STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Case No. 2013AP000557 CR
Trial Court Case No. 10 CF 652

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

COREY R. KUCHARSKI,

Defendant-Appellant.

ON APPEAL FROM THE CIRCUIT COURT OF MILWAUKEE COUNTY
THE HONORABLE JEANE DIMOTTO
CIRCUIT COURT JUDGE PRESIDING

BRIEF OF THE DEFENDANT-APPELLANT

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STATEMENT OF ISSUES

I. Did the Trial Court err in it's application of Wisconsin Statutes § 971.15?

Trial Court Answered: No.

II. Was the Trial Court's conclusion that Mr. Kucharski was mentally responsible for the crime supported by the testimony and evidence in the Record?

Trial Court Answered: Yes.

III. Do the interests of justice dictate that Mr. Kucharski should be granted a new trial?

Trial Court Answered: Not addressed directly by Trial Court.

IV. Was trial counsel ineffective for failing to call multiple witnesses and enter multiple exhibits in support of Mr. Kucharski's mental health defense?

Trial Court Answered: No.

V. Did the Trial Court err in denying Mr. Kucharski's post-conviction motion?

Trial Court Answered: Effectively answered no.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

It is the position of defendant-appellant that oral argument, pursuant to Wis. Stat. § 809.22, may prove useful to the Court with regard to the issues raised herein.

It is the position of defendant-appellant that the publication of a decision in this matter would be proper as such decision would likely fall within the criteria for publication, pursuant to Wis. Stat. § 809.23(1)(a), more specifically, Wis. Stat. §§ 809.23(1)(a)1, 4, and 5.

This case involves the application of the standard for determinations of mental responsibility as well as a review to determine whether the Trial Court's conclusions in this regard were supported by the Record. Additionally, this Court is being asked to determine whether the interests of justice dictate that Mr. Kucharski should be granted a new trial. Alternatively, this Court is being asked to determine whether Mr. Kucharski was provided ineffective assistance of counsel.

STATEMENT OF THE CASE

Mr. Corey Kucharski ("Mr. Kucharski") was convicted of two counts of "First Degree Intentional Homicide, Use of a Dangerous Weapon," violations of

Wis. Stats. §§ 940.01(1)(a), 939.50(3)(a), and 939.63(1)(b), as charged in the criminal complaint. R.1, App. 101-113; R. 2, App. 114-116; R. 5, App. 117; R. 17, App. 118-123; and R. 32, App. 124-125. Mr. Kucharski entered a plea of "no contest" during Phase I of an "NGI" court trial to the above-stated charges. R.1, App. 101-113; R. 2, App. 114-116; R. 5, App. 117; R. 17, App. 118-123; R. 32, App. 124-125; and R. 52 at p. 18. Mr. Kucharski was examined as to his plea by Judge Jean DiMotto on September 27, 2010. R. 52 at pp. 8-18. Convictions as to the charges were entered on that same date after completion of Phase II of the bifurcated trial as to Mr. Kucharski's mental responsibility. R. 32, App. 124-125; R. 52; and R. 53. Phase II was conducted as a Court Trial, the Hon. Jean DiMotto presiding. R. 52 and R. 53.

The defense at Mr. Kucharski's Phase II proceeding presented the testimony of Dr. Robert Rawski, a forensic psychiatrist who had evaluated Mr. Kucharski regarding his NGI defense. R. 10, App. 126-146; and R. 52 at pp. 19-77. Dr. Rawski concluded that Mr. Kucharski (1) suffered from a significant mental illness - undifferentiated schizophrenia and (2) was unable to appreciate the wrongfulness of his actions. R. 10, App. 126-146; and R. 52 at pp. 35-42. Dr. Rawski cited to numerous supports for his conclusions, including, but not limited to, the police reports and recorded 911 call and interrogations, reports by himself (R. 10, App.

126-146), Dr. Pankiewicz (R. 11, App. 147-157)[1]; Dr. Lundbohm (R. 52 at pp. 20-21); a letter report from Dr. Jurek (R. 12; App. 158); an interview with Mr. Kucharski (R. 10, App. 126-146; and R. 52 at pp. 21-22), as well as numerous writings of Mr. Kucharski (R. 52 at pp. 38-39), copies of which may be found attached to Mr. Kucharski's Motion for Post-Conviction Relief. R. 36; App. 159-192. All of the reports submitted and received into evidence supported a conclusion that Mr. Kucharski was not guilty by reason of mental disease or defect. R. 52 at pp. 44, 47, and 50. Mr. Kucharski was tested to determine whether malingering was an issue, and it was concluded that it was not. R. 10 at pp. 15-16 and 20; and R. 52 at pp. 32-33. Mr. Kucharski was never given psychotropic medications prior to incarceration for this offense and went almost entirely untreated until he arrived at the jail after these offenses. R. 52 at pp. 34-35.

The defense did not call any other witness, relying on the submission of the reports of Doctors Rawski, Pankiewicz, and Jurek, as well as the testimony of Dr. Rawski. R. 52 at pp. 44, 47, and 50. The defense never submitted to the Court, for its review, copies of the notes found in the home which had been authored by Mr. Kucharski. Further, the State called no witnesses and submitted no expert reports refuting the doctors' conclusions that Mr. Kucharski lacked the mental capacity to

1 Dr. Pankiewicz's report references that Mr. Kucharski lacked both "substantial capacity to appreciate the

appreciate the wrongfulness of his actions or conform his behavior accordingly. R. 52 at pp. 78-81.

