STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 2
Appeal No. 2013 AP 2559 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID M. CARLSON,

Defendant-Appellant.

ON REVIEW OF A DENIAL OF A MOTION FOR POSTCONVICTION RELIEF ENTERED ON OCTOBER 28, 2013, AND A JUDGMENT OF CONVICTION ENTERED MAY 16, 2012, AND AMENDED ON OCTOBER 10, 2013, IN THE CIRCUIT COURT FOR OZAUKEE COUNTY, HON. SANDY A. WILLIAMS PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ISSUES PRESENTED:

1. Carlson's attorney advised him that if he pled guilty to sexually assaulting AJK, he had a

realistic possibility of receiving a community-based sentence (*i.e.,* probation or a combination of jail and probation.) Carlson alleged in a postconviction motion that his attorney's advice constituted ineffective assistance of counsel, given the seriousness of the charges, the fact that he could be blamed for 300-400 assaults, and objective evidence that few defendants facing similar charges received a community-based sentence.

Issue: Did the Circuit Court err in denying, without a hearing, Carlson's postconviction claim?

The Court ruled, without a hearing, that counsel's performance was not deficient.

2. Did the Circuit Court err in denying, without a hearing, Carlson's claim that counsel was ineffective at sentencing for failing to object to the Court's statement that Carlson sexually assaulted AJK 300-400 times, or failing to present evidence that Carlson was not with AJK for much of the time, and therefore could not have sexually assaulted her that many times?

   The Court found that counsel was not ineffective.

3. Did the Circuit Court err in denying, without a hearing, Carlson's claim that the sentencing court based its sentence on inaccurate information, namely, that it based its sentence on its belief that Carlson sexually assaulted AJK 300-400 times?

   The Court found that its sentence was not based on inaccurate information.

4. Did the Circuit Court err in denying Carlson's claim that his sentence was harsh or unconscionable?

   The Court ruled that the sentence was neither harsh nor unconscionable (87:31-32).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Carlson welcomes oral argument to clarify any questions the Court may have. He does not request publication, as he believes that this case may be decided on existing law.

STATEMENT OF THE CASE AND FACTS

In 2011, AJK was a 22 year-old woman who was living with her mother and her siblings at the family home in Cedarburg, Wisconsin (1:1-2; 35:8). Also living in the home was the defendant, David Carlson, who was the long-time fiancé of AJK's mother, and who had lived with the family for the past twelve years (1:1-3; 35:5).

On May 31, 2011, AJK and Carlson got into a fight, which escalated until AJK yelled that Carlson had molested her years earlier (35:8-9). The next day, AJK reported to law enforcement that Carlson had molested her over a five-year period beginning in 5th grade and lasting until 9th grade (1:1). AJK told police that the last incident occurred over seven years earlier while they lived in Cedarburg, and that all other incidents occurred in the years before that,

when they lived in Washington County (1:1).

On June 3, 2011, the State filed a criminal complaint in Ozaukee County for the single Cedarburg allegation, charging Carlson with Second Degree Sexual Assault of a Child which occurred between November 1, 2003 and January 15, 2004 (1:1). Although the complaint did not formally charge Carlson with any sexual assaults from Washington County, the probable cause statement indicated that he had repeatedly committed sexual acts upon AJK, beginning when she was in the fifth grade (1:2). According to AJK, these acts occurred "at least twice a week" but ended by January of 2004, when AJK was in the ninth grade (1:1).

After the Ozaukee County complaint was filed, Carlson sought sex offender treatment, and began counseling with Brandie Tetzlaff at Pathways Counseling Center on August 3, 2011 (35:14). Tetzlaff viewed Carlson as an "active and engaged" participant in therapy, and noted that Carlson had participated in both group and individual counseling sessions weekly (35:14).

On August 4, 2011, two months after the Ozaukee County complaint was issued, the State filed a criminal complaint in Washington County, which was later consolidated with the Ozaukee County case (77:2-3). After several amendments, the final information charged Carlson with the following two counts:

Count 1: Sexual Assault of a Child under 16 years of age, occurring between November 1, 2003 and January 15,

2004, contrary Wis. Stats. § 948.02(2), 939.50(3)(c).

Count 2: Repeated Sexual Assault of the Same Child during the period between Spring 2000 and May 2003, contrary to Wis. Stats. §§ 948.025(1) and 939.50(3)(b).

