SUPREME COURT OF WISCONSIN

STATE OF WISCONSIN,
Plaintiff- Respondent

vs.

Appeal No. 2011AP450-CR

Case No. 2009CF002823

JULIUS C. BURTON,
Defendant- Appellant-Petitioner

BRIEF OF DEFENDANT-APPELLANT-PETITIONER

APPEAL FROM THE COURT OF APPEALS, DISTRICT I, FOLLOWING APPEAL FROM THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HON. PATRICIA D. MCMAHON, PRESIDING, AND THE HON. KEVIN E. MARTENS, PRESIDING IN POSTCONVICTION PROCEEDINGS

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TABLE OF CONTENTS

TABLE OF CONTENTS OF APPENDIX

VOLUME I

VOLUME II

VOLUME III

TABLE OF AUTHORITIES

Page

CASES

Federal Cases

State Cases

Constitutional Provisions

Statutes

Publications

STATEMENT OF ISSUES PRESENTED

1. Q. Did defense counsel's failure to advise the defendant that he had the right to a bifurcated trial in which he could plead guilty to the crimes and still have a jury trial to determine whether he was not responsible by reason of mental disease or defect constitute ineffective assistance of counsel? Did the Circuit Court's denial of the defendant's postconviction motion to withdraw his plea of guilty on that ground, without ordering a hearing, constitute an abuse of its discretion?

   A. a. The Circuit Court of Milwaukee County answered no.

   b. The Court of Appeals, District I, answered no.

2. Q. Since the Circuit Court failed to advise the defendant that he had the right to plead guilty to the crimes charged and still have a jury trial to determine whether he was not responsible by reason of mental disease or defect, had the defendant's plea of guilty not been knowingly, intelligently and voluntarily made and was the defendant entitled to have his plea of guilty withdrawn?

   A. a. The Circuit Court of Milwaukee County answered no.

   b. The Court of Appeals, District I, answered no.

STATEMENT OF ORAL ARGUMENT AND PUBLICATION

The defendant-appellant-petitioner requests that oral arguments be held in this matter and that the opinion in this matter be published. It appears that the issues raised in this matter are issues of first impression in the State of Wisconsin. The issues involve whether defense counsel and the trial court had a duty to advise the defendant, who had entered a plea of not guilty by reason of mental disease or defect, that he could plead guilty to the crimes charged and still have the right to a jury trial, under the bifurcated procedures set forth by statute, to determine whether he should not be held responsible for his conduct by reason of mental disease or defect.

STATEMENT OF THE CASE

This case involves the two convictions of the defendant-appellant-petitioner, Julius C. Burton, on February 25, 2010, in the Circuit Court of Milwaukee County, the Hon. Patricia D. McMahon, presiding, for Attempted Intentional Homicide in the first degree, with the use of a dangerous weapon, and the denial, on February 14, 2011, of the defendant's postconviction motion in the Circuit Court of Milwaukee County, Kevin E. Martens, presiding.

PROCEDURAL FACTS

1. This criminal action commenced with the filing of a Criminal Complaint in the Circuit Court of Milwaukee County on June 11, 2009, charging the defendant with two counts of Attempted Intentional Homicide in the first degree with the use of a dangerous weapon, contrary to Wis. Stats. §940.01(1)(a), §939.50(3)(a), §939.32, and §939.63(1)(b), Class B felonies. (Record 2, pp. 1-4; Appendix, pp. A11- A14). The shootings of two Milwaukee police officers in this case took place on June 9, 2009.

2. The defendant appeared in the Circuit Court of Milwaukee County on June 11, 2009 for an initial appearance. At that time, a competency examination was ordered by the Court. (R.39, pp.1-6). On June 26, 2009, Attorneys Julius Kim and Jonathan LaVoy were retained to represent the defendant. (R.40, pp. 1-7). On July 23, 2009, a report was filed by Dr. Luchetta, finding the defendant competent to proceed. (R.41, pp. 1-5). Defense counsel did not object to that finding.

3. On July 31, 2009, a preliminary hearing was held, at which Officer Bryan Norberg and Officer Graham Kunisch, the two officers who had been shot in this incident, as well as Officer Cory Harris and Detective Christopher Blaszak testified. (R.42, pp. 1-48; App.

pp. A15-A52). The Court found probable cause to believe that felonies had been committed by the defendant and bound the case over for trial. Following the hearing, an Information was filed, charging the same charges as in the Criminal Complaint. (R.3, p. 1; App. p. A53).

4. On August 27, 2009, defense counsel indicated that it was going to enter a plea of not guilty by reason of mental disease or defect. The Court ordered an examination of the defendant by Dr. Kenneth Smail to determine whether there was sufficient evidence to support such a plea. (R.43, pp. 1-6; pp. A54-A55). On October 12, 2009, Dr. Smail filed a report with the Court, finding that there was not sufficient evidence to support such a plea. (R.33, pp. 175-185; App. pp. A207- A217). The defense retained Dr. Diane Lytton to prepare a report as to whether there was sufficient evidence to support such a plea. She prepared a report, dated December 12, 2009, finding that there was more than sufficient evidence to support a plea of not guilty by reason of mental disease or defect. (R.33, pp. 186- 215; App. pp. A218- A247).

5.. On January 21, 2010, the defendant appeared in the Circuit Court of Milwaukee County, the Hon. Patricia D. McMahon, presiding, for a plea hearing. (R.46, pp. 1-27; App. pp. A56- A78). The State was represented by Mark Williams, Assistant District Attorney of Milwaukee County. The defendant was represented by Mr. LaVoy and Mr. Kim. At that time, an offer was made to the defendant that if he pled guilty to the two counts of the Information, the State would recommend that he receive fifty years of incarceration with no recommendation as to the length of the extended supervision.

6. Defense counsel indicated that it would abandon the defendant's plea of not guilty by reason of mental disease or defect and that the defendant would enter a plea of guilty to the two Counts of the Information. The defendant signed a plea questionnaire and waiver of rights form, which again indicated that the offer made by the State. (R.15, pp. 1-3; App. pp. A82- A84).

The defendant entered a plea of guilty to the two Counts of the Indictment and the Court accepted his plea.

7. On February 25, 2010, the defendant appeared before the Hon. Patricia D. McMahon for sentencing. (R.47, pp. 1-74; App. pp. A85- A157). The State recommended that the defendant be sentenced to fifty years of initial confinement and made no recommendation as to the length of the extended supervision. The Court refused to accept that recommendation and sentenced the defendant to forty years of initial confinement on each of the two charges, with the two sentences to run consecutively. It also sentenced him to ten years of extended supervision on each count to run consecutively. (R.47, p. 72; App. p. A156). A Judgment of Conviction was then filed. (R.22, pp. 1-2; App. pp. A9-A10).