The Court and the parties discussed whether the standard of proof was "preponderance of the evidence" or the higher standard, "clear and convincing", the Court ultimately concluding that the lesser standard was the appropriate one. R. 52 at pp. 81-83 and R. 53 at p. 2. The Court indicated that the difference between the two standards was important in this case since it was a "very close question" regarding whether the defense had met its burden. R. 53 at p. 2. Despite the fact that all of the testimony and evidence submitted supported Mr. Kucharski's NGI defense, including the opinions of all three doctors, Judge Jean DiMotto concluded that, Mr. Kucharski was able to appreciate the wrongfulness of his actions and was, therefore, mentally responsible. R. 53 at pp. 2-8. Based on its' statements that Wis. Stats. § 971.15 analysis required only a finding on one of the prongs (either that the individual could not appreciate the wrongfulness of one's behavior *or* that the individual could not conform his behavior to that which he knew to be right), the Court did not appear to address whether Mr. Kucharski could conform his conduct to the requirements of the law. *Id.* at p. 8.

Prior to sentencing Mr. Kucharski, through new trial counsel, attempted to withdraw his "no contest" plea for Phase I based on ineffective assistance of

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wrongfulness of his acts and conform his behavior to the requirements of the law." R. 11 at p. 9; App. 155.

counsel – premised on the theory that his prior trial attorneys had guaranteed him an outcome and that his plea was entered based on that guarantee. R. 20, App. 193-195; R. 22, App. 196-199; R. 58; and R. 59. A hearing was held, the Hon. Jeffrey Conen presiding, at which testimony was taken. R. 58. The Court concluded that the plea could not be withdrawn as counsel, at least insofar as that issue, had provided effective assistance of counsel. R. 59 at pp. 3-11. While the Court referenced that original counsel were not ineffective by not calling Dr. Pankiewicz or Dr. Jurek, the Court did not address trial counsel's failure to move into evidence the writings of Mr. Kucharski which were found at the crime scene. *Id.* at pp. 8-9.

Mr. Kucharski was sentenced on December 16, 2011, by the Hon. David Borowski, on Count 1, to a term of incarceration of life imprisonment in the Wisconsin State Prison System, consecutive to any other sentence and on Count 2, a term of incarceration of life imprisonment in the Wisconsin State Prison System, concurrent with Count 1; as to both counts Mr. Kucharski was made eligible for release to extended supervision after serving 30 years. R. 32, App. 124-125; R. 61. Mr. Kucharski was found ineligible for both the Earned Release and the Challenge Incarceration Programs. *Id.* Mr. Kucharski was credited for 676 days, time served. *Id.*

Mr. Kucharski filed a Motion for Post-Conviction Relief asserting: (1) that

the Trial Court erred by failing to apply the proper legal standard for the "Phase II" determination of Mr. Kucharski's NGI Court Trial; (2) that the Trial Court erred in its ultimate determination as there was no factual support in the Record for its conclusions; and (3) that, in the alternative, Mr. Kucharski was provided ineffective assistance of counsel related to the pursuit of the NGI defense. R. 36, App. 159-192. Briefs were submitted (R. 37, App. 200-217; R. 40, App. 218-222; and R. 41, App. 223-225) and the Trial Court issued a combined oral and written Decision denying Mr. Kucharski's motion for post-conviction relief. R. 62 and R. 42, App. 226-229. The Court concluded that (1) it had addressed both alternatives of the second prong of Wis. Stats. § 971.15; (2) there was a sufficient factual basis to have reached the conclusion it reached; and (3) counsel was not ineffective as further presentation of the evidence in question would not have affected the outcome. *Id.*

Mr. Kucharski now appeals the Trial Court's denial of his post-conviction motion and seeks a reversal of the judgment of conviction and a new disposition hearing in keeping with a proper finding that he was not guilty by reason of mental disease or defect pursuant to Wis. Stats. § 971.15.

STATEMENT OF THE FACTS

The facts relevant to the issues at hand have been discussed at some length throughout the procedural history outlined above. Additional facts, as necessary, shall

be referenced throughout the text of the Argument below.

STANDARD OF REVIEW

In the instant case a reviewing court must review (1) a question of law (whether the Trial Court properly construed the legal standard in its' Wis. Stats. § 971.15 analysis) *Phelps v. Physicians Ins. Co. of Wis., 2009,* 2009 WI 74, ¶ 36, 319 Wis.2d 1, 768 N.W.2d 615; (2) a mixed question of law and fact (whether the Trial Court, given the Record before it, erred in its conclusion that the defense failed to prove its' NGI defense) *State v. Gollon*, 115 Wis.2d 592, 600, 340 N.W.2d 912 (Ct. App. 1983)[2]; (3) a question of whether discretionary reversal is appropriate (whether reversal is appropriate in the interests of justice) *Wis. Stats. §* 752.35 and *State v. Murdock*, 2000 WI App 170, ¶ 31, 238 Wis.2d 301, 617 N.W.2d 175; and (4) a question of constitutional fact (whether trial counsel was ineffective in pursuing the NGI defense during Phase II of Mr. Kucharski's NGI trial) *Strickland v. Washington*, 466 U.S. 668 (1984); *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845, ___ (1990).

When reviewing a question of law, an appellate court is not bound by a trial court's conclusions and may review same *ab initio. In re Estate of Omernik*, 112 Wis.

2 A mixed question of law and fact requires a review of the Trial Court's factual determinations (application of the great weight/clearly erroneous standard) and an independent review of its' conclusions of law. *DOR v. Exxon Corp.*, 90 Wis. 2d 700, 713, 218 N.W.2d 94, 101 (1979).

2d 285, 290, 332 N.W.2d 307, 309 (1983); and *Board of Regents v. Personnel Comm'n*, 103 Wis. 2d 545, 551, 309 N.W.2d 366, 369 (Ct. App. 1981).