(30:1).

On March 22, 2012, Carlson pled guilty to both counts (86:20). At the plea hearing, Carlson's trial attorney, Craig Mastantuono, stated that while Carlson was admitting to a factual basis for three or more assaults for the Repeated Sexual Assault of the Same Child charge, and the factual basis for the one assault for the Sexual Assault of a Child charge, "there may be a wider scope and range of activity alleged by the State than is admitted to by Mr. Carlson" (86:5-6).

Prior to sentencing, a Presentence Investigation Report (PSI) was completed, in which Carlson admitted to only five or six assaults (35:4). The PSI author recommended that the Court impose terms totaling 12-14 years prison (9-10 years initial confinement plus 3-4 years extended supervision) (35:18).

Carlson was sentenced on May 14, 2012 (74:1-2). At the sentencing hearing, Dr. Michael Woody, a clinical psychologist, testified that he gave Carlson a psychological evaluation, which found that he posed a low risk of reoffending and that there was a likelihood of positive adjustment with community supervision (74:36-37, 35:13). One factor noted by

Dr. Woody was that Carlson ceased abusing AJK voluntarily while still having access to her (74:39). Dr. Woody identified the lack of abuse during the "substantial period of victim access" since the last incident (approximately eight years before the time he wrote his report) as evidence that Carlson did not appear to be "a substantial risk to the community" (35:13).

At the sentencing hearing, the Court stated that it would address several factors in determining Carlson's sentence, including the seriousness of the conduct (74:75), the fact that the Court gave credit to Carlson for pleading guilty (74:77), and the need to protect the community (74:82). Among these statements, the Court said that Carlson had abused AJK "anywhere from 300 to 400 times." (74:77). The Court stated that it based this calculation on the fact that AJK said that the abuse occurred "at least twice a week," for three years with "two weeks off" (74:77). This 300 to 400 figure had not been mentioned at any point by either party prior to this statement. Carlson's attorney did not object to the 300-400 figure, or introduce any evidence to refute it.

The Court then sentenced Carlson to consecutive terms of 23 years (15 years initial confinement plus 8 years extended supervision) (Attached as Appendix A).

Carlson subsequently filed a motion for postconviction relief on August 23, 2013 (62:25). The motion asserted that Carlson was entitled to withdraw his plea, and/or be resentenced, based on

the following claims:[1]

- That Carlson is entitled to withdraw his plea because his attorney was ineffective in advising him that if he pled guilty, he had a reasonable chance to receive a community-based sentence (*i.e.,* probation or a combination of probation and jail). (62:4-13).

- That trial counsel was ineffective at sentencing for failing to object to or refute the Court's statement that Carlson had assaulted AJK 300-400 times (62:21-23).

- That the Circuit Court relied on inaccurate information at sentencing, specifically, the allegation that Carlson had assaulted AJK 300-400 times (62:18-20).

- That the sentence was unduly harsh or unconscionable (62:23).

On October 24, 2013, the Court conducted a non-evidentiary hearing on the postconviction motion to determine whether Carlson was entitled to an evidentiary hearing on the allegations (87:1-4, 17-23). The Court denied each of Carlson's claims, finding that the postconviction motion lacked "sufficient material facts that, if proven, would generate any kind of relief." (87:21, 23, 31-32) (Order Denying Postconviction Motion is attached as Appendix B and Oct. 24, 2013 Oral Ruling Court is attached as Appendix C).

[1] The postconviction motion also made other claims that are not raised in this appeal.

ARGUMENT

I. The Court erred in denying, without a hearing, Carlson's claim that his attorney was ineffective for advising that he had a realistic possibility of receiving a community-based sentence if he pled guilty.

A. Legal Standards

The circuit court must hold an evidentiary hearing when the defendant has made a legally sufficient postconviction motion. *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433. A postconviction motion is legally sufficient when the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. *Id.*

Whether a postconviction motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief is a question of law that is reviewed *de novo*. *Id.* However, if the defendant fails to allege sufficient facts to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without an evidentiary hearing. *State v. Bentley,* 201 Wis. 2d 303, 309-310, 548 N.W.2d 50 (1996). These discretionary decisions by a circuit

court are reviewed under the deferential erroneous exercise of discretion standard. *Allen,* ¶ 9.