8. On March 3, 2010, a Notice of intent to pursue postconviction relief was filed on behalf of the defendant. (R.23, pp. 1-2; App. pp. A158- A159). On April 28, 2010, Esther Cohen Lee was assigned as counsel to represent the defendant on appeal. After several motions were filed for extensions, which were granted by the Court, a postconviction motion was filed on January 12, 2011 in the Circuit Court. (R.31, pp. 1-25; App. pp. A160-A184).

9. On February 14, 2011, the Hon. Kevin E. Martens, Circuit Court Judge of Milwaukee County, who had been assigned to determine the motion, issued a Decision and Order, denying the defendant's motion to withdraw his pleas of guilty. (R.36, pp. 1-4; App. pp. A185- A188).

10. A Notice of Appeal, dated February 25, 2011, was filed. (R.37, pp. 1-2; App. p. A189.. On that date, Esther Cohen Lee was assigned as counsel to handle this appeal in the Court of Appeals. (R.----; App.p. A190).

11. On May 20, 2011, the Appellant's Brief and Appendix was filed in the Court of Appeals, District I. The Respondent's Brief was thereafter filed. On February 14, 2012, the Court of Appeals, District I, issued a Decision, affirming the Judgment and Order. (App. pp. A1-A8).

12. On March 15, 2012, a Petition for Review was filed on behalf of the defendant in the Supreme Court of Wisconsin. On September 27, 2012, the Supreme Court issued an Order, granting the Petition for Review.

STATEMENT OF THE CASE-FACTUAL

A. The Shootings of Officer Kunisch and Officer Norberg

In his testimony at the preliminary hearing on July 31, 2009, Officer Norberg said that on June 9, 2009, he and Officer Kunisch were on routine patrol in their squad car in the area of Bradley Tech High School . (R.42, p. 11; App. p. A18). At 3:30 p.m., they were traveling east on W. National Aveune. They were both wearing their police clothes and badges and wearing their duty belts with their handguns. Kunisch was driving while Norberg sat in the passenger seat. (R.42, p. 12; App. p. A19).

As they drove along the street, Norberg said he saw a black male riding a bicycle on the sidewalk, which was contrary to a city ordinance. The officers decided to stop him and conduct a field interview of him. As they drove near him, Norberg yelled to him to stop and the man turned and looked at him. Norberg identified the defendant as being that man. (R.42, p. 13; App. p. 20).

As the defendant continued to ride his bicycle on the sidewalk, Norberg stopped the police car and got out of the car. He followed the defendant on foot and continued to yell at him to stop, but he did not do so. When the defendant turned right on S. 2nd Street, Kunisch followed him in the car. At 819 S. 2nd Street, as Kunisch was getting out of the car, Norberg went up to the defendant and grabbed him from behind to gain control of him. Norberg took the defendant off the bicycle and grabbed him, making him face west on S. 2nd Street. (R.42, p. 15; App. p. A19). He placed both of his hands on the defendant's back and forcibly removed him from the bicycle and as he did so, the defendant said, "Don't put your hands on me, why are you touching me?" (R.42, p. 22; App. p. A29).

While Norberg was holding the defendant from behind him, Kunisch got out of the car and approached them, standing to the defendant's left side. (R.42, p. 22; p. A29). Norberg got control of the defendant's left arm and he and Kunisch were trying to gain control of him to perform a pat-down search of him. The defendant was resisting their attempt to gain control of him and was flailing his arms and moving his feet. (R.42, pp. 24-25; App. pp. A31- A32). As Norberg was holding the defendant's left arm, he said, the defendant took out a pistol and shot him in the face. The pistol was only six inches from his face, he said. (R.42, p. 16; App. p. A23). Norberg fell to the ground and as he lay on the ground, he heard more gunshots. Norberg said that he never had the chance to withdraw his firearm. (R.42, p. 17; App. p. A24).

At the preliminary hearing, Officer Kunisch reiterated the events that Norberg had testified to, adding that when he first told the defendant to stop, he appeared to pull something away from his head, which could have been headphones. (R.42, p. 40; App. p. A47). He said that as the defendant was struggling with Norberg, he moved up to them and tried to take control of the defendant. After that, he said, he heard two gunshots and fell to the ground. (R.42, pp. 30- 31; App. pp. A37- A38).

Detective Christopher Blaszek testified that a videotape of the incident had been obtained from a security camera on the building at 819 S. 2nd Street. He said that it showed that the person who had done the shooting was the defendant. He said that it showed that as both officers were falling to the ground, the defendant continued to shoot at them. At no time, he said, had the officers ever drawn their weapons. (R.42, pp. 43-45; App. pp. A50-A52).

Norberg said that he had been shot several times and that the first bullet had gone through his lip, under his left nostril and then through and into his teeth, exiting out of his face. He also had a bullet wound to his shoulder and a wound to his left knee. (R.42, p. 18; App. p. A25).

Kunisch said that he had been shot in his left hand, which had torn the bone connected to his index finger to his hand. He also received a wound to his right shoulder and to the back of his neck. His most serious wound was to his face and skull, which destroyed his left eye and caused severe damage to the left side of his skull. (R.42. pp. 31- 32; App. pp. A38- A39).

B. The Lifelong History of Mental Illness of the Defendant

Unbeknownst to the officers when they decided to stop the man who was riding his bicycle on the sidewalk, they were about to approach a man who was very seriously mentally ill, and who, just a few weeks before this incident, had been held for observation in a psychiatric hospital because he had had homicidal and assaultive ideations and had been hearing voices telling him to hurt someone.

The medical records show that the defendant's first admission to a mental health facility was when he was only nine years old, when he was admitted for dangerous behavior. On April 29, 2009, just a few weeks before this incident, the defendant was taken to a mental health facility because he was hearing voices telling him to hurt someone. The notes indicated that he was paranoid and hostile, depressed, anxious and having difficulty sleeping. Under "Violence Risk Factors", it states: "homicidal/ assaultive ideation, homicidal/ assaultive plan, violence severe stressor, paranoid." It stated that when he was asked who he wanted to hurt, he said, "no particular target, can't say what's bothering him." (R.33, pp. 147-150; App. pp. A191-A194)..

He was discharged the next day, at his insistence, and told to take Risperdal and go to the Acacia Clinic. He was seen by a therapist there on May 11 and June 4, 2009. In their notes, the Clinic said he reported hearing voices and had daily thoughts of harming people. They noted

that he said he was taking his meds, and seemed less angry. (R.33, pp. 159-162). However, his family stated that he had not been taking his meds.

C. The Arrest of the Defendant and the Taking of his Statement

After the two officers had been shot, the defendant was arrested at 922 S. 3rd Street. The police found him hiding in the basement. (R.33, p. 139). When the police yelled into the basement for him to come out, he came out with his hands up. He was placed on the ground and handcuffed. Upon being searched, the police found the magazine of a gun in left pants pocket. The officers asked him where the gun was and he told them it was in a box in the basement, which is where the police found it. (R.33, pp.142-143).