When reviewing the legal portion of a mixed question of law and fact, an appellate court again is not bound by a trial court's conclusions of law and may review same *ab initio*. *In re Estate of Omernik*, 112 Wis. 2d 285, 290, 332 N.W.2d 307, 309 (1983); and *Board of Regents v. Personnel Comm'n*, 103 Wis. 2d 545, 551, 309 N.W.2d 366, 369 (Ct. App. 1981). When reviewing the factual portion of a mixed question of law and fact, the trial court's finding of fact will only be overturned if clearly erroneous. *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711, ___ (1985). In other words, trial court findings are to be affirmed unless they are "against the great weight and clear preponderance of the evidence." *Noll v. Dimiceli's, Inc.,* 115 Wis.2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983).

Discretionary reversal is appropriate where it can be established that:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

Wis. Stat. Ann. § 752.35. This standard has been referenced by Appellate Courts and applied accordingly. *State v. Murdock,* 238 Wis.2d 301, 321, 617 N.W.2d 175, 184 (Ct. App. 2000).

The facts involved in the question of whether trial counsel provided ineffective assistance of counsel are Constitutional facts. Similar to mixed questions of law and fact, the legal implications of Constitutional facts are reviewed *de novo* after the historical facts are reviewed using the great weight/clearly erroneous standard. *State v. Hajicek,* 2001 WI 3, ¶ 15, 240 Wis.2d 349, 620 N.W.2d 781.

ARGUMENT

I. THE TRIAL COURT ERRED IN ITS APPLICATION OF WISCONSIN STATUTES § 971.15.

Wisconsin has laid out its standard for assessing the mental responsibility of a defendant for his criminal conduct in Wis. Stat. § 971.15. The portion of the statute at issue is clearly written in the disjunctive and provides that "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect the person lacked substantial capacity *either* to appreciate the wrongfulness of his or her conduct *or* conform his or her conduct to the requirements of law." (Emphasis added) Wis. Stat. § 971.15.

> The critical inquiry under § 971.15 is whether, as a result of a certain mental condition, a defendant lacks substantial capacity to either appreciate the wrongfulness of the defendant's conduct or conform the defendant's conduct to the requirements of the law.

> The legislature intended to excuse a defendant from criminal liability only where a mental condition has the requisite effect, i.e., the inability to appreciate wrongfulness ***or*** to conform conduct.

State v. Duychak, 133 Wis.29 307, 316-17, 395 N.W.2d 795 (Ct. App. 1986) (*emphasis added*). Thus, to prevail on a defense of NGI, a defendant must show that at the time of the criminal conduct, he suffered from a mental disease or defect and that the mental condition had the required effect. *Id.* (*See also* Wis. JI-Criminal 605). The requisite effect includes two possible impairments: (1) the defendant lacked substantial capacity to appreciate the wrongfulness of his conduct *or* (2) the defendant lacked substantial capacity to conform his conduct to the requirements of law. Wis. Stat. § 971.15 and *State v. Duychak* at 316-17. To require the defendant to show both that he lacked capacity to appreciate the wrongfulness of his conduct *and* to conform his conduct to the requirements of the law would be to interpret this portion of the statute conjunctively and to ignore the plain language of the statute, as well as the caselaw interpreting it. The defendant has satisfied his burden if he is able to demonstrate by a preponderance of the evidence that his mental condition resulted in either requisite effect included in the statute. Thus, an NGI inquiry is not complete unless the trier of fact evaluates whether the defendant's conduct exhibits either of the requisite effects provided for in § 971.15.

The Phase II portion of Mr. Kucharski's trial was to the Court. The

Honorable Judge Jean DiMotto, presiding, stated that "I don't think there's a doubt, much less a reasonable doubt, that Mr. Kucharski suffered from a mental illness at the time that he committed these crimes, and the name of that mental illness is schizophrenia." R. 53 at p. 2. Since the Court found that the answer to the first question of Wis. Stat. § 971.15 was that Mr. Kucharski did suffer from a mental disease at the time of the criminal conduct, it was necessary to proceed to the second question, whether Mr. Kucharski had either of the specified impairments.

It is the Court's analysis of the second prong of evaluating Mr. Kucharski's mental responsibility that is at issue. The Court made a finding whether Mr. Kucharski could appreciate the wrongfulness of his conduct. Upon determining that he did not lack substantial capacity to appreciate the wrongfulness of his actions, the Court appeared to gloss over the second category of impairment (whether Mr. Kucharski lacked substantial capacity to conform his conduct to the requirements of the law). *Id.* at p. 6-8. Defense counsel stated to the Court that it was her understanding "that the court has to find whether or not he [Mr. Kucharski] could have appreciated the wrongfulness of his actions and also, that he could conform his conduct to the requirements of the law." *Id.* at p. 8. The Court responded that "[i]t's an either or under the statute" to which defense counsel stated, "Well, I thought it was and conform his behavior to the

requirements of the law" to which the Trial Court responded, "It's not" and then ended discussion without fully addressing the second prong.[3]

The Court's discussion on this second prong of the analysis, while referencing it as being in the disjunctive, appeared to conclude that the language of the statute was in the conjunctive, requiring a finding that Mr. Kucharski was not NGI if the Court concluded that his condition failed to satisfy either of the two options of the second prong of the analysis. Judge Jean DiMotto's interpretation alters the law by ending the analysis if a Court concludes that a defendant fails to satisfy the conditions of either option, thus turning the disjunctive into the conjunctive. Such an interpretation of the law is error.

The Court must make a finding on both categories under the second prong of § 971.15 before it decides the issue of a Defendant's mental responsibility. The "either/or" component of the statute is that the defense need only prove that the defendant fits in one of the two categories. As a result of incorrectly applying the legal standard for the Phase II determination of Mr. Kucharski's NGI Court trial, the Court did not appear to make a finding as to whether Mr. Kucharski was not mentally responsible because he lacked substantial capacity to conform his conduct to the requirements of the law. This alone requires that the matter be re-opened for the purpose of taking testimony to determine whether Mr. Kucharski's illness

3 The Record reflects that the second prong was briefly addressed in Dr. Pankiewicz's Report (R. 11 at page

prevented him from conforming his conduct to the requirements of the law.