A defendant may withdraw a guilty plea after sentencing upon a showing of "manifest injustice" by clear and convincing evidence. *State v. Rock*, 92 Wis. 2d 554, 558-59, 285 N.W.2d 739 (1979). *Rock* recognized that the "manifest injustice" requirement is met if the defendant was denied the effective assistance of counsel. *Id.*

To establish a claim of ineffective assistance of counsel, a defendant must show (1) that his counsel's performance was deficient and (2) that such performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show that counsel's conduct fell below an objective standard of reasonableness. *Id*. at 687–88. To establish prejudice, a defendant must show that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. *Id*. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*. Prejudice in the context of an ineffective assistance of counsel claim "should be assessed based on the cumulative effect of counsel's deficiencies." *State v. Thiel*, 2003 WI 111, ¶ 59, 264 Wis. 2d 571, 665 N.W.2d 305.

The Sixth Amendment demands effective assistance of counsel during the pretrial and plea bargaining process. *Missouri v. Frye*, 132 S.Ct. 1399, 1407 (2012). When a defendant enters his plea upon the advice of counsel, the "deficient performance" requirement of *Strickland* is satisfied if he shows

that the advice he relied on in entering his guilty plea was not within the range of competence demanded of attorneys in criminal cases. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985); *Bentley*, 201 Wis. 2d at 312. To satisfy the prejudice requirement of *Strickland* in the context of a case that resulted in a plea, the defendant must show that there is a reasonable probability that, but for counsel's unreasonable advice, he would not have pled guilty and would have insisted on going to trial. *Hill*, 474 U.S. at 59; *Bentley*, 201 Wis. 2d at 312. A defendant must allege sufficient facts that would allow a reviewing court to meaningfully assess a claim of prejudice beyond a conclusory allegation of misinformation by defense counsel. *Id*. at 318.

B. Carlson's attorney was deficient for advising him that probation was a realistic possibility.

The Circuit Court ruled that Carlson's attorney was not deficient in advising him that probation was realistic (87:19-20). The Court stated that Carlson had "strong ammunition" at sentencing by his acceptance of responsibility, and the fact that he had stopped the assaults for a long period of time (87:19). But while the Court correctly identified the positive aspects of Carlson's case, this does not mean that probation was a realistic possibility, given the seriousness of the allegations.

In his postconviction motion, Carlson offered evidence that his attorney believed that if he pled guilty, there was a realistic possibility that he could

receive probation[2] (63:4-7). On November 2, 2011, Carlson's attorney wrote to the prosecutor, "I am hopeful that we are able to structure plea discussions within the parameters of a community-based sentence." (62:5). And on January 27, 2012, Carlson's attorney wrote a letter to AJK, stating that he was trying to resolve the case in a way that would lead to probation, and possibly a jail sentence, but which would avoid a prison sentence (62:5). His letter stated, "My only consistent goal for Mr. Carlson has been to keep him out of the Wisconsin State Prison system." (62:5).

Similarly, counsel's advice to Carlson continued to convey the idea that probation was a realistic possibility upon pleading guilty (62:4-7).

Counsel should have known that probation was not a realistic goal for several reasons. First, the prosecutor had flatly rejected the possibility of probation in discussions with counsel. Second, the charges were serious; according to the complaints, Carlson sexually assaulted AKJ twice a week for five years, amounting to hundreds of assaults. Finally, according to objective information, similarly situated offenders rarely, if ever are sentenced to probation. Each of these is addressed below:

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[2] Since this case concerns whether Carlson alleged sufficient facts to entitle him to an evidentiary hearing, the entire postconviction motion (with exhibits) is attached as Appendix D. *See State v. Nielsen*, 2011 WI 94, 337 Wis. 2d 302, 805 N.W.2d 353.

1. The prosecutor had flatly rejected the possibility of probation in discussions with counsel.

Carlson alleged in his motion that his attorney advised him that a community-based sentence was a realistic possibility, despite communications with prosecutors that should have alerted counsel that such a sentence was extremely unlikely (62:4-7).

