STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 14 AP 1019

In re: the findings of contempt:

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

STEPHANIE M. PRZYTARSKI,

Defendant-Appellant.

# REPLY BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDERS ENTERED ON MAY 7, 2013 AND APRIL 17, 2014 IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, BRANCH IV, THE HONORABLE MEL FLANAGAN PRESIDING.

Respectfully submitted,

STEPHANIE M. PRZYTARSKI,
Defendant-Appellant

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## ARGUMENT

### I. Ms. Przytarski should have been allowed to present evidence of an affirmative defense.

The State is correct that not every affirmative defense must permitted by the courts. However, its reliance on State v. Dundon is misplaced. In Dundon, the defendant wanted to assert the defense of necessity to a concealed carry charge because he was transporting a large sum of money to a bank and felt it would be better if he had a gun. 226 Wis. 2d 654, 594 N.W.2d 780, 782 (1999). Mr. Dundon could offer evidence of a generalized threat (high crime and past robberies), but not a specific threat that would justify the defense of necessity. Id. at 783.

The facts in this case are easily distinguished from those in Dundon. First of all, Ms. Przytarski was not attempting to assert one of the general privileges outlined in Wisconsin Statutes section 939.45. Instead, she was asserting an affirmative defense that was specifically authorized by the charging statute. Wis. Stat. § 948.31(4)(a)1. To do so, she needed to demonstrate that she did not comply with the custody order because of a reasonable belief that she was protecting her daughter from a situation that posed the threat of physical harm. Id.

The physical harm in question was self-harm. The State persists in questioning whether self-harming behaviors actually constitute emotional harm. While self-harm inevitably has emotional roots, the same could often be said of physical harm done by another. Suicide is self-harm that stems from emotional issues, but no one would question the physical harm that results. In this case, Ms.

Przytarski's daughter would engage in self-harming behaviors like repeatedly banging her head against solid objects following her visitations with Mr. Vallejos. (R. 36:11). According to Ms. Przytarski's offer of proof, this was witnessed by Ms. Przytarski and others. (R. 36:15). Also, Ms. Przytarski intended on calling two psychologists who had examined her daughter to more clearly establish the link between these self-harming behaviors and Mr. Vallejos. (Id.)

The State has said that the psychologist's opinions were dated and would not have shown conclusively that visitations with Mr. Vallejos caused the self-harm. Such a showing, despite how often the State references a causal nexus, is not necessary. Ms. Przytarski should have been allowed by statute to testify about the self-harming behaviors based solely on what she observed. The State may not think it was reasonable for Ms. Przytarski to believe that her daughter was in danger because of visits with Mr. Vallejos and the self-harming behaviors that followed. The State may believe the self-harming behaviors and the emotional issues that it concedes S.V.K. had were due to the contentious nature of the ongoing custody dispute. However, what the State believes does not matter in the slightest. Whether Ms. Przytarski's belief was reasonable is a question for the jury. Yet, Judge Flanagan robbed Ms. Przytarski of the right to have a jury decide that question, which is central to her guilt or innocence.

## II. But for Attorney Carson's misinformation, Ms. Przytarski would have insisted on a trial to protect her appellate rights.

Ms. Przytarski's affidavit in support of her post-conviction motion, this appeal, and the record all support the conclusion that she would have insisted on a trial if she had known it was the only way to get appellate review regarding her affirmative defense. Any argument to the contrary defies common sense. In its brief, the State refers to State v. Bentley in support of the proposition that it is not enough for a defendant to merely claim that he or she would not have entered a plea but for a lack of information. However, the facts in this case are not similar to those in Bentley. Mr. Bentley was convicted of felony murder and first-degree intentional homicide and received a very substantial sentence in excess of the State's recommendation. 201 Wis. 2d 303, 548 N.W.2d 50, 52 (1996). Mr. Bentley's motivation to say or do anything to improve his lot is clear, which is why his mere claim that he would not have entered a plea seems hard to believe.