The Trial Court, in response to Mr. Kucharski's post-conviction motion, asserts that it did, in fact, make findings as to both of the categories under the second prong of Wis. Stats. § 971.15. R. 42, App. 226-229; and R. 62, pp. 3-5. The Trial Court asserts that, despite its apparent mis-statement of the law, it did conclude that Mr. Kucharski failed to satisfy his burden of showing that his mental disease or defect prevented him from either appreciating the wrongfulness of his conduct or conforming his conduct to that which the law requires. *Id.* The Trial Court's original decision when finding against Mr. Kucharski's defense, however, self-admittedly, was speculative:

> And I understand the problem here. *We're all speculating* because all we have is the Defendant's behavior itself and a few statements made in varying degrees of closeness of time, afterwards.
>
> So I don't doubt that he was suffering from a major mental illness called schizophrenia and that that's characterized by the schism between thoughts and emotions. Often as well, characterized by symptoms of delusional thinking, disorganized thinking and hallucinatory thinking. . . .
>
> I think both Dr. Pankiewicz and Dr. Rawski opined that they could not find evidence of a rational, alternative motive for the Defendant's behavior. I don't disagree with that. I think shooting your parents to death with a gun, is conduct that we might not find quote unquote rational. But the lack of finding – This is –
>
> In the end I am going to find him responsible, and the reason is I am not persuaded that it's more probable that his reason for killing his parents – Or strike that.

9; App. 155; and Dr. Rawski's testimony regarding same R. 52 at pp. 46-47.

> The reason for killing his parents isn't the issue. I'm finding him legally responsible because I'm not persuaded beyond a level scale. I can't – It's not tipping, even slightly, that he lacked substantial capacity to conform his conduct to the law.
>
> I have the speculative, interesting opinions and very thoughtful, professional opinions of these two psychiatrists, but the basis of these opinions, in part, or in large enough part to leave me with being at an unpersuaded level, is that they're speculating about what happened.
>
> There's no speculation about the fact of the murders. There's no speculation, there's full agreement, that it was planned and purposeful, that he did not kill himself, or allow himself to be killed. Those we all know without – without a doubt, frankly.
>
> What the speculation is, is whether in killing his parents he could not appreciate, he lacked substantial capacity to appreciate, the wrongfulness of his conduct.
>
> I'm not convinced that he did. I'm not saying it's like – It's because – Strike that.
>
> It's because of the burden of proof here. I can't – I can't see this – the scales at any different level. They're level. And it's my obligation on level scales, to deny the if you will, affirmative defense, and instead to find him legally responsible, to adjudge him convicted of both crimes, and order entries of conviction as to counts 1 and 2, entered into the record.
>
> Ms. Wynn: *Your Honor, my understanding that the court has to find whether or not he could have appreciated the wrongfulness of his actions and also, that he could conform his conduct to the requirements of the law.*
>
> Judge DiMotto: *It's an either or under the statute. And I don't – Well, I can't explain it any better than I have.*
>
> Ms. Wynn: *Well, I thought it was and conform his behavior to the requirements of the law.*
>
> Judge DiMotto: *It's not.*

R. 53, *excerpts from* pp. 5-8, (*emphasis added*). Ultimately the Trial Court appears to indicate that it needn't address the second category.

It should be noted, that the Trial Court also appears to have blended the two phases of an NGI trial when reaching its conclusions on the Phase II portion, focusing on the fact that the act occurred as being evidence that the action was both appreciated by Mr. Kucharski as being wrongful and that Mr. Kucharski was able to comport his behavior to that which the law requires. This "blending" is not the legal standard. The legal standard requires a review of the evidence, especially the un-refuted expert reports and testimony, which reflect that Mr. Kucharski lacked substantial capacity to either understand the wrongfulness of his conduct or to conform his behavior to that which he knew to be right.

Further, it appears that, assuming *arguendo*, that the Trial Court did reach a conclusion as to both prongs, it replaced the multiple expert opinions, opinions reached after extensive review of Mr. Kucharski's case, evidence of his mental disorder, and interviews with him, with the Court's own speculation. This shall be discussed at greater length in the sections which follow.

II. THE TRIAL COURT'S CONCLUSIONS REGARDING MR. KUCHARSKI'S MENTAL RESPONSIBILITY LACK SUPPORT IN THE RECORD.

Under Wis. Stat. § 971.15(3), the defense of not guilty by mental disease or defect "is an affirmative defense which the defendant must establish to a

reasonable certainty by the greater weight of the credible evidence."[4] The issue of whether a defendant has met the burden of proof for this defense is a question of fact. *State v. Leach*, 124 Wis.2d 648, 660, 370 N.W.2d 240 (WI 1985) (citing *State v. Sarinske*, 91 Wis.2d 14 (WI 1979) and *Pautz v. State*, 64 Wis.2d 469, 219 N.W.2d 327 (WI 1974)). Since this issue requires a finding of fact, when trial is to the court, the trial court's finding that the defendant did not meet his burden will be set aside only if it is clearly erroneous. Wis. Stat. § 805.17(2). A "finding will be upset when the evidence is not sufficient to support it and especially when no credible evidence has been received to support it." *Leach* 124 Wis.2d at 660, 370 N.W.2d at 247.