From the moment he agreed to represent Carlson, counsel attempted to negotiate a plea deal for a community-based sentence (62:4). However, the prosecutors consistently rejected these proposals (62:4). On February 13, 2012, DA Adam Gerol wrote to counsel, stating that "I think this is a prison case, and candidly not even a token one." (62:6). When counsel inquired what the State's final offer would be, DA Gerol responded, "I think most people would rank a repeat child sexual assault up there with OWI homicide in terms of crime severity," and further stated that "I would recommend a 30 year prison sentence, with 15 years' incarceration and 15 years extended supervision." (62:6). That same day, ADA Stephanie Hanson wrote to defense counsel, emphasizing her agreement with DA Gerol's recommendation, saying that, "based upon the repeated and long-term nature of the sexual relationship your client had with the victim in this matter, punishment is the primary factor" (62:6-7).

The unwillingness of the State to offer probation, along with its recommendation for such a long prison term would have alerted a reasonable attorney that a court would almost certainly sentence Carlson to at least some prison time.

2. The charges were serious, alleging hundreds of assaults.

In his postconviction motion, Carlson alleged that his attorney was deficient in failing to advise him that he could be blamed for hundreds of sexual assaults, making it even more unlikely that he might receive a community-based sentence if he pled. This should have been apparent to Carlson's attorney because the criminal complaint alleged that Carlson had sexually assaulted AJK "at least twice a week," beginning when AJK was in fifth grade and ending in ninth grade (1:2).

The postconviction motion alleged that counsel admitted that he was unaware of the potential number of assaults based on the allegations in the complaints and stated that had he known that the number could be as high as 300 to 400 times, he would not have advised Carlson to plead guilty (62:10-11). A reasonably competent attorney would realize that a defendant who could be blamed for that many sexual assaults is extremely unlikely to receive a community-based sentence.

3. Objective sources of sentencing data.

The postconviction motion set forth objective sources of sentencing data showing the unlikelihood of a community-based sentence. The motion first noted that attorneys who rely on limited personal memory of analogous cases and familiarity with a prosecutor or judge often can badly predict a sentencing outcome in a particular case (62:7). It is for this reason that tools have been developed which

allow an attorney to analyze sentencing distributions for similarly situated defendants. The motion alleged that one such tool is CourtTracker, a sophisticated research tool that can allow an attorney to explore criminal case data in search of patterns (62:7).

According to the motion, CourtTracker reveals that in the ten years since Truth in Sentencing (TIS-II) was passed, 354 defendants have pled guilty to Repeated Sexual Assault of the Same Child (Wis. Stat. § 948.025). (62:7). See Table 1 below. Of those cases, 72%, or 255 defendants, were sentenced to prison (62:7-8). Of those 255 defendants, 79% (200 defendants) received over a five-year prison sentence (62:8). Nearly 45% (112 defendants) were sentenced to more than ten years' incarceration (62:8).

Table 1

Prison Terms	Number of Prison Cases	Prison Terms as a % of Total Cases	Prison Terms as a % of Prison Cases
12 to 36 months	22	**6%** (22/354)	**9%** (22/255)
36 to 60 months	33	**9%** (33/354)	**13%** (33/255)
60 to 120 months	88	**25%** (88/354)	**35%** (88/255)
> 120 months	112	**32%** (112/354)	**44%** (112/255)
Totals:	**255**	**72%**	**100%**

Furthermore, the motion alleged that during the same period, nearly 50% of defendants who pled guilty to Second Degree Sexual Assault of a Child (Wis. Stat. § 948.02(2)) were sentenced to prison

(62:8). See Table 2 below. Of the defendants sentenced to prison, 53 percent (456 defendants) received over a five-year sentence (62:8).

Table 2

Prison Terms	Number of Prison Cases	Prison Term as a % of Total Cases	Prison Term as a % of Prison Cases
12 to 36 months	193	**11%** (193/1,809)	**22%** (193/860)
36 to 60 months	211	**12%** (211/1,809)	**25%** (211/860)
60 to 120 months	294	**16%** (294/1,809)	**34%** (294/860)
> 120 months	162	**9%** (162/1,809)	**19%** (162/860)
Totals:	**860**	**48%**	**100%**

In denying the postconviction motion, the Court commented on the above statistics, and used them to show that some individuals do receive probation (87:19). But that ignores the fact that Carlson was not charged with only Second Degree Sexual Assault of a Child, or only Repeated Sexual Assault of the Same Child. He was charged with *both* crimes. The motion alleged that in the past ten years, only five defendants pled guilty to both of these charges (62:8-9). See Table 3 below. None of these defendants avoided prison sentences (62:8-9). Rather, all five received prison sentences of at least six years' incarceration, followed by a long period of extended supervision (62:9):