After the defendant had been taken into custody, the police began questioning him at 6:15 p.m. The police reports indicate that the defendant told them he was riding the bicycle of Charles Johnson and was returning it to him. He said he only had the gun a couple days and that it was tucked inside his pants. He said he was riding on the sidewalk and listening to his Ipod when the police approached him and told him to stop. He said they grabbed him and pulled him off of the bicycle. When he asked the officers, "What did I do?", he tried to run away and officers grabbed one of his arms. He said he struggled with the officers because he did not feel he had done anything wrong. (R.33, p. 133).

When they began to pat him down, he said, he was afraid they would find the gun and that then they would shoot him. He said he pulled away and began running. He said he had taken the gun out and was going to toss it away but that the officers chased him with their guns drawn. Then, he said, he pulled the gun over his left shoulder and fired at them to scare them and to make them stop chasing him. (R.33, p. 133).

However, the police report failed to mention that throughout the first ten minutes of the interview, when his Miranda rights were being read to him, the defendant was experiencing hallucinations. In her report, Dr. Diane Lyntton noted that she had watched the interview on videotape and that during those first ten minutes, he was crying continually. He was also telling the officers that there was a man in the room who wanted to hurt him and he repeatedly begged them to make him go away. When the officers explained that there was no man in the room, the defendant insisted that he was there and that he would talk to them if only they would make him go away. (R.33, pp. 210-211; App. pp. A242- A243).

That report was consistent with the report of Dr. Luchetta who had found the defendant to be competent. She stated that the jail records showed that he complained in the jail that he was having visual and auditory hallucinations, and believed there was a man in his cell who wanted to hurt him. (R.33, p. 167; App. p. A211). She said that he was having paranoid ideations where he said he was scared of everyone. He was prescribed Haldol at the jail, a very strong anti-psychotic drug. (R.33, p. 180; App. p. A213).

D. The Reports of the Doctors as to the Evidence that Supported a Plea of Not Guilty by Reason of Mental Disease or Defect

Dr. Smail, the Court appointed psychologist, filed a report on October 12, 2009. He had interviewed the defendant once, on October 5, 2009. (R.33, p. 176; App. p. A208). He noted that the defendant received SSI due to mental illness. He said that when he interviewed the defendant at the jail, he had been taking Haldol for several months to control the voices that he had been hearing. (R.33, p. 183; app. p. A215).

The defendant told him, he said, that he had gotten the gun because someone had recently put a gun in his face and he was scared that someone was trying to kill him. (R.33, p. 180; App.

p. A212). He had gotten the gun, he said, from Jacob Collins, who had bought it for him several weeks before this incident.

Dr. Smail said that the jail records noted that the defendant was diagnosed with Schizophrenia, sometimes specified as paranoia. He also noted that the records said the defendant had reported that there was someone in the cell with him, even though he was alone in his cell, and that he was hearing voices that told him to hurt himself. The jail records showed he was found by the jail staff standing on his sink, about to harm himself. He was given injections of Haldol. (R.33, p. 183; App. p. A215).

Nevertheless, Dr. Smail said that in his opinion, there was no evidence that the defendant had a diagnosis of psychosis at the time of the incident. He said that the defendant's behavior had been "fear driven" but that his behavior was not out of his control. Further, he said, the defendant knew that the shooting of the officers had been wrong, both morally and legally. For these reasons, he said, there was no evidence to support a plea of not guilty by reason of mental disease or defect. (R.33, p. 183; app. p. A215).

In her report, prepared at the request of the defense, Dr. Lytton, stated in her report of December 12, 2009, that she had examined all of the defendant's past mental health records and had interviewed his family members and his girlfriend about his bizarre and paranoid behaviors in the weeks just before this incident. She concluded that at the time of the incident, the defendant was experiencing significant "active symptoms of a psychotic disorder which significantly and substantially affected his abilities to think and act and, therefore, his ability to conform his conduct to the requirements of the law." (R.33, pp. 186-187; App. pp. A218-A219).

Dr. Lytton interviewed the defendant four times for many hours. She said the defendant told her he was taking Haldol at the jail to stop him from hearing voices and to stop seeing

hallucinations. He said he was afraid people were trying to harm or kill him. She noted his long history of mental illness and his history of cutting himself, which was proven by the many scars on his legs and arms. (R.33, p. 191; App. p. A223).

The defendant's mother told her that he had been having auditory and visual hallucinations since early childhood. (R.33, p. 197; App. p. A229). His sister, cousin and grandmother also suffered from a disorder that caused them to have such hallucinations. (R.33, pp. 198-199; App. pp. A230- A231). His girlfriend told her that in the weeks before this incident, the defendant had become very paranoid and was afraid that people were following him. She said he always carried a bat, screw driver or knife with him. She said he refused to take his meds due to their side effects. On the night before this incident, he had become angry and hit her, she said, and she left the house that night. (R.33, pp. 200-210; App. pp. A232-A233)..

In regard to the incident itself, she said, the defendant was suffering from a mental disease or defect at that time, specifically, bipolar disorder, paranoid schizophrenia and mood disorder. (R.33, p. 212; App. p. A244). She said he was afraid of the police and that when they approached him and pulled him off the bicycle, they had caused him to have a fear reaction, which exacerbated "his extreme and increasingly delusional paranoia". Although the defendant knew the men who were involved were police officers, she said, and that he knew it was wrong to shoot them, she concluded that due to his mental illness' effect on his perceptions of reality, he was unable to control his actions and was unable to conform his actions to the requirements of the law." (R.33, pp. 214- 215; App. pp. A246- A247).

E. The Plea Hearing and Sentencing

On January 21, 2009, defense counsel indicated that it was abandoning the defendant's plea of not guilty by reason of mental disease or defect and that he was going to enter a plea of guilty to the two Counts of the Information. (R.46. p.4; App. p. A59). At the plea hearing, the State said it would recommend that the defendant receive fifty years of confinement with no recommendation as to extended supervision. (R.46, pp. 2-3; App. pp. A57-A58). The Court advised the defendant that it was not required to accept the State's recommendation and could sentence him up to forty-five years of initial confinement on each count. (R.46, pp. 5-6; App. pp. A60-A61). The defendant then signed the plea questionnaire and waiver of rights form, which indicated the offer that the State had made. (R.15, pp. 1-3; App. pp. A82-A84)..

The Court then elicited a plea of guilty from the defendant. The defendant acknowledged that he had shot both officers with a firearm and that his conduct was substantially likely to cause their death. (R.46, p. 12; App. p. A67). The Court asked him if he realized that he was giving up the insanity defense and the defendant answered, "Yes." He told the Court he was withdrawing his plea of not guilty by reason of mental disease or defect and giving up his right to a hearing to determine the admissibility of the statements that he had made to the police. (R.46, pp.13-14; App. pp. A68-A69)..

