STATE OF WISCONSIN

C O U R T A P P E A L S

District I

Case No. 2015AP000522-CR

STATE OF WISCONSIN,

Plaintiff-Respondent

vs.

ENNIS BROWN,

Defendant-Appellant

ON APPEAL TO REVIEW THE JUDGMENT OF CONVICTION ENTERED ON OCTOBER 23, 2013, AND THE DECISION AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF ENTERED ON MARCH 4, 2015, THE HONORABLE DAVID BOROWSKI PRESIDING ON BOTH, BOTH ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY.

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. THE RESPONDENT'S BRIEF MISINTERPRETS AND MISSTATES THE FACTUAL CIRCUMSTANCES PRESENT CONCERNING DEFENDANT'S SPEEDY TRIAL MOTION. FURTHERMORE, RESPONDENT'S CASE LAW IS INAPPLICABLE TO THE PRESENT SITUATION.

In its Brief, the Respondent attempts to place the blame for much of the delay in the case on the Defendant. However, this is inaccurate.

Michael Hicks had failed to visit with Defendant for approximately seven months. True, this includes the period of time that his license had been suspended multiple times. However, the

trial court record, as indicated in Appellant's Brief, had indicated that the preliminary hearing had occurred on August 10, 2012. There had been a final pretrial hearing on November 30, 2012. Finally, Hicks had been allowed to withdraw on March 29, 2013. During this entire period, Hicks had only met with the Defendant on the date of the final pretrial. He never met with him at any other time. At that hearing, Defendant had indicated that Hicks had never visited him at the jail. Yet, Hicks never again met with him, even after that hearing. The Motion to Dismiss due to Speedy Trial Violation had contained jail records confirming Defendant's representations. Furthermore, Defendant had never received any of the police reports, and no private investigator met with him. Hicks had never filed any pretrial pleadings or Motions. There is no indication that he ever performed any work as Defendant's attorney. Hence, during this entire period, Defendant was either legally, or factually, without counsel.

The American Bar Association Standards has established standards for attorney's conduct. Attorneys should establish a relationship of trust and confidence with the accused. This includes communication and contact. A.B.A. Standards for Criminal Justice, Chapter 4: The Defense Function (Third Edition), August 1990, Standards 4-3.1(a), 4-3.6, 4-3.7. Also, a defense attorney has a duty to conduct a prompt investigation of the case, and to investigate all facts relevant to the merits of the case. Id.,

Standard 4-4.1(a). The Wisconsin Ethical Rules mirror these standards. See Rules of Professional Conduct for Attorneys, Chapter 20A SCR 20:1-4 Communication (2015). Hence, based upon these standards, clearly, Hicks had failed to abide by the legal standards required of an attorney. Under the facts of this present matter and the standards, his performance was deficient.

True, the public defender system was not responsible for failing to "catch" Hicks's suspensions. Nevertheless, his representation during the entire period of time was clearly deficient. Unless a Defendant charged with a serious offense has counsel able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the proceedings themselves. A party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the proceedings are fair. Because the right to counsel is so fundamental to a fair trial, the Constitution cannot tolerate proceedings in which counsel, though present in name, is unable to assist the Defendant to obtain a fair decision on the merits. When a State obtains a criminal conviction through such a trial, it is the State that unconstitutionally deprives the Defendant of his liberty. Evitts, Superintendent, Blackburn Correctional Complex, et al., vs. Lucey, 469 U.S. 387,

105 S.Ct. 830, 83 L.Ed.2d 821 (1984). If the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State. It is not the gravity of the attorney's error that matters, but that it constitutes a violation of petitioner's right to counsel, so that the error must be seen as an external error imputed to the State. Coleman vs. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). The State of Wisconsin has adopted this principle. See e.g., State vs. Ziegenhagen, 73 Wis.2d 656 at 670, 245 N.W.2d 656 (1976). Hence, based upon the foregoing, Hicks' entire over seven month period of lack of representation, whether legal or factual, must be attributed to the State.