Ms. Przytarski stated clearly in her affidavit that she would not have entered a plea if she had known that doing so would forfeit most of her appellate rights. Unlike Mr. Bentley, all her actions prior to entering a plea and all of her post-plea actions support this contention. In its brief, the State provided additional background information on the long-running custody dispute between Ms. Przytarski and Mr. Vallejos. The State also detailed the materials that Ms. Przytarski provided to the trial court, which include materials prepared for litigation that was occurring as far back as 2007. She had been trying for years to

prevent Mr. Vallejos from seeing her daughter because she was concerned for her daughter's safety. We know that Ms. Przytarski was also actively engaged in an appeal of the family court order. (R. 33:16). In short, this is a woman that has been litigating issues relating to her daughter's placement for a very long time. There is no reason to think she would not want to pursue her defense in this matter as long as possible.

The State points out that Ms. Przytarski completed a plea questionnaire and was told that by entering a plea she was waiving her right to a trial and the right to present a defense. This means nothing. If she was told by her attorney that she had no chance at trial without her affirmative defense and the only possibility was to appeal on that basis, there would be no reason for her to doubt his expertise. This is particularly true because many defendants are able to enter a plea, waive their rights to a trial and to present a defense, and then appeal a previously lost motion (e.g. a defendant's suppression motion). Despite claims by the State, Ms. Przytarski's decision to enter a plea was not a strategic decision in the hope that the no contact order involving her daughter would be lifted. It is true that Ms. Przytarski knew that if she entered a plea, her bond would end and she might be allowed to see her daughter again. If that was her lone motivation, she would have entered a plea in January at the start of this case, not in May.

Ms. Przytarski's decision to pursue an appeal is indicative of the fact that she had no intention of merely entering a plea and ceasing litigation in this matter. Mr. Bentley received a life sentence and had no reason not to try every possible

avenue available to him. Ms. Przytarski was able to enter a plea to a reduced misdemeanor charge and received probation. There would be no reason to pursue an appeal following such a good outcome, unless it had been your intention all along. Through counsel, she acknowledged that the affirmative defense was essential if she was to have any chance of success in defending herself. After pleading to a misdemeanor and receiving probation, why would she pursue an appeal if she knew that she had waived any chance of appealing the court's decision regarding her affirmative defense? The record, her personal history, and common sense all clearly support her statement that she would not have entered a plea if she had been properly informed by Attorney Carson.

## III. Ms. Przytarski was prejudiced by the incorrect information Attorney Carson provided regarding her ability to appeal.

Whether Ms. Przytarski should have been allowed to present a statutorily authorized affirmative defense is the central question in this matter. If she did, then there is a reasonably probability that the outcome would have been different. She would have appealed Judge Flanagan's decision and eventually had a second trial at which she may have been acquitted of the original charge. This satisfies the requirement in Strickland v. Washington: that a person asserting ineffective assistance of counsel must also be able to demonstrate prejudice by showing "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. 668, 694 (1985).

It is clear from its filings in the trial court as well as its brief, that the State does not believe Ms. Przytarski should have been able to present an affirmative defense. Therefore, the State asserts, her ineffective assistance of counsel claim must fail. This is the same circular logic in which Judge Flanagan engaged when denying Ms. Przytarski's post-conviction motion. The trial court judge obviously believes that her decision on the question of the affirmative defense was legally correct; therefore, she can find no prejudice stemming from Attorney Carson's deficient performance. This is what makes Attorney Carson's error so damaging. By misinforming Ms. Przytarski of her appellate options, he not only jeopardized her ability to get meaningful review of Judge Flanagan's refusal to allow her to put on a defense, but he also made it more difficult for her to prevail on an ineffective assistance of counsel claim. This should not be allowed.

## CONCLUSION

For all of the reasons stated in this brief and Ms. Przytarski's previous submission, the judgment of the trial court should be reversed. Ms. Przytarski respectfully asks this action be remanded to circuit court where she should be permitted to withdraw her plea, granted a trial, and allowed to present evidence to support her affirmative defense.

Dated this 13th day of October, 2014.

Respectfully Submitted,

_____
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## CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,546 words.

I also certify I have submitted an electronic copy of this brief that complies with the requirements of Wis. Stat. § 809.19(12). That electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certification has been served upon both the court and all opposing parties.

Dated this 13th day of October, 2014.

Signed,

_____

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State Bar No. 1074251