The defendant said that he was aware of Dr. Lytton's report that indicated there was evidence that he was not guilty by reason of mental disease or defect. (R.46, p. 17; App. p. A72). Mr. LaVoy said that the defendant wished to forgo that issue and to plead guilty to the charges. He did not state why the defendant would plead guilty to at best, fifty years in prison, and at worst, ninety years in prison. (R.46, p. 18; App. p. A73).

The defendant then pled guilty to the two counts of the Information. (R.46, pp. 22-23; App. pp. A77-A78). The Court accepted the plea and in doing so, it noted that there were mental

health issues in the case but that it was satisfied that the defendant was competent to proceed to trial. It said it was satisfied that the defendant had entered his plea knowingly, intelligently and voluntarily. The Court found the defendant guilty of both counts and ordered a presentence report. (R.46, p. 23; App. p. A78).

On February 25, 2010, the defendant appeared before the Court for sentencing, the Hon. Patricia D. McMahon, presiding. The State recommended that the defendant be sentenced to fifty years of initial confinement with no recommendation as to the extended supervision. (R.47, p. 3; App. p. A87). He noted that the presentence report was replete with mental health records and that "no one can argue that there are some mental health problems here." (R.47, p. 7; App.p. A91). However, he said, the defendant knew what he was doing and he knew right from wrong. (R.47, p. 8; App. p. A94). He said that he was satisfied that the plea would mean that the defendant would spend the rest of his life in prison and that the officers had suffered enough and he did not want to have to put them through the ordeal of a trial. (R.47, p. 10; App. p. A94).

Both of the officers spoke at the sentencing, describing the terrible ordeal they had gone through and the permanent injuries they had received, including the loss of Officer Kunisch's left eye and the loss of a portion of the left frontal lobe of his brain. (R.47, pp 23, 28; App. pp. A107, A112).

Mr. Kim spoke on behalf of the defendant. He acknowledged that the defendant suffered from "severe mental illness", paranoia in particular, and that that had played a role in the incident. (R.47, pp. 44-47; App. A128- A131). He described some of the defendant's long history of mental illness and the fact that he had been hearing voices since he had been a child. (R.47, p. 47; App. p. A131). As a result, he said, the defendant did not have the capacity to make choices as clearly as other people and that this incident was a result of that. He said that when he first

started seeing the defendant at the jail, he was disoriented and did not understand what was happening. He said that after he started taking his medication, he was a different person. (R.47, pp. 50-51; App. pp. A134- A135). Still, he said, the defendant had chosen to withdraw his defense.

He asked the Court to give the defendant credit for sparing everyone a trial and that he did not know if the jury would have found him not guilty by reason of mental disease or defect. (R.47, p. 53; App. p. A137). He said the defendant pled guilty because he hoped by doing so, he would someday get out of prison. He recommended an initial confinement of thirty years. (R.47, p. 54; App. p. A138).

The Court completely ignored the State's recommendation and completely ignored the defendant's mental illness. The Court stated that the defendant had shot the officers at point blank range to their heads and that after the shootings, he had run and hid. (R.47, p.58; App. p. A75; App. p. A142). The Court noted that the defendant had mental health issues that were "serious and devastating for the defendant." It did not give him any credit for sparing the officers from having to go through a trial. (R.47, p. 62; App. p. A146).

The Court concluded that the defendant was extremely dangerous. It found he had had mental health issues throughout his life. (R.47, pp. 69- 70; App. pp. A153- A154). However, it felt that he should never be allowed to be in the community because he presented too great a risk of causing more harm. For those reasons, the Court sentenced the defendant to forty years of initial confinement on each count, to run consecutively, for a total period of initial confinement of eighty years. It also sentenced him to a period of extended supervision of ten years on each count, to run consecutively. (R.47, p.72; App. p. A156).

POINT I

DEFENSE COUNSEL'S FAILURE, ACCORDING TO THE RECORD, TO ADVISE THE DEFENDANT THAT HE HAD THE RIGHT TO A BIFURCATED TRIAL IN WHICH HE COULD PLEAD GUILTY TO THE CRIMES AND STILL HAVE A TRIAL TO DETERMINE WHETHER HE WAS NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL. THE CIRCUIT COURT'S DENIAL OF THE DEFENDANT'S POSTCONVICTION MOTION TO WITHDRAW HIS PLEA OF GUILTY ON THAT GROUND, WITHOUT ORDERING A HEARING, CONSTITUTED AN ABUSE OF ITS DISCRETION.

In Wisconsin, the finding of guilt of the crimes charged and the finding of whether the defendant may not be responsible for the crimes by reason of mental disease or defect are determined in a bifurcated trial before the same jury or fact-finder. Wis. Stats. 971.165; *State v. Duychak*, 133 Wis.2d 307, 311, 395 N.W.2d 796 (Wis. App. 1986); *State v. Smith,* 117 Wis.2d 399, 415, 344 N.W.2d 711 (Wis. App. 1983).

Under this bifurcated procedure, a defendant is entitled to enter a plea of guilty to the crimes charged and then request a trial to determine whether or not he should be held criminally responsible because of a mental disease or defect. *Schulz, v. State,* 87 Wis. 2d 167, 169, 274 N.W.2d 614 (Wis. 1979); *Duychak,* 133 Wis. 2d at 311.

This bifurcated procedure was established by the Wisconsin Supreme Court in 1967 in *State ex rel. LaFollete v. Raskin,* 34 Wis.2d 607, 614, 150 N.W.2d 318. There, the Court held that the bifurcated procedure was necessary to comply with due process so that statements made by the defendant during the mental examination would not be disclosed to the jury before it had decided the issue of guilt. Id. at 623- 627; see also, *State v. Murdock,* 2000WI App 170, ¶23, 238 Wis.2d 301, 316, 617 N.W.2d 175. This rule of law was eventually codified in Wis. Stats. §971.165 (1)(a), which provides that "If a defendant couples a plea of not guilty with a plea of

not guilty by reason of mental disease or defect: (a) There shall be a separation of the issues with a sequential order of proof in a continuous trial. The plea of not guilty shall be determined first and the plea of not guilty by reason of mental disease or defect shall be determined second."

If the defendant enters a plea of guilty to the crimes themselves and continues his plea of not guilty by reason of mental disease or defect, then the trial will only consist of proof regarding the second issue. The jury will then have to decide whether the defendant suffered from a mental disease or defect at the time the crimes were committed and if so, whether the defendant should not be held responsible because the mental disease or defect caused him to lack substantial capacity either to "appreciate the wrongfulness" of his conduct or to conform his conduct to "the requirements of law". Wis. Stats. 971.15(1).

In this case, defense counsel had a duty to advise the defendant that he could do one of three things: First, the defendant could plead not guilty to the crimes charged and not guilty by reason of mental disease or defect. Such a plea would lead to a bifurcated trial before the same jury, if the trial is before a jury, to decide whether the defendant was guilty of the crimes and then, if so, whether he was not responsible for them due to a mental disease or defect.