Contrary to the Respondent, Vermont vs. Brillon only indicates that assigned counsel are not treated as agents of the State simply because they have been appointed through the public defender's office. Assigned counsel are generally not state actors for purposes of speedy trial claim. Vermont vs. Brillon, 556 U.S. 81, 129 S.CT. 1283, 173 L.Ed.2d 231 (2009). This case essentially holds nothing more than such. However, this is not the issue presented here.

Interestingly, one of Brillon's attorneys, Sleigh, had been appointed through the Vermont Defender General's office on January 15, 2003. Brillon had been without counsel for two months prior to that date. All that Sleigh had done as Brillon's lawyer was sought

extensions of various discovery deadlines, noting that he had been in trial out of town. On April 10, Sleigh withdrew from the case, based on modifications to his firm's contract with the Defender General. Vermont vs. Brillon, 556 U.S. 81 at 87. However, the State had conceded at oral arguments before the Vermont Supreme Court that Sleigh's period of representation was properly attributed to the State. Furthermore, the State had also conceded that the total of seven months that Defendant was actually without counsel during the entire period of his case should also be attributed to the State. The State sought to withdraw this concession concerning Sleigh's representation before the U.S. Supreme Court, but the Court did not rule upon this concession. However, the State never sought to withdraw its concession about the time that Brillon was without counsel. Id. at 93. Hence, the State, in Brillon, had originally conceded that ineffectiveness of counsel must be attributed to the State. The U.S. Supreme Court did not reject this conclusion.

As indicated in Appellant's Brief Defendant had never sought the withdrawal of attorney Plaisted. The Respondent's Brief fails to indicate such. Defendant had indicated on May 14, 2013 that he did not object to Plaisted not filing Defendant's Motions if Plaisted felt that they conflicted with his ethics or anything that would jeopardize his position. The Respondent's Brief does not indicate this statement. Again, on that date, Defendant had

reasserted his speedy trial rights. Furthermore, the trial court had granted Plaisted's request only after Defendant had been removed from the courtroom. Defendant, contrary to the Respondent, had never "concurred" in this request. Contrary to the Respondent, Plaisted's Motion to withdraw was not at the request of the Defendant. This request was not a "tactical" decision regarding trial strategy, as envisoned by State vs. Williams, 270 Wis.2d 761 at 782, 677 N.W.2d 691 (Ct.App. 2004). Accordingly, Plaisted was not acting as Defendant's representative/lawyer agent on May 14, 2013.

Nathan Opland-Dobbs had not been appointed for a month after May 14, 2013. His first appearance was on June 14, 2013. This is one month during which Defendant was without counsel. On that date, the court, on its own and without Defendant's concurrence, had ordered a competency evaluation. The court found that Defendant was acting erratically. The Respondent fails to indicate that this included comments about a conspiracy and about people out to get him. (103:13-14). Hence, contrary to the State, this evaluation was not just about aggressive behavior. Here, the competency evaluation that prompted this delay of the case was not attributed to the Defendant, but instead to concerns about his competency.

Also, contrary to the Respondent, in Vermont vs. Brillon, the trial court had never ordered a competency evaluation. Hence, the Respondent's reliance of this case for the proposition that

aggressive behavior attributes against the Defendant is misapplied. (Resp. Brf., page 7).

The Respondent has indicated, essentially, that since June 14 was prior to the trial date of June 24, this delay in the appointment of Opland-Dobbs was not relevant. (Resp. Brf, page 7). However, logically, this is not accurate. Defendant was without counsel during this time period from May 14 until June 14. As previously discussed in this Brief, this period is attributable to the State, as the State of Vermont had conceded in Vermont vs. Brillon.

Furthermore, there is no indication that Opland-Dobbs would have been ready to proceed to trial a scant ten days after June 14. This, especially since the court had previously found the case to be complex. The original trial date was June 24, 2013. Hence, as well, this delay until June 14 cannot be attributable to the Defendant.