Table 3

County	Case Number	Defendant	Prison	Extended Supervision[3]
Jefferson	07CF0066	Sean Manley	6 years	15 years
Marathon	07CF0108	Charles Bailke	6 years	6 years
Marathon	08CF0362	Andrew Nowak	6 years	6 years
Rock	07CF2967	Donald Drost	10 years	15 years
Waushara	08CF0017	Arthur Schwersenska	12 years	18 years[4]

If counsel had consulted objective sources of sentencing data such as CourtTracker, he would have found that that Carlson faced an extremely high likelihood of a prison sentence. Objective sources of sentencing data are not secret, but are available to defense attorneys.[5] A reasonable defense attorney

[3] Carlson's postconviction motion erroneously stated that this was probation, instead of extended supervision, according to CCAP.

[4] The 18 years includes 8 years extended supervision plus 10 years consecutive probation, according to CCAP.

[5] Indeed, Atty. Mastantuono was aware of objective sources of sentencing data. Posted on the Internet are the materials he distributed for his "Spectacular Sentencing Arguments" presentation at the 2011 Annual Criminal Defense Conference sponsored by the Wisconsin State Public Defender. Included among the materials is an article by Randall E. Paulson, entitled, *Using Gallion to Organize Sentencing Arguments: McCleary Requires More*. (62:Exh. C). The article expressly recognizes the importance of using sentencing distribution data. *Id*. at 5. In his remarks introducing the Paulson article, Atty. Mastantuono wrote:

would not advise his client that a community-based sentence was a realistic possibility given this available sentencing data.

C. Carlson was prejudiced by his attorney's deficient performance.

The Circuit Court found that Carlson had failed to establish prejudice since Carlson was telling his attorney that he did not want to go to trial (87:20). The problem with the Court's ruling is that Carlson's desire to avoid trial was based on counsel's assessment that probation was possible.

If Carlson had known that pleading guilty would have likely led to prison, he would have insisted on going to trial. Had the court conducted an evidentiary hearing, it would have heard evidence in support of this claim (62:13-15). The motion set forth trial counsel's statement that he would not have recommended a plea if he had known that Carlson would be held responsible for up to 400 assaults (62:11). The motion alleged that Carlson desperately wanted to avoid a prison term, and that he decided to plead guilty because his attorney informed him that by pleading guilty he had a realistic chance of avoiding a prison term (62:13).

> Attorney Randy Paulson originally authored and published this article following his litigation of the *Gallion* case. Since that time, I have rarely failed to consult it – and place a copy in my sentencing file – during any large case in which I anticipate a sentencing hearing. It is a concise and insightful outline of Wisconsin sentencing law.

Id. at 1.

The postconviction motion alleged specific facts regarding statements made by both Carlson and defense counsel. If proven, these facts establish a "reasonable probability" that Carlson would not have pled guilty but for counsel's deficient performance. Therefore, under *Hill* and *Bentley*, these alleged facts establish prejudice, entitling Carlson to a *Machner* hearing at which time he can offer evidence in support of his claims.

II. The Court erred in denying, without a hearing, Carlson's claim that trial counsel was ineffective at sentencing for failing to refute the Court's statement that Carlson sexually assaulted AJK 300-400 times.

A. Carlson's attorney's performance was deficient.

The criminal complaint alleged that Carlson sexually assaulted AJK "at least twice a week," beginning when she was in fifth grade and ending when she was in ninth grade (1:1). At the sentencing hearing, it became apparent that the Court had used this allegation to calculate the number of times Carlson had assaulted AJK. The Court stated that Carlson had abused her "anywhere from 300 to 400 times" (74:77) (Attached as Appendix E). This 300 to 400 figure had not been mentioned at any point by either party prior to this statement. Carlson's attorney did not object to the 300-400 figure, or introduce any evidence to refute it.

Carlson alleged in his postconviction motion that his attorney's performance was deficient in that he did not realize that Carlson could be blamed for assaulting AJK for up to 400 assaults (62:10). Carlson alleged that his attorney admitted to being unaware of the potential number of assaults based on the allegations in the complaints (62:10-11).