Second, the defendant could plead guilty to the crimes and request a trial solely to determine whether he was not responsible due to a mental disease or defect. Third, the defendant could plead guilty to the crimes and waive his plea of not guilty by reason of mental disease or defect.

Further, defense counsel had a duty to inform the Court, on the record, as to which of the three choices the defendant had made. If the defendant chose the first option, that is, if the defendant chose to continue his plea of not guilty to the crimes charged as well as continue his

plea of not guilty by reason of mental disease or defect, then defense counsel would merely have to inform the Court that the defendant had requested a trial in regard to the two parts of the plea.

It should be noted that at that point, defense counsel would also have to inform the Court as to whether the defendant wished to have a jury trial or whether he wished to waive a jury trial and instead, have a bench trial. If the defendant wishes to waive a jury trial and to have a bench trial, instead, §972.02(1) Wis. Stats. provides that, "… criminal cases shall be tried by a jury selected as prescribed in §805.08, unless the defendant waives a jury in writing or by statement in open court, or under §967.08(2)(b), on the record with the approval of the court and the consent of the state." (Section 967.08(2)(b) refers to proceedings by telephone or by audiovisual means.)

If the defendant chose the second option, that is, if the defendant chose to plead guilty to the crimes charged yet continue his plea of not responsible by reasonable by reason of mental disease or defect, then counsel would be required to advise the Court that the defendant wished to waive his right to a trial in regard to the criminal charges themselves but still request a trial in regard to the affirmative defense.

Finally, if the defendant chose the third option, that is, if the defendant chose to plead guilty to the crimes charged and to withdraw his previously made plea of not guilty by reason of mental disease or defect, counsel would be required to advise the Court that the defendant wished to waive his right to a trial in regard to *both* the criminal charges themselves and the affirmative defense.

It has been noted that, "The court should question the defendant to ensure that the defendant agrees with the decision to withdraw the insanity defense and that the decision was based *upon the advise of counsel*." Wisconsin Practice Series, Volume 9, p. 535, 2d Ed., by C.

M. Wiseman and M. Tobin. (West's Publishing Co., 2008). Further, it has been noted that, "A careful record of the plea's withdrawal will eliminate or minimize later time consuming hearings on ineffective assistance of counsel or the assertion that the plea was withdrawn without the defendant's permission." Id. at p. 535.

In this case, the record indicates that defense counsel had merely advised him that he could either continue his plea of not guilty and his plea of not guilty by reason of mental disease or defect and go to trial on the two issues, or simply plead guilty to the crimes and waive his right to a trial to determine the affirmative defense. At no time during the proceedings in this matter is there any indication that defense counsel had ever advised the defendant that he had a third choice: to plead guilty and to request a trial to determine the affirmative defense.

And counsel failed to indicate that he had advised the defendant of that third choice even though counsel had obtained the extensive report of Dr. Diane Lytton, who, after having read all of the defendant's medical records, and after having interviewed not only the defendant but many of his family members and his girlfriend, had come to the expert conclusion that the defendant had been suffering from a mental disease or defect at the time the crimes had been committed.

Specifically, based upon all of that evidence, she had come to the conclusion that as a result of his extreme paranoia at the time the crimes had been committed, he had been unable to conform his conduct to the requirements of the law. Although the defendant acknowledged at the plea hearing that he was aware of that report, there is nothing in the record to indicate that counsel had advised him that a jury could still consider Dr. Lytton's report to determine whether he was not responsible by reason of mental disease or defect even if he wished to plead guilty to having committed the crimes charged. Instead, counsel merely advised the Court that the

defendant wished to plead guilty to the crimes charged and to waive his plea of not guilty by reason of mental disease or defect. If counsel fails to advise the defendant that even if he pled guilty to the crimes charged, he could still go to trial on the issue of the affirmative defense, such failure constitutes ineffective assistance of counsel.

It has been held by the United States Supreme Court that the Sixth Amendment right to counsel includes the right to be represented by effective assistance of counsel. *Strickland v. Washington,* 466 U.S.668, 688, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984). In order to determine whether the defendant had received ineffective assistance of counsel, the Court has established a two prong test. First, it must be determined that counsel's performance was that of "reasonably effective assistance" under "prevailing professional norms." 466 U.S. at 688. Second, it must be determined that the deficiencies in counsel's performance were "prejudiced to the defense." 466 U.S. at 692.

This same two prong test has been held to be applicable under the Constitution of the State of Wisconsin, Article I, §7. *State v. Fritz,* 212 Wis.2d 284, 292, 569 N.W.2d 48 (Wis. App. 1997). Further, it has been held that an issue may be raised as to whether the failure to use the defense of not guilty by reason of mental disease or defect constituted ineffective assistance in a particular case. *Long v. Krenke,* 138 F.3rd 1160, 1163 (Seventh Cir., 1998).

The United States Supreme Court has also held that the defendant is entitled to effective assistance of counsel in regard to entering a plea of guilty. *Hill v. Lockhart,* 474 U.S. 52, 58, 106 S.Ct. 366, 88 L. Ed.2d 203 (1985). If a defendant enters a plea of guilty on advise of counsel, the voluntariness of the plea has been held to depend on whether counsel's advise "was within the range of competence demanded of attorneys in criminal cases." 474 U.S. at 56. The Court

held that the two prong test under *Strickland* applies to cases where the defendant has entered a plea of guilty. 474 U.S. at 57.

Therefore, the first part of the test is whether counsel's performance had been competent. 474 U.S. at 58. The second part of the test is whether counsel's performance affected the outcome of the plea process. 474 U.S. at 59. The Court held that the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have, instead, insisted on going to trial. 474 U.S. at 59.

In this case, if the defendant had pled guilty to the crimes charged and requested a jury trial to determine whether he should not be held criminally liable by reason of a mental disease or defect, the defense would have been able to call Dr. Lytton to testify as an expert witness.. Due to her exhaustive research and interviews, and due to her conclusion that the defendant should not be held criminally liable for his conduct, there was a strong possibility that the jury could have accepted her expert conclusion and found the defendant not guilty by reason of mental disease or defect.

There is nothing in the record to indicate that defense counsel had ever given that information to the defendant. Had the defendant been given this information by counsel, and advised that he could still go to trial on that issue even if he pled guilty to the crimes charged, there is a reasonable probability that he would not have waived his plea of not guilty by reason of mental disease or defect. That is particularly true due to the fact that by waiving that plea, he was facing, at the very least, fifty years in prison, and at the most, ninety years in prison. As it was, of course, he received eighty years in prison.