Also, although a status date had occurred on June 28, there was no indication that Opland-Dobbs would have been ready for trial on that date, or reasonably shortly thereafter, either. Originally, as indicated, on November 30, 2012, the trial court had tolled Defendant's statutory speedy trial act right due a finding that the case was "complex due to the number of victims and the number of counts." (99:14). This was over Defendant's objection. Nothing had changed with respect to this "complexity of the case" since that

date until June 28, or even until August 13, 2013. This is the date that the trial court had allowed Opland-Dobbs to withdraw. Hence, all of this delay time is attributable to the State. All of this delay, whether attributable to the "complexity of the case" or not, is attributable to multiple trial counsels' ineffectiveness and/or acting not as a legal agent, and/or time that Defendant was without counsel. Delays had been over the Defendant's objections and his repeated assertions of his speedy trial rights. Under the relevant and applicable case law, all of this time is attributable to the State. This is a period of over a year. Hence, contrary to Respondent, Defendant's constitutional right to a Speedy Trial had been violated.

Respondent has argued that Defendant had waived his right to argue this issue on appeal by disavowing the Motion to Dismiss. (Resp. Brf. Page 8, footnote 1). However, the trial court, immediately after issuing its oral Decision denying the Motion, had indicated that it did not allow the Defendant to withdraw this Motion. (109:28). Hence, this issue is properly before this Court.

Based upon the foregoing, as well as the arguments in Appellant's Brief, this Court must reverse the trial court's Decision and Order denying Defendant's Motion to Dismiss.

II. THE STATE INCORRECTLY INDICATES THAT DEFENDANT WAS COMPETENT TO REPRESENT HIMSELF. THE RELEVANT FACTS AND LAW MATERIALLY REBUT THIS CONTENTION.

Here, the Respondent has asserted that Defendant's sole basis

for asserting that he was not competent to proceed pro se was his purported pretrial obstructive behavior. Furthermore, the Respondent has asserted that this is insufficient for a pretrial finding that a Defendant is not competent to proceed pro se. Finally, the Respondent equates competence to stand trial with competence to represent oneself. However, the Respondent is incorrect on all of these grounds.

First, the Respondent is incorrect in asserting that Defendant's sole basis for asserting that he was not competent to proceed pro se was his pretrial obstructive behavior. As indicated in Appellant's Brief, Defendant's pretrial behavior exhibited erratic and questionable behavior, throughout the pretrial proceedings, outside of supposedly mere obstructive behavior. As indicated by the trial court at multiple times, Defendant had acted erratically throughout the proceedings. He had made comments about the devil, various conspiracies, people out to get him, that Ann Bowe was the trial court's "baby's mama" followed by a question to the clerk as to whether or not she was the court's "baby's mama," and other questionable comments and behavior. There was an issue with Defendant exhibiting self harm as well as being on suicide watch. As the court had repeatedly indicated, this was more than mere manipulative obstructive behavior. This was behavior that reflected a lack of competence.

Furthermore, the Respondent has failed to mention that the

second psychological evaluation, a scant week prior to the jury trial, was one of an evaluation of Defendant's competence to proceed pro se as well as to stand trial. The Respondent has also failed to mention that Dr. Pankiewicz had indicated in that report that Defendant's conduct had caused concerns about an ability to proceed pro se. Among the comments, Dr. Pankiewicz had noted that Defendant had made questionable choices as well as exhibited problematic behaviors. He had exhibited paranoid thoughts. Furthermore, he had stopped taking his anti-depressant medications. These medications had been prescribed to treat his clinically diagnosed depression. (29:1-4). The Respondent's Brief fails to note this psychological problem that existed as of early October, 2013.

On October 4, 2013, both standby counsel as well as the State itself had questioned Defendant's competence to proceed pro se. Standby counsel had indicated that, based upon his contact with the Defendant, that Defendant had no insight and ability to represent himself. The State had concurred by indicating that Defendant had a distorted and unrealistic perception. (111:6-11). The Respondent's Brief fails to mention any of this indications.

The Respondent's Brief cites both competence evaluations for the argument, essentially, that because one is competent to stand trial, then one is competent to proceed pro se. However, as indicated in Appellant's Brief, this is not the correct law in

Wisconsin. The level of competence required for self-representation is higher than that of standing trial. State vs. Klessig, 211 Wis.2d 194, 564 N.W.2d 716 (1997); State vs. Pickens, 96 Wis.2d 549, 292 N.W.2d 601 (1980). The Appellant's Brief has further detailed and explained this law. (Appl. Brf, pges 44-46). This present Brief will not repeat this detail. Hence, the Respondent's Brief has materially provided erroneous law. This is fatal to the Brief's analysis.