When reviewing whether or not a trier of fact had credible evidence at trial sufficient to support its decision, the Wisconsin Court of Appeals has looked to four Wisconsin Supreme Court opinions (*Kemp v. State*, *Pautz v. State*, *Schultz v. State*, and *State v. Sarinske*) for the relevant standards to address this issue. *State v Murdock*, 238 Wis.2d 301, P 32, 617 N.W.2d 175 (Wis. Ct. App. 2000). The Supreme Court of Wisconsin has granted the defendant a new trial on the issue of the defendant's mental responsibility at the time of the act when the weight of the

4 It should be noted that the Trial Court itself referred to the case as "a very close question" when discussing whether the defense's burden of proof was a "preponderance of the evidence" or the higher standard of "clear and convincing". *Decision Transcript* 9/27/10 at p. 2. The Court further noted that the standard of proof was "a very important distinction" given the fact that the determination was a close question. *Id.* The only way that such a distinction would be important is if the evidence in the Record falls somewhere between the two standards of proof.

evidence predominates "quite heavily" for the defendant, and the Court believes that a new trial would likely produce a different result. *Kemp v. State*, 61 Wis.2d 125, 138, 211 N.W.2d 793 (WI 1973).

The Supreme Court of Wisconsin has stated that "'it is the responsibility of the trier of fact to determine the weight and credibility of medical testimony on the issue of insanity and to determine whether the defendant has met the burden of proving he was insane.'" *Pautz*, 64 Wis.2d at 476 (quoting *Sprague v. State*, 52 Wis.2d 89, 99, 187 N.W.2d 784 (WI 1971)). Thus, the Court explained, "'[t]he jury was at liberty to reject any portions of the aforementioned testimony which they discredited and to consider the evidence before it in the light of human experiences and understandings.'" *Id.* at 478 (quoting *State v. Coleman*, 46 N.J. 16, 43, 214 A.2d 393 (NJ 1965)). The Court has further stated that "[t]he opinion of an expert even if uncontradicted need not be accepted by the jury." *Sarinske*, 91 Wis.2d at 48. Additionally, "[i]n cases of conflicting expert testimony, it is the role of the trier of fact to determine weight and credibility. This role is not different when the trial court, rather than a jury makes the determination of capacity under § 971.15." (Citations omitted) *Schultz v. State*, 87 Wis.2d 167, 173, 274 N.W.2d 617 (WI 1979).

The Supreme Court of Wisconsin has looked to several factors when assessing whether a trier of fact could conclude that evidence was credible. One

factor that the Court has found important during a determination of the defendant's mental responsibility is whether any expert unequivocally testifies that the defendant was mentally responsible. *Kemp*, 61 Wis.2d at 138. In *Kemp*, the fact that not one of six expert witnesses testified that the defendant was sane contributed to the Court's determination that the evidence weighed "quite heavily" on the defendant's side regarding the issue of mental responsibility. *Id.* In the instant case there existed no testimony or expert opinion to support the Trial Court's conclusion that Mr. Kucharski was mentally responsible for his actions and, in fact, there are three separate doctors' opinions in support of Mr. Kucharski's position that he was not mentally responsible for his actions. R. 10, App. 126-146; R. 11, App. 147-157; and R. 12; App. 158.

Another factor that the Wisconsin Supreme Court has looked at when assessing the credibility of evidence regarding a defendant's mental responsibility is the defendant's mental health history. *See Kemp*, 61 Wis.2d at 137 (the Court found that since the defendant had a history of mental health issues, this provided credible evidence which the trier of fact could have used when evaluating the NGI defense). Since there is no dispute as to the fact that Mr. Kucharski suffered from schizophrenia at the time of this offense, a fact which the Trial Court itself concluded, this factor supports Mr. Kucharski's position as well.

A third factor to be considered is a defendant's ability to recall the relevant

event(s). While a defendant's ability to recall events surrounding a crime is a factor which may be considered in an NGI determination, it is not dispositive and is not a sufficient basis to reject an NGI defense.[5] *Murdock*, 238 Wis.2d at P 42.

In the case at hand three psychiatrists (Dr. Rawski, Dr. Pankiewicz, and Dr. Jurek) filed reports with the Court regarding their evaluation of Mr. Kucharski's mental responsibility. Although only Dr. Rawski testified in court, all three doctors' reports were admitted during the Phase II portion of the trial as part of the record. R. 52, pp. 47 and 50. All three of the doctors unequivocally stated in their respective reports that the defendant lacked mental responsibility or that they had no reason to doubt the opinion of the doctors who so found. In fact, Dr. Rawksi testified that "I believe to a reasonable degree of medical certainty that Corey Kucharski- Corey Kucharski's symptoms of schizophrenia were so severe on February 7, 2010, that it resulted in the lack of substantial capacity to appreciate the wrongfulness of his actions." *Id.*, pp. 35-36. Dr. Pankiewicz's report reflected his opinion that as a result of Mr. Kucharski suffering symptoms of schizophrenia on the date of the offense, he [Kucharski] "did lack substantial capacity to appreciate the wrongfulness of his acts and conform his behavior to the

5 The *Pautz* court used the fact that the defendant "signed a confession not only clearly recounting the incidents but also indicating his clear intent to commit such a crime" as evidence that distinguished it from *Kemp*). *Pautz*, 64 Wis.2d at 479. It is important to note that the Wisconsin Court of Appeals found that on at least one occasion when a defendant could recall the events surrounding the incident that this "did not provide a sufficient basis for the jury to reject his defense of lack of mental capacity." *Murdock*, 238 Wis.2d at P 42.

requirements of the law." R. 11, p. 9. Lastly, Dr. Jurek, who provided a brief letter report regarding his evaluation of Mr. Kucharski, stated that Mr. Kucharski was suffering from a genuine mental illness and that it was unlikely that his conclusions regarding Mr. Kucharski's mental responsibility would differ from the findings of Dr. Rawski's 7/5/10 report. R. 12. Therefore, since two doctors explicitly found that Mr. Kucharski lacked mental responsibility and a third doctor did not dispute these findings, this weighs heavily for the defense's assertion that the Trial Court's decision finding Mr. Kucharski mentally responsible lacked any factual basis in the Record and that the existing evidence weighs "quite heavily" for the defendant. *Please see Kemp v. State*, at p. 138.