This issue was raised in the postconviction motion filed on behalf of the defendant. In response, the Circuit Court held in its Decision and Order of February 14, 2011 that, "There was

a very extensive record made during the plea hearing about the defendant's desire to withdraw his original plea of not guilty by reason of mental disease or defect." (R.36, p. 2; App. p. A98). The Court also noted that the defendant's attorneys said that they had "explained to the defendant that experts were retained who would be prepared to testify in his favor" but that "he's informed us he wishes to accept responsibility by entering the pleas." (R. 36, pp. 2-3; App. pp. A98- A99).

The Court noted that counsel had said that they had read the report to the defendant "word for word" and that he was aware that she was prepared to testify but that he wished to "accept responsibility and forego that issue." The Court also noted that counsel had stated that the defendant's position was that he wished to resolve the case with a plea today." Finally, the Court said that the defendant had been asked at the plea hearing whether he had talked about his right to raise that defense and he answered that he did. (R. 36, p. 3; App. p. A99).

The Court concluded that, "there is nothing which demonstrates that the defendant was forced into entering guilty pleas to both counts or that his original plea of not guilty by reason of mental disease or defect was abandoned without reason." The Court also held, "The record reflects that it was the defendant's own decision to withdraw his plea of not guilty by reason of mental disease or defect and simply take responsibility for his actions." (R.36, p.3; App. p. A99).

The problem in this case, however, is that there is nothing in the record to indicate that the defendant's waiver of his plea of not guilty by reason of mental disease or defect had been a knowing decision. Never once at the plea hearing had counsel ever advised the Court that they had informed the defendant of his choice to plead guilty to the crimes and still request a jury trial on that issue..

Since there was nothing in the record to indicate that that information had been given to the defendant and since the postconviction motion moved to withdraw the defendant's plea of guilty to the two charges on that ground, the Circuit Court was required to order a *Machner* hearing to determine exactly what information or advise the attorneys may or may not have given the defendant in regard to his choices in this matter. Yet the Court failed to order such a hearing and summarily denied the motion. (R.36, p.4; App. p. A100).

In *State v. Machner*, 92 Wis. 2d 979, 804, 285 N.W.2d 905 (Wis. App. 1979), the Court held that where counsel's conduct is "questioned", a hearing should be held at which counsel would appear and be questioned about his conduct. The Court held that, "We hold that it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel. We cannot otherwise determine whether trial counsel's actions were the result of incompetence or deliberate trial strategies. In such situations, then, it is a better rule and in the client's best interests, to require trial counsel to explain the reasons underlying the handling of the case." Id. at 804.

In this case, since the Circuit Court failed to order a *Machner* hearing, there is no way of knowing, other than what is contained in the transcripts of the proceedings in this matter, and especially the transcript of the plea hearing, exactly what information and advise counsel had given to the defendant about his choices in this matter. As the matter stands, without such a hearing, it appears that counsel never informed the defendant of his right to plead guilty to the two charges and still have a jury trial to determine whether he should not be held responsible by reason of mental disease or defect. If that is the case in this matter, then the defendant received ineffective assistance of counsel and was entitled to have his plea of guilty to the two charges

withdrawn. It was, therefore, an abuse of the Court's discretion to fail to order the defendant's plea of guilty to be withdrawn, or, in the alternative, to order a *Machner* hearing.

These arguments were also made in the Court of Appeals, District I. In its Decision and Order, dated February 14, 2012, the Court held that the allegation in the Postconviction Motion that there was no indication on the record that defense counsel had ever advised the defendant that he had the right to plead guilty to the charges and still have a trial on the issue of whether he should not be held responsible by reason of mental disease or defect was not sufficient to order a hearing or to find that there was ineffective assistance of counsel in regard to that conduct. (App., pp. A1-A8).

Specifically, the Court held that, "As the State observes, the record 'ordinarily does not and should not ' contain the details of all of counsel's discussions with the client. Indeed, expecting the record to do so would seem to undermine the very nature of the attorney-client relationship." (App. p. A6).

The Court also held that the defendant had not shown that he would have been prejudiced if counsel had not advised him of his right to plead guilty to the crimes and still have the right to have a trial to determine the affirmative defense. The Court noted, "That is, he does not allege how the availability of bifurcation would have persuaded him to do something other than accept the State's offer." (App. p. A6).

The problem with the Court's findings, however, is that if the defendant had waived his right to a trial on the issue of his guilt of the crimes, and withdrew his affirmative defense, without ever knowing that he had a right to a trial on the issue of the affirmative defense even if he pled guilty to the crimes, it would be clear that he would have been prejudiced. Especially in this case, where the defense had obtained reports showing that as recently as two weeks before

the incident, the defendant had been hospitalized due to being in a paranoid state, with homicidal ideations, and further where the defense had obtained a lengthy report by an expert in which she had found that he should not be held responsible due to a mental disease or defect he had at the time of the incident, the defendant would be prejudiced if he did not know that he could have presented this information to a jury, even if he had pled guilty to the crimes charged.

Further, it was essential that the record be made clear at the time of the plea hearing that the defendant had been given this choice by his attorneys and that he was knowingly and voluntarily waiving his right to a trial not only on the issue of his guilt but also of the issue of his affirmative defense of mental disease or defect. This is not the type of information that is protected by the attorney-client privilege. By waiving his right to a trial in regard to the affirmative defense, the defendant was also waiving his right to a jury trial in regard to that affirmative defense. A defendant cannot be presumed to have knowing and voluntarily waived his right to a jury trial when there is nothing on the record to show that he even knew he had that right.

Even in cases where the defendant is not entirely waiving his right to a trial but only waiving his right to a jury trial, §972.02 Wis. Stats. requires that the waiver of the jury be either in writing or by statement in open court or made on the record in some manner. A statement by counsel in open court, on the record, that his client knows he has the right to a jury trial on the issue of his affirmative defense of mental disease or defect but that he specifically wishes to waive that right is essential to provide for due process of law.

It is also essential for purposes of appeal, so that the appellate courts may make a determination as to whether any waiver of the defendant's right to a jury trial had been knowingly and voluntarily made. Here, the Circuit Court refused to order a *Machner* hearing so

that the defendant's attorneys could testify and place on the record whether they had advised the defendant that even if he pled guilty to the crimes, he could still have a trial on the issue as to whether he should not be held responsible by reason of mental disease of defect.

For all of these reasons, the Decision and Order of the Court of Appeals, District I, affirming the Decision of the Circuit Court of Milwaukee County, should be reversed. The defendant's plea of guilty to the two crimes of Intentional Homicide in the first degree, with the use of a dangerous weapon, should be vacated, or, in the alternative, a *Machner* hearing in the Circuit Court should be ordered.

POINT II

THE CIRCUIT COURT FAILED TO ADVISE THE DEFENDANT THAT HE HAD A RIGHT TO PLEAD GUILTY TO THE CRIMES CHARGED AND STILL HAVE A JURY TRIAL TO DETERMINE WHETHER HE WAS NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT. THEREFORE, THE DEFENDANT'S PLEA OF GUILTY HAD NOT BEEN KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY MADE AND THE DEFENDANT WAS ENTITLED TO HAVE HIS PLEA OF GUILTY VACATED.

