clerk to ask that his attorney be removed from the case because of this failure to communicate, but

these requests were denied. *Id.* at 636–37. After the attorney argued Holland's case in the Florida Supreme Court, Holland again wrote to the attorney to stress the importance of filing a timely federal habeas petition. *Id.* at 637.

Holland's AEDPA time limit expired twelve days after the Florida Supreme Court denied relief, but Holland did not learn of the court's ruling until five weeks later while he was working in the prison library, and he then "immediately wrote out his own *pro se* federal habeas petition and mailed it to the Federal District Court for the Southern District of Florida the next day." *Id.* at 639. The United States Supreme Court found that Holland's actions satisfied the reasonable diligence requirement for equitable tolling. *Id.* at 653.

Famous' facts do not rise to the level of *Holland*. Famous did not alert the federal courts about a possible habeas petition, did not repeatedly communicate his wish to file a federal habeas corpus petition with anyone, let alone Attorney Rosen, and did not file his petition until more than five years after he received all of his legal materials from Attorney Rosen, far greater a time than the five weeks it took the petitioner in *Holland* to file his petition. *Id.* at 637.

But even if the time period until June 28, 2005 were tolled, Famous still took no state court action after he received his file from Rosen during the following periods:

- from June 28, 2005 until June 12, 2006 when Famous filed a sentence modification motion before the circuit court;
- from December 12, 2006 until June 18, 2007 after the Wisconsin Supreme Court denied Famous' writ petition *ex parte*;
- from August 14, 2007 until June 16, 2008, when Famous attempted to file a writ petition in Racine County circuit court, and;
- from August 17, 2009 when the Wisconsin Court of Appeals denied Famous' writ petition until August 17, 2010, when Famous filed his initial federal habeas petition.

Finally, Famous argues that his mental health issues warrant equitable tolling. (Doc. 19:31.) The record reflects that Famous was concerned about "ill effects from prison food as early as 1995" when he was incarcerated for another crime, and those references continued into 2001, 2004, and 2007. (Dkt. 53-1:26.) Before the district court, Famous claimed that, from August 14, 2007, to July 21, 2008, his mental health issues prevented him from timely filing a habeas petition. (Dkt. 53:21–22.) And there is evidence of Famous raising mental health issues to prison officials. (Dkt. 53-1:26.) However, that evidence does not begin until a report dated July 21, 2009, more than one year *after* the time period Famous claimed should be tolled before the district court. (*See* Dkt. 53-1:26.)

As the district court properly recognized, a report from July 2009 cannot support Famous's claim for equitable tolling from August 14, 2007, to July 21, 2008. (Dkt. 65:8.) Moreover, the report specifically declares that Famous' "thought process[es] [were] well-organized and did not show signs of loose associations, neologisms, or derailment that would be characteristic of thought disorder/psychosis." (Dkt. 53-1:26.) The report further declares that Famous's "functioning is not noticeably impaired." (Dkt. 53-1:27.) Famous is quoted as saying he does not believe he has any type of mental health issue. (Dkt. 53-1:27.)

The record also reflects that Famous' mental health issues did not prevent him from filing a number of motions in state court. Indeed, from 2002 until 2010, Famous filed a July 17, 2006 motion for sentence modification, a June 18, 2007 petition for writ of habeas corpus in the Wisconsin Supreme Court, the attempted state habeas petition on June 16, 2008, and a March 16, 2009 petition for state habeas corpus relief. (Dkt. 50-3:18–20.) Given all of the above which occurred during the time periods in which Famous claimed he was too mentally ill to file a petition, Famous failed to show the district court that his illness "in fact prevent[ed] [him] from managing his affairs and thus from understanding his legal rights and acting upon them." *Miller*, 77 F.3d at 191.

Moreover, a remand for additional information about Famous' mental health is not warranted. Famous cites *Mayberry*, but the case does not support

an evidentiary hearing here. In *Mayberry*, the petitioner sought an evidentiary hearing on his mental health claims, and the district court denied the petitioner's motion. *Mayberry*, 904 F.3d at 532. This Court affirmed the district court's exercise of discretion to deny Mayberry a hearing, concluding that the district court was only required to hold a hearing if Mayberry had "alleged facts, which if proven, would entitle him to relief." *Id.*