Carlson's attorney was aware that Carlson admitted to only five or six assaults, as this was reported in the PSI (35:4). Counsel was also aware that the State was alleging a higher number of assaults than his client had admitted to, as indicated by his statement at the plea hearing that, "there may be a wider scope and range of activity alleged by the State than is admitted to by Mr. Carlson" (86:5-6).

According to the postconviction motion, counsel said that he did not object immediately to the Court's statement regarding 300-400 assaults because he believed that the Court was reproaching Carlson before handing down a favorable sentence (62:21-22). However, counsel's decision to not object to that statement was unreasonable. By the time the 300-400 figure was mentioned, the Court had already rejected probation and stated that Carlson's conduct was "awful." (62:22, 74:75). A reasonable attorney at this point would not conclude that a favorable sentence was forthcoming; therefore counsel's decision to not object was below the objective level of competency required by *Strickland*.

Alternatively, Carlson claimed in his postconviction motion that even if counsel was making a reasonable strategic decision to not object to the 300-400 figure, it was still unreasonable for

him to not object after the Court pronounced the sentence (62:22). After that, there could be no strategic reason to not object, as was done in. *Rosado v. State*, 70 Wis. 2d 280, 284-287, 234 N.W.2d 69 (1975) (after the court imposed its sentence, the defense objected to "surprise" information that had been presented, and the circuit court then vacated the sentence to afford the attorney an "opportunity to respond to and rebut" this evidence).

Had counsel properly investigated, he could have presented evidence showing that Carlson could not have sexually assaulted AJK anywhere close to 300-400 times. This evidence was set forth in the postconviction motion and included information that:

- Carrie Kammerer, AJK's mother, stated that during the time frame of the alleged assaults, she was nearly always present while AJK was home (62:11).

- Carlson and AJK were apart for nearly 700 days of the approximately 1,385 days comprising the alleged offense period (62:11). This could be shown in two ways. First, Carlson was away from home for work for extended time during the alleged offense period (62:11). Second, AJK spent many nights away from home for various Girl Scout and church events, as well as summer camps. These events were memorialized in Kammerer's appointments books that she meticulously maintained. (62:11).

- Throughout the summer of 2000, Kammerer was home all day, on maternity leave after the

birth of the son she had with Carlson on May 13, 2000 (62:11).

- After the end of her maternity leave, Kammerer worked only three days a week during the remainder of the alleged offense period (62:11).

The above proffered evidence shows that the 300-400 figure was demonstrably high by a wide margin. It would be impossible for abuse to have occurred for the nearly 700 days out of the total 1,385 when AJK and Carlson were apart (62:11). In order for there to have been 400 incidents of abuse, Carlson would have had to assault AJK every other day for the remaining 685 days. It is extremely unlikely that so many assaults could have occurred without being noticed by Kammerer or others, especially considering Kammerer's greater presence in the home during her maternity leave, and her reduced workload after her maternity leave. (62:11).

In its decision denying Carlson's postconviction motion, the Circuit Court did not comment on Carlson's proposed evidence that the 300-400 figure was inaccurate. Instead, the Court simply found that counsel's approach was reasonable, and that it focused on Carlson's acceptance of responsibility, and the fact that the assaults had stopped for a long period of time (87:19-20).

But simply because counsel's performance was reasonable in certain aspects does not mean that he should have simply accepted the 300-400 figure adopted by the Court. All of the above information concerning the number of assaults was easily

available to counsel, but none of it was presented to the Court—either before or after pronouncing its sentence. Nor did counsel present any argument objecting to the Court's statement. This constitutes deficient performance.

B. Carlson was prejudiced by counsel's deficient performance.

There is a reasonable probability that, but for counsel's deficient failure to rebut the 300-400 figure, the results of the sentencing would have been different. Had counsel presented the above information to the Court, it stands to reason that it would have taken this information into account in making its sentencing decision.

In denying the postconviction motion, the Circuit Court stated that "[Carlson] was not being sentenced for 300 to 400 assaults, but I had heard how the effect of the numerous assaults he had on the victim and the effect it has had on the victim." (87:31).

But the Court's finding is clearly erroneous, as shown by the context of the Court's statements at sentencing as well as the sheer unlikelihood that anyone, including the Court, could have set aside its belief that Carlson sexually assaulted a minor up to 400 times.