Section 971.08(1) of the Wisconsin Statutes provides that, "Before the court accepts a plea of guilty or no contest, it shall do all of the following: (a) Address the defendant personally and determine that the plea is made voluntarily with an understanding of the nature of the charge and the possible punishment if convicted." It has been held that in order to make certain that the plea has been voluntarily made under this statute, the Court must make the defendant aware that by entering a plea of guilty to the crimes, he is waiving his constitutional right to a jury trial. The Court must also obtain a clear waiver of that right from the defendant. *State v. Bangert,* 131 Wis.2d 246, 389 N.W.2d 12 (Wis. 1986).

In *Bangert*, the Court held that the defendant has the right to withdraw his plea of guilty if the plea hearing record is "insufficient to show that he understood the nature of the charge" and if "the plea colloquy itself was facially insufficient." Id. at 251. The Court held that it is insufficient if it establishes that the defendant's plea had not been knowingly, voluntarily and intelligently entered. Id. at 251-252. The Court further held that the court has a duty to make certain that the defendant had knowledge of the constitutional rights that he was waiving by entering the plea, including the constitutional right to a jury trial.

In order for a waiver of a constitutional right to be valid, the Court held, the plea must be based on "an intentional relinquishment or abandonment of a known right or privilege." Id. at

265. The Court continued, "A plea may be involuntary either because the defendant does not have a complete understanding of the charge or because he does not understand the nature of the constitutional rights he is waiving." Id. at 265- 266.

If the guilty plea is not knowing, voluntary and intelligent, then it has been held that the defendant is entitled to withdraw his plea as a matter of right because such a plea violates fundamental due process. *State v. Brown*, 2006 WI 100, ¶19, 293, Wis.2d 594, 611, 716 N.W.2d 906. The defendant is entitled to an evidentiary hearing on the issue if he shows that he did not know or understand an aspect of the plea because of an omission by the court. Id. at 612. Finally, it has been held that if the Court failed to make the defendant aware of a constitutional right that he was waiving by entering his plea of guilty, he is entitled to an evidentiary hearing to determine the issue. *State v. Howell,* 2007 WI 75, ¶7, 301 Wis. 2d 350, 361, 734 N.W.2d 48.

In a case where the defendant has entered a plea of not guilty by reason of mental disease or defect, the Court, as a matter of due process of law, must also advise him not only that he has the right to a jury trial but specifically that he has the right to a bifurcated jury trial where the jury would first determine whether he is guilty of the crimes charged and then, second, would determine whether he was not criminally responsible for those crimes by reason of mental disease or defect. The Court must also make it clear to him that he may enter a plea of guilty to the crimes charged and still be entitled to have a jury determine whether he should not be held responsible for those crimes by reason of a mental disease or defect.

In this case, at the plea hearing, the Court advised the defendant that if he pled guilty to the two crimes charged, there would not be a jury trial in the case, "because you are giving up the right to have a jury trial." The Court asked the defendant, "Correct?", and the defendant

answered, "Yes." (R.46, p. 10; App. p. A65). The Court discussed other rights the defendant was waiving by his plea of guilty.

However, the Court never once made any reference to the fact that the defendant could plead guilty the crimes and still have a jury trial. Although that jury trial would not involve the issue of whether he was guilty or not, it would involve the issue of whether he was not responsible for his conduct by reason of mental disease or defect. At no time did the Court ever obtain a waiver from the defendant of his right to that second part of a jury trial.

At one point during the plea hearing, after the defendant had admitted that he had shot both of the officers with a dangerous weapon with the intention of killing them, and after he had pled guilty to the two charges, the Court advised the defendant that by pleading guilty, he was giving up the defense of "insanity". The Court asked him, "You talked with your attorney about entering, in fact, I believe, you did enter a plea of not guilty by reason of mental disease or defect?" He answered, "Yes." The Court asked him, "You are withdrawing that plea at this time. Correct?" He answered, "Yes." (R.46, p. 13; App. p. A68).

Even at that time, the Court made it appear to the defendant that if he entered a plea of guilty to the crimes, he was, therefore, withdrawing his plea of not guilty by reason of mental disease or defect, without ever advising him that by entering a plea of guilty, he was not necessarily also waiving his right to a jury trial on the issue of whether he was not responsible by reason of mental disease or defect.

After the plea of guilty had been entered, the Court stated it accepted the guilty plea. In doing so, the Court noted that it realized that there were mental health issues in the case but that it was satisfied that the defendant was competent and was making a knowing and intelligent waiver of his rights. (R.46, p. 23; App. A78).

However, since the Court had failed to advise the defendant of his right to a jury trial to determine whether he was not responsible for his conduct by reason of mental disease or defect, even though he had pled guilty to the crimes charged, the Court failed to obtain a knowing, intelligent and voluntary waiver of his right to a jury trial on that issue.

This issue was also raised in the postconviction motion that was filed in this matter. In denying that motion, the Circuit Court held that, "The court also finds that Judge McMahon had no duty to advise the defendant of the possibility of a bifurcated trial on his original plea when he was entering guilty pleas to the charges. She fulfilled her duties during the guilty plea colloquy and was under no obligation to inform him of the benefits of his original plea when he was clearly not pursuing it at that time." (R.36, p. 4; App. p. A188).

The problem with that ruling is that when the Circuit Court was eliciting the defendant's plea of guilty in this matter, it was also obtaining a waiver from the defendant of his plea of not guilty by reason of mental disease or defect. It was not possible for such a waiver to have been knowingly, voluntarily and intelligently made by the defendant unless the defendant had been informed by the Court that such a waiver had not been necessary simply because he had chosen to admit his guilt to these crimes. The failure of the Court to inform the defendant of that fact, and the fact that he could still proceed to trial on the question of whether he was not responsible by reason of mental disease or defect, denied the defendant his right to due process of law. The Circuit Court, therefore, erred in denying the defendant his right, pursuant to his postconviction motion, to withdraw his guilty plea on that ground.

These arguments were also made on appeal to the Court of Appeals, District I. In its Decision, dated February 14, 2012, the Court held that since neither the Federal Constitution nor the State Constitution conferred a "right to an insanity defense or plea", it was not necessary for

the Circuit Court to engage in "personal colloquies" to protect the defendant "against violations of their fundamental constitutional rights". (App. p. A8).

The Court of Appeals further held that, "The circuit court also 'had no obligation to personally address [Burton] with respect to the withdrawal of [his] NGI plea." (App. p. A8). The Court concluded, "Thus, the circuit court correctly found that the circuit court was not obligated to advise Burton of the availability of bifurcation, and it properly denied relief." (App. p. A8).