Famous has made no such showing here. First, he did not seek an evidentiary hearing before the district court. (*See* Dkt. 65:9.) As a result, this Court cannot review whether he properly "alleged facts, which if proven, would entitle him to relief." *Mayberry*, 904 F.3d at 532. Second, the evidence Famous did submit to the district court did not establish that Famous' mental health "actually impaired his ability to pursue his claims." *Id.* at 531 (citation omitted). Just as in *Mayberry*, here Famous was filing postconviction and appellate motions before the Wisconsin state courts during the same times that he alleges his mental health should toll the habeas statute of limitations. Thus, just as in *Mayberry*, although Famous' "mental limitations undoubtedly made filing a petition for habeas corpus difficult," Famous "failed to show how those difficulties affected him during the relevant time period to such an extent that he qualifies for the extraordinary remedy of equitable tolling. *Id*.

II. The Wisconsin courts properly rejected Famous' ineffective assistance of trial and appellate counsel claims, and the record shows Famous' failure to develop a factual basis for his claims was solely his fault.

A. Under the AEDPA, relief is available only for objectively unreasonable applications by a state court of the holdings of the United States Supreme Court.

The Antiterrorism and Effective Death Penalty Act (AEDPA) provides that a federal court cannot grant relief for any claim adjudicated on the merits by a state court, unless the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *See, e.g.*, *Wright v. Van Patten*, 552 U.S. 120, 123 (2008) (per curiam).

To be an unreasonable application of clearly established federal law, "the state court's application of Supreme Court precedent must be so erroneous as to be objectively unreasonable." *Badelle v. Correll*, 452 F.3d 648, 654 (7th Cir. 2006). However, a state court's determinations are "not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Burt v. Titlow*, 571 U.S. 12, 18 (2013) (citation omitted). Thus, if a state court decision is "minimally consistent with the facts and circumstances of the case" it is not unreasonable. *Conner v. McBride*, 375 F.3d 643, 649 (7th Cir. 2004) (citation omitted). A court only unreasonably applies federal law if it reaches a determination "lying well outside the boundaries of

permissible differences of opinion." *Id.* (citation omitted). Federal review of the state court's decision is therefore "highly deferential" and "demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (citation omitted). Under AEPDA review, "an unreasonable application of' [the Supreme Court's] holdings must be objectively unreasonable, not merely wrong; even clear error will not suffice." *Woods v. Donald*, 575 U.S. 312, 316 (2015) (citation omitted).

To overturn a state-court conviction in federal court, a petitioner must prove that the state court resolved his ineffective assistance claim in a manner that was contrary to, or involved an unreasonable application of, the principles of *Strickland*. *Taylor v. Bradley*, 448 F.3d 942, 948–49 (7th Cir. 2006). To prevail on his ineffective-assistance challenge in state court, Famous had to prove that his trial counsel and appellate counsel's performance was both deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Anderson v. Sternes*, 243 F.3d 1049, 1057 (7th Cir. 2001).

To show deficient performance, Famous had to show that his trial counsel's performance fell "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688, and that the alleged failure to raise the alibi witness issue was so serious it denied him the "counsel" guaranteed by the Sixth Amendment. *Bieghler v. McBride*, 389 F.3d 701, 707–08 (7th Cir. 2004). And when, as here, the alleged deficient performance is a failure to investigate,

"a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691. Second, to establish prejudice, Famous must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Richardson v. Lemke*, 745 F.3d 258, 273 (7th Cir. 2014) (quoting *Strickland*, 466 U.S. at 694).

As for allegations of ineffective assistance of appellate counsel, the "general *Strickland* standard governs claims of ineffective assistance of appellate counsel as well as trial counsel, *Smith v. Robbins*, 528 U.S. 259, 285 (2000), but with a special gloss when the challenge is aimed at the selection of issues to present on appeal." *Makiel v. Butler*, 782 F.3d 882, 897 (7th Cir. 2015). Thus, "appellate counsel's performance is deficient under *Strickland* only if she fails to argue an issue that is both 'obvious' and 'clearly stronger' than the issues actually raised." *Makiel*, 782 F.3d at 898. "Proving that an unraised claim is clearly stronger than a claim that was raised is generally difficult 'because the comparative strength of two claims is usually debatable.'" *Id.* (quoting *Shaw v. Wilson*, 721 F.3d 908, 915 (7th Cir. 2013)). Failure to raise a claim is prejudicial only if there is a reasonable probability that the outcome of the appeal would have been different had the claim been raised. *Winters v. Miller*, 274 F.3d 1161, 1167 (7th Cir. 2001).