The context of the Court's comments regarding the 300-400 assaults shows that it played a factor in the sentencing decision. Indeed, the allegation that led to the 300-400 figure was stated repeatedly prior to sentencing. The PSI stated that Carlson had

sexually assaulted AJK at least twice per week for many years (35:16). The Court noted that it had read the PSI three times (74:74). Then, at the sentencing hearing, the prosecutor emphasized that the assaults against AJK began when she was in fifth grade and occurred about two times a week until the ninth grade (74:8-9).

The Court's statements at sentencing also show that the allegation of 300-400 assaults was an important consideration in arriving at the sentence. It first must be noted that the seriousness of the offense was the primary factor considered by the Court. The Court began its comments by rejecting probation, stating that Carlson's conduct was "awful,' and that "sometimes, it's the very nature of the conduct that makes the Court reject probation (74:75). The Court then spent a considerable amount of time (five pages of transcript) addressing the seriousness of the offense and stated that "you don't want to think of yourself as a monster [but] your acts speak louder than any other words that describe your actions." (74:75-80).

It was while discussing the seriousness of the offense that the Court stated that Carlson had abused AJK "anywhere from 300 to 400 times." (74:77).

After discussing the seriousness of the offense, the Court then addressed Carlson's character and the need to protect the public (74:80-83). The Court then pronounced sentence (74:83-84). It is clear from the context of the Court's statements that the Court considered the 300-400 figure in arriving at Carlson's sentence.

Obviously, the offenses were serious—whether there were five or six, as maintained by Carlson, or 300-400 as stated by the Court. However, under any reasonable view, the degree of seriousness would differ depending on the actual number of assaults. Evidence rebutting the 300-400 figure necessarily diminishes the seriousness of the offense to some degree, and creates a reasonable probability of a different sentencing outcome.

It is highly unlikely that a Court could believe that a defendant committed 300-400 sexual assaults, mention that during its sentencing comments, but then not allow this belief to affect its sentencing decision. The combined sentence of 24 years was nearly twice as long as the 12-14 years recommended by the PSI, figure. Further, the long period of initial confinement was longer than any of the similarly situated defendants in Table 3 above. These comparisons provide strong evidence that the Court was influenced by the 300-400 figure.

In addition, the Court's ruling fails to account for any court's tendency to blame a defendant who does not take complete responsibility for the allegations. Given the Court's view that there were 300-400 assaults, and the fact that Carlson admitted to committing only five or six assaults, any court would negatively view Carlson's denials. But evidence that the 300-400 figure was incorrect would cause a court to not place as great blame on the defendant for his failure to admit responsibility for the larger number of offenses.

Therefore, counsel's failure to rebut the 300-

400 figure prejudiced Carlson. As Carlson alleged facts, which if proven, would entitle him to relief, the Court erred by denying his claim without an evidentiary hearing.

III. The Court erred in denying, without a hearing, Carlson's claim that the sentence was based on inaccurate information, that Carlson sexually assaulted AJK 300-400 times.

A defendant has "a constitutionally protected due process right to be sentenced upon accurate information." *State v. Travis*, 2013 WI 38, ¶ 17, 347 Wis.2d 142832 N.W.2d 491; *State v. Tiepelman*, 2006 WI 66, ¶ 12, 291 Wis. 2d 179, 717 N.W.2d 1. When a sentencing court gives explicit attention or specific consideration to inaccurate information, a defendant is entitled to resentencing, or a sentence reduction because the defendant's due process rights have been violated. *Id*. at ¶ 14. "It is not the duration or severity of this sentence that renders it constitutionally invalid; it is the careless or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide, that renders the proceedings lacking in due process." *Travis*, at ¶ 18. When a court relies on inaccurate information, it is irrelevant that other information – independent of the inaccurate information – may justify the sentence. *Id*., at ¶ 47. To prevail, a defendant must show that the information presented at the original sentencing was inaccurate and that the court actually relied on the inaccurate information during sentencing. *Id*., at ¶ 21. "Once actual reliance on inaccurate

information is shown, the burden then shifts to the state to prove the error was harmless." *Tiepelman*, at ¶ 26.

The Court's statements at the sentencing hearing support Carlson's allegation that it relied on the incorrect 300-400 figure in assessing the serious of the offense. The facts alleged in Carlson's postconviction motion, if proven, show that the 300-400 figure is inaccurate,[6] and therefore show that the Court relied on inaccurate information in sentencing Carlson. This entitles Carlson to sentence reconsideration. *See Tiepelman* at ¶ 14. As Carlson alleged facts entitling him to relief, the Court's denial of this claim without a postconviction hearing was in error. *See Allen,* at ¶ 9.