In making this determination, the Court of Appeals stated that it was relying on *State v. Francis*, 2005 WI App 161, 285 Wis. 2d 451, 701 N.W.2d 632. In *Francis*, the Court held that neither the United States Constitution nor the Constitution of the State of Wisconsin had conferred the right to the insanity defense or plea on criminal defendants. Id. At 462-463. The Court noted that the insanity defense was strictly a statutory right. Id. at 463. Therefore, the Court held, the Circuit Court was not required to engage the defendant in a personal colloquy in regard to his desire to abandon his not guilty by reason of mental disease or defect plea. (The Court referred to it as a NGI plea.) Id. at 463-464.

In order to withdraw a NGI plea, the Court held, the defendant was merely choosing to withdraw an affirmative defense, that is, choosing not to present evidence as to that affirmative defense. Id. at 463. A plea of not guilty by reason of mental disease or defect, the Court held, is not a fundamental right. Id. at 463.

Therefore, the Court held, the Circuit Court is not required to conduct a colloquy, on the record, with respect to his desire to abandon his not guilty by reason of mental disease or defect plea. Id. at 463-464. That is, the Court held, the Circuit Court is not required to personally address a defendant to "ensure a knowing and voluntary, and understanding waiver of a NGI

plea." Id. at 464. In fact, the Court held, counsel alone may advise the Court that the defendant wished to withdraw his NGI plea without the Court even addressing the defendant on that issue at all. Id. at 464.

In making this determination, the Court noted that it recognized that personal colloquies with the defendant by the Circuit Court are necessary in order to protect the defendant's fundamental constitutional rights. Id. at 460. It recognized that when a defendant enters a plea of guilty, for example, the defendant is waiving "several important constitutional rights" and, therefore, a personal colloquy with the defendant by the court is necessary to protect those rights. Id. at 464. One of those fundamental rights, the Court noted, for which a personal colloquy between the court and the defendant is necessary, is the right to a jury trial. Id. at 460.

The Court also noted that this Court, in *State v. Anderson,* 2002 WI 7, 249 Wis.2d 586, 602, 638 N.W.2d 301, had held that a personal colloquy was essential before a defendant could waive his right to a jury trial, which was a fundamental right. Id. at 460. The Court then concluded that since the right to a plea of not guilty by reason of mental disease or defect was not a fundamental constitutional right, no such personal colloquy was necessary in order to determine whether the withdrawal of that affirmative defense had been voluntarily, knowingly and intelligently made by the defendant. Id. at 465.

The problem with the Court's reasoning in *Francis* as well as the Court's adoption of that reasoning in this case is that in conferring upon the defendant the statutory right to enter a plea of not guilty by reason of mental disease or defect, the legislature also conferred upon the defendant the right to have a jury trial to determine whether he should not be held not responsible by reason of mental or defect, irrespective of whether he had pled guilty to the crimes charged.

In withdrawing this affirmative defense, which had been previously made and which had been made on sufficient evidence to warrant it, the defendant is not merely withdrawing that affirmative defense- the defendant is also waiving his right to have a jury trial determine the issue of whether he should not be held responsible due to mental disease or defect. He is, therefore, waiving a fundamental right that had been bestowed upon him by the legislature. It is just as fundamental as the right to have the jury determine whether he is guilty of the crimes with which he is charged.

In *Anderson*, this Court made it clear that there must be a personal colloquy between the defendant and the court whenever there is a waiver of a jury trial. The Court held, "We conclude that without a personal colloquy, we are unable to determine that Anderson's jury trial waiver is knowing, intelligent, and voluntary." 249 Wis. 2d at 601. This Court further held that, "The right to a jury trial is a fundamental right." Id. at 601-602.

Citing *State v. Resio,* 148 Wis. 2d 687, 694, 436 N.W.2d 603 (1989), this Court held that, "the right to a trial by jury is one of the rights that is so fundamental to the concept of fair and impartial decision making, that their relinquishment must meet the standard set forth in *Johnson v. Zerbst,* 304 U.S. 458 (1938)." Id. at 602. This Court continued by stating that, "The waiver of a jury trial therefore must be an intentional relinquishment or abandonment of a known right or privilege." Id. at 602.

This Court then set forth the rule that, "Therefore, based on our recognition that a jury trial involves a fundamental right, we mandate the use of a personal colloquy in *every* case where a criminal defendant seeks to waive his or her right to a jury trial." Id. at 602. This Court continued by noting that, "A colloquy is the clearest means of determining that the defendant is

knowingly, intelligently, and voluntarily waiving is his right to a jury trial, and a colloquy documents the valid waiver for postconviction motions and appellate proceedings." Id. at 602.

As a remedy in that particular case, the Court remanded the case back to the Circuit Court to "hold an evidentiary hearing on whether the waiver of the right to a jury trial was knowing, intelligent, and voluntary." See also, *State v. Hauk,* 2002 WI App 226, 257 Wis.2d 579, 601.

Although *Anderson* involved the waiver of the right to a jury trial and to, instead, have a bench trial, as set forth in §972.02(1), the same holds true for cases where the waiver of the right to a jury trial involves the right for a jury to determine whether the defendant was not responsible by reason of mental disease or defect, even if he had pled guilty to the crimes charged.

Due process of law requires that the defendant knows that he has the right to such a jury trial and that he has voluntarily, knowingly and intelligently waived that right. Without a personal colloquy between the court and the defendant, where the court advises him of that right and then questions him as to whether he is knowingly waiving that right, there is no way for an appellate court to know whether the waiver of that fundamental right to a jury trial had been constitutionally made.

For all of these reasons, the defendant respectfully requests that the Order of the Court of Appeals, District I, affirming the Decision and Order of the Circuit Court of Milwaukee County, be reversed. The defendant also respectfully requests that the defendant's plea of guilty be vacated or, in the alternative, that the case be remanded to the Circuit Court for an evidentiary hearing. The hearing would be to determine whether the defendant had ever been advised of his right to a jury trial to determine the issue of whether he was not responsible by reason of mental disease or defect, even if he wished to plead guilty to the crimes charged, and to determine

whether, if so, his waiver of that right to a jury trial had been voluntarily, knowingly and intelligently made.

CONCLUSION

The defendant respectfully requests that the Decision of the Court of Appeals, District I, affirming the Decision and Order of the Circuit Court of Milwaukee County, be reversed and that the defendant's plea be vacated, or, in the alternative, that an evidentiary hearing by held to determine whether the defendant's waiver of his right to a jury trial to determine whether he should be found not responsible by reason of mental disease or defect had been constitutionally obtained.

Submitted: October 26, 2012

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief, including the Statement of the Case- Procedural Facts and Factual, Point I, Point II, and Conclusion, conforms to the rules contained in §809.19(8)(b) and (c) Wis. Stats. for a brief produced with a proportional serif font.

The brief contains 10,990 words.

Date: October 26, 2012

_____

Esther Cohen Lee
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CERTIFICATION AS TO COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §809.19(12) Wis. Stats. I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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

Dated: October 26, 2012

_____

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