When reviewing a state court's denial of an ineffective assistance claim, the federal court applies the deferential standards of § 2254(d) to its consideration of the prong or prongs (deficient performance and prejudice) on which the state court decided the claim. *Thomas v. Clements*, 789 F.3d 760, 766 (7th Cir. 2015). The "standards created by *Strickland* and § 2254(d) are both 'highly deferential,' . . . and when the two apply in tandem, review is 'doubly' so." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (citations omitted). Consequently, the bar for establishing that the state court unreasonably applied *Strickland*'s already deferential standard is "a high one." *Taylor,* 448 F.3d at 948. Thus, it is not enough for Famous to prove that the state courts may have incorrectly applied *Strickland*'s principles. He must show that the state courts' resolution of his *Strickland* challenge was, again, "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. Federal habeas review of an ineffective-assistance challenge is therefore "doubly deferential" because deference is owed both to counsel's decisions and to the state court's deferential assessment of those decisions. *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009).

B. The Wisconsin court's resolution of Famous' ineffective assistance of trial and appellate counsel claims was not an unreasonable application of clearly established federal law, and Famous, not the State, is solely responsible for the failure to develop an adequate factual record in state court.

1. The Wisconsin Court of Appeals did not unreasonably apply clearly established law when it held that the circuit court found that Famous did not tell Attorney Rosen about Attorney Demark's alleged retaliation.

Famous contends that the Wisconsin Court of Appeals unreasonably applied clearly established federal law when it held that the circuit court made an "implicit finding that Famous did not tell postconviction counsel about trial counsel's purported retaliatory refusal to call the witnesses [was] not clearly erroneous." (*See* Dkt. 50-5:6.)

Famous is incorrect. The Wisconsin Court of Appeals properly assessed the totality of the circuit court's statements at the *Machner* hearing to determine that Famous did not tell Attorney Rosen about the retaliation issue. The circuit court first stated that, "[I]f we assume that the refusal to call the witnesses was in retaliation for Mr. Famous having sought counsel's discharge and Mr. Famous was prejudiced, then that failure would rise to the level of constitutionally ineffective assistance." (SA 498–99.) However, the court then found that, the "record of sworn testimony does not establish that there was retaliation involved, nor that Mr. Famous advised Mr. Rosen that there was some retaliation involved." (SA 499.) The court noted that this "is a very sparse

record and a very old case," but it was "satisfied that [Attorney Rosen] met with Mr. Famous, discussed the legal issues at length with Mr. Famous, did his own investigation, and made a determination as to what issues would be the best issues to raise." (SA 499.) From this factual conclusion, the circuit court further concluded that "any issue claimed by Mr. Famous [was not] clearly stronger than the issues [Attorney Rosen] did present." (SA 499.)

From these statements, the Wisconsin Court of Appeals reasonably concluded that the circuit court "implicit[ly]" found that "Famous did not tell [Attorney Rosen] about [Attorney Demark]'s purported retaliatory refusal to call witnesses." (Dkt. 50-5:6.) There is ample basis in the circuit court's comments to support such a conclusion, because the circuit court specifically stated that the "record of sworn testimony does not establish that there was retaliation involved, nor that Mr. Famous advised Mr. Rosen that there was some retaliation involved." (SA 499.) Even if implicit, such a finding is permissible under Wisconsin law. *See State v. Quarzenski*, 2007 WI App 212, ¶ 23, 305 Wis. 2d 525, 739 N.W.2d 844. And, even further, the federal habeas presumption of correctness applies to a state appellate court's findings, so that finding is presumptively correct here. *Miranda v. Leibach*, 394 F.3d 984, 999 (7th Cir. 2005).

Thus, because there is, at a minimum, "adequate" support within the record to uphold the Wisconsin Court of Appeals' factual finding that Famous

did not tell Rosen about the retaliation issue, the court of appeals' decision was not "so inadequately supported by the record, or so arbitrary,' as to be unreasonable." *Badelle*, 452 F.3d at 655 (citation omitted).

2. Famous has not shown he is entitled to an evidentiary hearing because he failed to develop a factual record in state court despite chances to do so.

Finally, Famous contends that he should be afforded an evidentiary hearing in federal court on his ineffective assistance of trial counsel claims. (Doc. 19:41–46.) He argues that the state court record "does not contain any testimony from or other evidence from Demark explaining his decision not to call the available alibi witnesses" and that Famous "did not fail to develop the factual basis for his claim because he was diligent." (Doc. 19:42, 46 (emphasis omitted).)