Dr. Rawski testified that he reviewed documents that included the criminal file supplied by the defense counsel, audio recordings of the 911 call and detective's interviews, writings and diagrams discovered among Mr. Kucharski's possessions, medical records from the Milwaukee County Jail, a psychologist's report from the Wisconsin Forensic Unit, a disability report from September 2009 from a Social Security evaluation, and a personal interview with Mr. Kurcharski. R. 52 at pp. 20-21. Dr. Pankiewicz also personally reviewed these same documents and conducted his own interviews. R. 11. Dr. Jurek's report does not detail each document he reviewed but, as he received his documents from the

State, any concern about doctors substantially relying on information provided solely by the defense is not present.

Though Mr. Kucharski's history of mental illness is difficult to establish since he never pursued mental health treatment, there is no dispute as to his diagnosis. Dr. Rawski's testimony supports a finding that Mr. Kucharski suffered from mental illness dating back to 2005. Dr. Rawski testified that Mr. Kucharski first began having auditory hallucinations in 2005. R. 52, p. 24. Dr. Rawski also testified that, based on his review of Mr. Kucharski's writings, Mr. Kucharski has "a wide range of delusional ideas that have developed over time." *Id.* at p. 24. Further, due to the lack of psychiatric evaluations to assist with establishing the history of Mr. Kucharski's mental illness, Dr. Rawski had a doctor in the Wisconsin Forensic Unit, Dr. Brooke Lundbohm, assess the potential for faking or exaggerating mental health symptoms through administration of the Structured Interview of Reported Symptoms ("SIRS") test. *Id.* at p. 32-33. Dr. Lundbohm found that Mr. Kucharski's "classification of genuine responding had greater than 90 percent accuracy" which indicates that Mr. Kucharski reported legitimate psychological experiences. *Id.* at p. 33. *See also* R. 11, p. 6 and R. 12, ("It would be my [Dr. Jurek's] opinion that Mr. Kucharski does suffer from a genuine mental illness and it does not appear that he is malingering.").

Although Mr. Kucharski could recall events surrounding the incident, this is

not a sufficient basis to reject the NGI defense given the over-whelming evidence supporting the conclusion that Mr. Kucharski lacked mental responsibility.

The Trial Court appears to have based its decision on a belief that the various expert opinions were "speculation" and that Mr. Kucharski did not kill himself, therefore, he could appreciate the wrongfulness of his conduct. (R. 53 at pp. 3-6). The Court appeared to extrapolate that this alone was sufficient evidence to counter all of the medical experts' opinions, both the reports received and the testimony taken. Additionally, the Trial Court itself speculates that Mr. Kucharski's not killing himself was a volitional act, ignoring the doctors' reports which indicate that Mr. Kucharski did not kill himself because the gun was out of his reach and he forgot to have a shootout with the police (R. 10 at pp. 8-9; R. 11 at pp. 7-8, and R. 52 at pp. 31 and 64-65) as well as the numerous references that Mr. Kucharski's actions appear to have been driven by "command" hallucinations (voices told him it was someone's will that he do the "right" thing – R. 11 at p. 6; people controlled him through the voices – *Id.*; he would follow the commands -- *Id.* at pp. 4-5 and 7-9; he was told to kill his parents first, then himself – R. 52 at pp. 27-28; that he forgot to kill himself – R. 10 at p. 9 and R. 52 at pp. 31 and 64-65; and that the voices fell silent after the gunshots, resuming once he was in the jail – R. 10 at p. 9 and R. 52 at p. 64). The Court's conclusion ignores all of the medical evidence and replaces the facts in the Record with its own speculation.

Given the facts of Mr. Kucharski's mental illness and the evidence that he was suffering from severe symptoms of schizophrenia at the time of the incident as well as the presence of factors indicating that such evidence is credible, the weight of the evidence predominates "quite heavily" for Mr. Kucharski and a new trial would likely produce a different result as to Phase II of the bifurcated trial. There exists ample credible evidence in the Record to support Mr. Kucharski's defense and, conversely, nothing upon which a trier of fact can rely to conclude otherwise. As the Trial Court's decision in the instant case is not supported by the Record, reversal is required.

III. THE INTERESTS OF JUSTICE DICTATE THAT MR. KUCHARSKI SHOULD BE GRANTED A NEW TRIAL.

According to Wis. Stat. § 752.35, the Court of Appeals may grant a discretionary reversal "if it appears from the record that the real controversy has not yet been fully tried, or that it is probable that justice has for any reason miscarried. . . . " In the instant case, Mr. Kucharski argues that justice has miscarried. Justice has miscarried if the Court determines that there is a "substantial probability" that a new trial would have a different result. *State v. Vento*, 2013 WL 2157900, *citing State v. Murdock*, 238 Wis.2d 301, 617 N.W.2d 175 (WI 2000).

At trial, Mr. Kucharski had the burden to establish that he was not guilty by

reason of mental disease or defect "to reasonable certainty by the greater weight of the credible evidence." Wis. Stat. § 971.15(3). This required Mr. Kucharski to affirmatively prove that he had a mental disease or defect at the time the offense was committed, and, as a result of the mental disease or defect, lacked "substantial capacity to either appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law." *See* WI JI-CRIMINAL 605 (2011).

A new trial in this matter would yield a different result as Mr. Kucharski met his burden of establishing a mental disease or defect by a "greater weight of the credible evidence". Wis. Stat. § 971.15(3). The Supreme Court of Wisconsin has granted a defendant a new trial on the issue of a defendant's mental responsibility at the time of the act when the weight of the evidence predominates "quite heavily" for the defendant, and the Court believes that a new trial would likely produce a different result. *Kemp v. State*, 61 Wis.2d 125, 138, 211 N.W.2d 793 (WI 1973).