Furthermore, contrary to the State, pretrial disruptive behavior, by itself, can be a basis for a finding of lack of competence. This, although here, as the court had repeatedly indicated throughout the proceedings, Defendant's behavior was more than merely aggressive and disruptive.

In State vs. Haste, Haste's disruptive behavior had occurred before the trial had even commenced. This behavior had occurred the morning of the jury trial, prior to the arrival of the jury panel. This was when Haste had made his request to proceed pro se. He had been excused prior to any portion of the trial. State vs. Haste, 175 Wis.2d 1, 500 N.W.2d 678 (Ct.App. 1993). Hence, the State is incorrect in asserting that the behavior had occurred at the trial.

Furthermore, the Court of Appeals in Haste had indicated the following:

> "When, therefore, the Assistant District Attorney argued that Haste was not 'competent to fire (this attorney),' and when the Deputy District Attorney argued that Haste 'cannot represent himself,' 'he has waived

> his right to self-representation,' 'his attorney...has to continue,' they were offering a legally imprecise but largely accurate caution to the court implicitly consisting of several points: (1) Haste had not and, due to his disruptive conduct, could not provide the 'affirmative showing' of waiver, required by Pickens; (2) Haste had not and, due to his disruptive behavior and resulting exclusion from the courtroom, could not demonstrate the 'competency' that would enable him to represent himself; (3) assuming that he was seeking to represent himself, Haste, therefore, effectively had waived his right to self-representation; (4) accordingly, Haste was required to have his attorney continue to represent him. Each point of caution was correct." State vs. Haste, 175 Wis.2d 1 at 25-26.

Hence, contrary to the State, pretrial disruptive behavior, by itself, is a valid basis for a finding of a lack of competency to proceed pro se. Accordingly, even if Defendant's pretrial conduct was merely disruptive and manipulative, this by itself was a basis for a conclusion that the trial court had erred in allowing Defendant to proceed pro se. However, and further unfortunately for the Respondent, as argued herein and in Appellant's Brief, Defendant's pretrial behavior was more than merely disruptive and manipulative.

Furthermore, contrary to the Respondent, Defendant's lack of judgment is a basis for a conclusion that he was not competent to proceed pro se. The Appellant's Brief cites abundant case law for the proposition that a person of less than average intellect, or lacks the ability to effectively communicate, or because of less than average intellectual powers is unable to attain the minimal understanding necessary to prevent a defense, is not competent to

proceed pro se. (Appl. Brf, pages 44-46).

Here, the record is abundantly clear that Defendant did not meet the legal standard for self representation. This, based upon various cited sources such as the trial court itself, a psychological evaluation report, standby counsel, and the State itself. Hence, the Respondent is incorrect in asserting that Defendant was competent to represent himself.

Based upon the arguments raised herein, as well as in Appellant's Brief, the trial court had erred in denying Defendant's Postconviction Motion. This denial Decision and Order must be reversed.

CONCLUSION

Based upon this present Reply Brief, and the arguments raised in Appellant's Brief, Defendant respectfully requests that this Court reverse the erroneous Decisions and Orders Denying Postconviction Motion and Motion to Dismiss. Defendant requests that this Court enter all appropriate decision(s) consistent with the issue(s) that Defendant had raised in these Briefs.

Dated this 3rd day of June, 2015.

Respectfully Submitted,

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CERTIFICATION

I hereby certify that the Appellant's Reply Brief of Defendant-Appellant in the matter of State of Wisconsin vs. Ennis Brown, 2015AP000522 CR conforms to the rules contained in Wis. Stats. 809.19 (8)(b)(c) for a Brief with a monospaced font and that the length of the Brief is thirteen (13) pages.

Dated this 3rd day of June, 2015, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-Appellant

CERTIFICATION

I hereby certify that the text of the e-brief of Appellant's Reply Brief of Defendant-Appellant in the matter of State of Wisconsin vs. Ennis Brown, Case No. 2015AP000522 CR is identical to the text of the paper brief in this same case.

Dated this 3rd day of June, 2015, in Waukesha, Wisconsin.

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Attorney for Defendant-Appellant