Again, Famous is mistaken. As discussed above, after an evidentiary hearing that was tailored to Famous' requests, the circuit court found that the "record of sworn testimony does not establish that there was retaliation [by Attorney Demark] involved, nor that Mr. Famous advised Mr. Rosen that there was some retaliation involved." (SA 499.) Further, Famous fundamentally failed to develop the factual basis for his claim, as he refused the State's offer to subpoena Attorney Demark for the *Machner* hearing, and instead chose expressly to focus on Attorney Rosen. As Famous expressly stated when the circuit court asked if he wanted to question Attorney Demark, the "only issue

the appeal [sic] court directed you to review was the ineffective assistance of appellate counsel, Mark Rosen, for failing to assert the ineffective assistance of Mr. Demark for failure to call the witnesses. This *Machner* hearing is supposed to be for appellate counsel, not trial counsel." (SA 399.) At Famous' insistence, the circuit court directed the State to subpoena Attorney Rosen, not Attorney Demark, to testify, and, when the circuit court further reiterated that Famous' claim was "solely as to ineffective assistance of appellate counsel?" Famous replied, "That's correct." (SA 404, 406.) Finally, the court again asked if there were any other witnesses Famous would be calling, and Famous replied "probably not." (SA 406.)

Moreover, even with a limited state court record, it is clear that Famous' retaliation claim has no merit. It is true that Attorney Demark said he would call witnesses at Famous' trial, and he did call the ones he listed in his opening: Elizabeth Green and David Famous. (SA 132, 270, 280.) Thus, *none* of the alibi witnesses were identified by Attorney Demark as witnesses who were likely to testify at trial, so a key factual predicate for Famous' ineffective assistance of trial and appellate counsel claims, that Attorney Demark intended to call the alibi witnesses but then did not out of retaliation, simply does not exist. Thus, Famous' case is not like those cited in his brief in which trial counsel specifically mentioned some alibi witnesses and then did not call them. (Doc. 19:40.)

Based on the foregoing facts, the facts of Famous' case fall far short of those required for an evidentiary hearing. For example, in *Davis*, this Court observed that Davis had shown he was diligent in pursuing his claims before the Illinois appellate courts regarding the failure of trial counsel to call some alibi witnesses. *Davis v. Lambert*, 388 F.3d 1052, 1061 (7th Cir. 2004). Despite his repeated requests, the Illinois courts did not provide Davis an evidentiary hearing to prove his claims. *Davis*, 388 F.3d at 1060–61. Thus, this Court held that Davis "did all that he could [to obtain an hearing an evidentiary hearing in state court] and . . . therefore conclude[d] that [Davis] is not responsible for failing 'to develop the factual basis of his claim in State court.'" *Id.* at 1061.

Famous decidedly did not do "all that he could" to develop the record before the Wisconsin courts. Following a remand specifically to allow for an evidentiary hearing regarding Famous' alibi witnesses and his trial and appellate counsel's alleged failure to investigate those witnesses, Famous said he did not want to question Attorney Demark, specifically turning down the State's offer to subpoena Demark, and affirmatively stating that Famous did not intend call any other witnesses, including any of the alleged alibi witnesses to testify. (SA 399, 405–06.) Indeed, Famous said that he was "in touch" with Lynette Famous and could ask her to appear at the *Machner* hearing but Famous (apparently) did not do so because she did not appear. (SA 425.) Thus, it was Famous' decision, not the State or any other entity, to not call Attorney

Demark to provide "testimony or other evidence." (Doc. 19:42.) Because Famous fundamentally "failed to develop the factual basis for [his] claim," 28 U.S.C. § 2254(e)(2), he is not entitled to an evidentiary hearing in federal court.

CONCLUSION

This Court should affirm the district court's order dismissing Famous' petition as untimely.

Dated this 11th day of June 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), typeface requirements of Fed. R. App. P. 32(a)(5), and type style requirements of Fed. R. App. P. 32(a)(6).

> This brief contains 13,420 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 13 point Century Schoolbook.

Dated this 11th day of June 2021.

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CERTIFICATE OF SERVICE

I certify that on June 11, 2021, I electronically filed the foregoing Brief of Respondent-Appellee with the clerk of court using the CM/ECF system, which will accomplish electronic notice and service for all participants who are registered CM/ECF users.

Dated this 11th day of June 2021.

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