As argued in the section above, Mr. Kucharski has demonstrated the factors referenced in *Kemp* to justify a discretionary reversal. In the instant case, all of the doctors' opinions support Mr. Kucharski's position that he was not mentally responsible for his actions, there exists no dispute as to the fact that Mr. Kucharski suffered from schizophrenia at the time of this offense, and no logical explanation for Mr. Kucharski's behavior exists in the Record. *See, for example, Murdock*,

238 Wis.2d at 327.

In the present case, the State did not provide any evidence to support another explanation of Mr. Kucharski's behavior. Additionally, the State called no witnesses and submitted no expert reports refuting the doctors' conclusions that Mr. Kucharski lacked the mental capacity to appreciate the wrongfulness of his actions or conform his behavior accordingly. R. 52 at pp. 78-81.

Three other Supreme Court opinions have elaborated upon the standards for addressing requests for discretionary reversals (*Schultz v. State*, *Pautz v. State*, and *State v. Sarinske*). In *Schultz*, conflicting expert testimony led the Court to question "the degree of mental illness and its effect upon the defendant." *Schultz v. State,* 87 Wis.2d 167, 172, 274 N.W.2d 614, 616 (WI 1979). In *Pautz*, the Court denied the defendant's request for a discretionary reversal because of his detailed confession of premeditation and an expressed desire for a "'light sentence'" directly conflicted with expert testimony diagnosing him with a mental disease. *Pautz v. State,* 64 Wis.2d 469, 477, 219 N.W.2d 327, 331 (WI 1974). Finally, in *Sarinske*, the Court determined that a discretionary reversal was not required because the defendant had no history of mental or emotional complications and there was conflicting expert testimony. *State v. Sarinske,* 91 Wis.2d 14, 49-50, 280 N.W.2d 725, 742 (WI 1979).

Mr. Kucharski's case is distinguishable from each of these cases. First,

there was no conflicting expert testimony in Mr. Kucharski's case; all, three doctors' opinions support Mr. Kucharski's position that he was not mentally responsible for his actions. R. 10, App. 126-146; R. 11, App. 147-157; and R. 12, App. 158. Second, there exists no evidence of significant pre-meditation and all of the evidence supported a conclusion that Mr. Kucharski was actively psychotic at the time of the offense. *Id.* Third, there is nothing in the Record which conflicts with Mr. Kucharski's diagnosis of having a mental disease. And lastly, it is undisputed that Mr. Kucharski actively suffered from schizophrenia at the time of this offense. *Id.* Thus, discretionary reversal is appropriate for Mr. Kucharski.

Given the facts of Mr. Kucharski's mental illness and the evidence that he was suffering from severe symptoms of schizophrenia at the time of the incident as well as the presence of factors indicating that such evidence is credible, the weight of the evidence predominates "quite heavily" for Mr. Kucharski and a new trial would likely produce a different result. Thus, justice has miscarried in Mr. Kucharski's case and discretionary reversal is appropriate.

IV. ALTERNATIVELY, TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CALL MULTIPLE WITNESSES AND ENTER MULTIPLE EXHIBITS IN SUPPORT OF MR. KUCHARSKI'S MENTAL HEALTH DEFENSE.

All criminal defendants are guaranteed a right to counsel under the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Section 7,

of the Wisconsin Constitution. *Strickland v. Washington*, 466 U.S. 668, 685 (1983); *State v. Santos*, 136 Wis.2d 528, 531, 401 N.W.2d 856 (Ct. App. 1987). The U.S. Supreme Court held that the right to counsel implies that "[a]n accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland*, 466 U.S. at 685. This, the Court has held, requires that a criminal defendant receive assistance from counsel which does not undermine ". . . the proper functioning of the adversarial process [such] that the trial cannot be relied on as having produced a just result." *Id.* at 686. Where such assistance is not rendered, the defendant has not received the effective assistance of counsel and a motion for a new trial based on ineffective assistance of counsel is appropriate. *Id*.

The model a court is to use when determining whether an attorney's actions constitute ineffective assistance of counsel is the two-prong test delineated in *Strickland v. Washington*. This test requires:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. 466 U.S. 668, 687 (1983).

Determining whether an attorney's behavior was both deficient and prejudicial to the defense are questions of law. *State v. Johnson*, 126 Wis.2d 8, 11, 374 N.W.2d

637 (Ct. App. 1985), *summarizing State v. Pitsch*, 124 Wis.2d 628, 634, 369 N.W.2d 711, 715 (1985).

The first prong of the *Strickland* test, according to *State v. Harper*, indicates that a lawyer has a duty to provide his client with "reasonably effective representation." *Id.*, 57 Wis.2d 543, 557, 205 N.W.2d 1 (1973). "Reasonably effective representation" has been defined by the court as being, ". . . equal to that which the ordinarily prudent lawyer, skilled and versed in criminal law, would give to clients who had privately retained his services." *Id.; State v. Davis*, 114 Wis.2d 252, 255-56, 338 N.W.2d 301 (Ct. App. 1983). When analyzing the performance of trial counsel, for the purpose of an ineffective assistance claim, the ". . . inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688. Additionally, ". . . the defendant must overcome the presumption that, under the circumstances, the challenged action `might be considered sound trial strategy.'" *Id.* at 689, *quoting Michel v. Louisiana*, 350 U.S. 91, 101 (1955).

Under the second prong of the *Strickland* test, it must be shown that the deficient performance of counsel prejudiced the defense. *Strickland*, 466 U.S. 668, 687. According to the test, this requires a showing "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* The defendant bears the responsibility of demonstrating that ". . . there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

In the instant case three doctors evaluated Mr. Kucharski regarding his mental responsibility and wrote reports summarizing their findings. All three doctors had findings which were favorable to the defense's argument that Mr. Kucharski was not mentally responsible for his actions. Nevertheless, the defense only called one medical expert, Dr. Rawski, to testify at trial. The defense introduced the two non-testifying doctors' reports (Dr. Pankiewicz and Dr. Jurek) into the record. R. 52, pp. 47 and 50. The defense also examined Dr. Rawski during his testimony at trial with regards to the contents of Dr. Pankiewicz's and Dr. Jurek's reports. *Id.* at pp. 44-48 and pp. 49. The State agreed not to object to such testimony as hearsay. *Id.* at p. 11.