IV. Carlson's sentence was unduly harsh or unconscionable.

The Circuit Court's denial of Carlson's claim that his sentence was unduly harsh or unconscionable was clearly erroneous. Even where a defendant presents no new factor, a court may modify a sentence if it determines that the sentence is unduly harsh or unconscionable. *State v. Wuensch*, 69 Wis. 2d 467, 480, 230 N.W.2d 665, 672-73 (1975); *State v. Ralph*, 156 Wis. 2d 433, 438, 456 N.W.2d 657, 659 (Ct. App. 1990). Sentences well within the limits of the maximum sentence can be harsh or unconscionable, even though courts are unlikely to find them to be so. *State v. Scaccio,* 2000 WI App 265, 240 Wis. 2d 95, 108, 622 N.W.2d 449.

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[6] See Section II(A) for alleged facts which show that the 300-400 figure is inaccurate.

In ruling that Carlson's sentence was not harsh or unconscionable, the Court based its decision on the fact that the sentence was below the statutory maximum (87:31). The Court also noted the seriousness of the offense and the effect of the crime on AJK (87:31-32). However, the Court erred in not considering a number of compelling factors, including the following:

1. Carlson accepted responsibility for his conduct. He demonstrated this unequivocally when he pled guilty to the offenses without the benefit of a plea agreement (86:17-21)

2. Carlson was 43 years old at the time of his arrest and had no criminal record (35:1, 7). He had never been arrested prior to this offense (62:23).

3. Despite continued access to AJK, Carlson ceased his criminal conduct without law enforcement intervention over seven years before his arrest in this case (35:13-14).

4. Although Carlson pled guilty to two separate offenses, there is essentially only one course of conduct, encompassed by the repeated acts charge in Count 2. Had the family not moved to Ozaukee County from Washington County near the end of the offense period, Count 1 would not have been charged.

5. Carlson participated in sex offender treatment for nine months leading up to the sentencing hearing. Under the care of Brandie Tetzlaff, MSSW, LCSW, at Pathways Counseling

Center, Carlson was an active and engaged participant, taking positive steps in his group and individual therapy sessions (35:14).

6. Tetzlaff responded directly to the PSI author's impressions of Carlson's treatment progress: "How Mr. Carlson demonstrates responsibility today has progressed from 8 months ago and it is expected that his responsibility will continue to progress as he continues through treatment . . . . [I]t is important to note that Mr. Carlson is truly at the beginning stages of the treatment process. These offenses happened years ago and Mr. Carlson has not had the benefit of treatment until recently" (62: Exh. G).

7. Carlson posed no risk to the community at the time of sentencing. A psychological evaluation and risk assessment conducted by Dr. Michael Woody determined that Mr. Carlson's risk of recidivism was virtually non-existent (62:Exh. H). Tetzlaff agreed with Dr. Woody that Carlson posed a low risk of re-offending and that "he should continue to be able to be safely monitored in the community." (62:Exh. F).

8. The combined 23 year term ordered by the court was significantly larger than the combined 12-14 year term recommended by the Pre-Sentence Investigation (35:18).

9. The term of initial confinement ordered by the court was considerably longer than the terms of initial confinement for any other defendant who pled to both charges (Repeated Sexual Assault of a Child and Second Degree Sexual Assault of

a Child), as shown in Table 3.

10. AJK did not think that prison would help Carlson. Instead, she wanted Carlson to continue with therapy (35:7).

CONCLUSION

For the above reasons, Carlson respectfully requests that this court remand this case to the circuit court for an evidentiary hearing on his claims that his attorney was ineffective, or grant him the right to withdraw his plea, be resentenced, or have his sentence modified.

Respectfully submitted this 3rd day of April, 2014.

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John Arnold
Law Student

CERTIFICATION AS TO FORM

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 5,954 words.

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Gregory W. Wiercioch

ELECTRONIC CERTIFICATION

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

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Gregory W. Wiercioch

CERTIFICATION AS TO APPENDICES

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: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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 including juveniles and parents of juveniles, with a notation that the portions of the record have so reproduced to preserve.

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Gregory W. Wiercioch

TABLE OF APPENDICES

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