Dr. Pankiewicz's and Dr. Jurek's testimony would have bolstered the assertions made by Dr. Rawski during his testimony and would have provided additional testimony in support of the alternative basis for Mr. Kucharski's NGI defense – that he was not capable of conforming his conduct to that required by law. For example, Dr. Pankiewicz concluded that Mr. Kucharski was not only incapable of appreciating the wrongfulness of his actions but also incapable of conforming his behavior to that which is required by the law, an area not addressed by Dr. Rawski's report. R. 11 at p. 9; R. 52 at pp. 46-47 and 65. This alternative basis in support of Mr. Kucharski's NGI defense was not fully fleshed out through just Dr. Rawski's

testimony. Calling Dr. Pankiewicz would have allowed further testimony on this critical point. Further, the effect of their testimony could reasonably have been more forceful had they personally testified as opposed to another doctor summarizing their findings. The opinions of medical expert witness testimony was critical to the trier of fact's evaluation of the defendant's NGI claim. *See, generally, Kemp v. State*, 61 Wis.2d 125, 211 N.W.2d 793 (WI 1973). Moreover, since each doctor both independently reviewed documents related to Mr. Kucharski and personally interviewed Mr. Kucharski at varying points after the incident, the two additional doctors' testimony would not have been cumulative but would have provided additional evidence to strengthen the credibility of each doctor's opinion. Dr. Pankiewicz especially could have provided unique insight separate from Dr. Rawski given that he interviewed Mr. Kucharski eight days after the incident and then again several months after the incident. R. 11.

Trial counsel did not offer any reasons why only one medical expert was called at trial to testify other than over-confidence in the outcome. R. 58, pp. 21-24, 33-35, 37-39. In light of the nature of the "Phase II" determination of the NGI defense, further testimony pertaining to Mr. Kucharski's mental responsibility was critical to the defense; in fact, it was the only defense. It was a significant error on the part of the defense to not call either Dr. Pankiewicz or Dr. Jurek to testify in further support of that only defense.

Additionally, the defense had obtained numerous delusional writings authored by Mr. Kucharski and found at the crime scene. These writings (copies of which are attached to the Post-Conviction Motion – R. 36) include the following: "The mirror is taking. Sorry your soft they get the deal. You lost again, it picked you apart. Sorry kid there no light at the end of the tunnel. Take a trip and get manual in an accident. Run away like a big baby. He paid for that election Collect color stick."; "Manual Called. Their taking turns raping you. Their raping your cell phone. I don't want to live across the street. Give G his check."; "Corey is a hoar for Jews. Ken's a good Christian. Corey king of MEX. Burn down your house. It's always a white guy. I pool cue = your Catholic death. I have the Silverado google. I'm going to make that nigure. L H watch. RT handwatch."; "Pay Italy off. It's alley. You lost because of a pool cue and a dentist. Roland's a real dad. You're a pink flamingo." These are but a few of the numerous writings demonstrative of Mr. Kucharski's active psychosis at, and near, the time of the offense. None of these materials were moved into evidence during the "Phase II" portion of Mr. Kucharski's NGI trial. Defense not using these materials at trial is significant given the Court's conclusion that Mr. Kucharski's inability to appreciate, i.e. comprehend, the wrongfulness of his behavior had not been proven to its satisfaction. The writings demonstrate quite clearly Mr. Kucharski's very impaired ability to comprehend reality, including an understanding of the difference between right and wrong.

Regarding the second prong of the *Strickland* analysis, these errors are significant given the nature of the determination- Mr. Kucharski's defense was that he lacked the requisite mental responsibility at the time he committed the crime. Failure to present all of the testimony and evidence which directly supported the defense's theory that Mr. Kucharski was not mentally culpable amounted to deficient performance and undermines confidence in the outcome of the trial. The collective effect of the errors cannot be viewed as not prejudicing Mr. Kucharski's right to a fair trial and effective assistance of counsel. There exists a significant likelihood of a different outcome had all of the defense's tools been used.

V. THE TRIAL COURT ERRED IN DENYING MR. KUCHARSKI'S MOTION FOR POST-CONVICTION RELIEF.

Based on all of the arguments raised above which relate directly to this issue, it is undersigned counsel's position that further elaboration on this point is unnecessary as it has been fully discussed above.

CONCLUSION

For all of the foregoing reasons, Corey Kucharski respectfully requests that this court reverse the Trial Court's findings and conclusions pertaining to the "Phase II" portion of Mr. Kucharski's NGI trial. Mr. Kucharski asks this Court for an Order granting him a new trial due to either the Trial Court's errors or, in the alternative,

ineffective assistance of counsel; or for an Order granting him such other relief as this Court may deem appropriate.

Respectfully submitted this 18th day of July, 2013.

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CERTIFICATION

I certify that this Brief conforms to the rules contained in Wis. Stats. §§ 809.19(8)(b) for a brief produced using the following font:

Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is **8,139** words.

Dated this 18th day of July, 2013, at Milwaukee, Wisconsin.

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CERTIFICATION
As to E-Filing

Undersigned counsel certifies that he has electronically filed an exact copy of the attached "Brief of Defendant-Appellant" for Mr. Corey Kucharski, Case No. 2013AP000557-CR, pursuant to Wis. Stats. § 809.19(12)(f).

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated at Milwaukee, Wisconsin, this 18th day of July, 2013.

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