STATE OF WISCONSIN
IN SUPREME COURT
Appeal No. 2015AP000993 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

HEATHER L. STEINHARDT,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals,
District II, Affirming a Judgment of Conviction and
an Order Denying the Postconviction Motion,
Entered in Ozaukee County Circuit Court,
the Honorable Sandy Williams, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUES PRESENTED

1. Was Ms. Steinhardt's constitutional right to be free from double jeopardy violated when she was convicted of failure to act and first-degree sexual assault of a child as party to a crime, pursuant to Wis. Stat. §§ 948.02(3) and 948.02(1)(e)?

The circuit court ruled that Ms. Steinhardt's convictions for failure to act and first-degree sexual assault of a child did not violate double jeopardy.

The court of appeals did not rule on this issue, instead concluding that the claim of double jeopardy could not be resolved by a review of the record before the court and therefore, Ms. Steinhardt waived her right to direct review of her double jeopardy claim by entering no contest pleas to both charges.

2. Did Ms. Steinhardt waive her right to raise the double jeopardy claim by pleading no contest to the charges?

The circuit court did not address this issue because it held that the convictions did not violate double jeopardy.

The court of appeals held that Ms. Steinhardt waived her right to raise the double jeopardy issue by entering no contest pleas to both charges.

3. Did Ms. Steinhardt's postconviction motion sufficiently allege trial counsel was ineffective for failing to advise her of the double jeopardy issue and that the deficiency caused her prejudice, such that she was entitled to a hearing on the issue?

The circuit court did not address this question because it held that the convictions did not violate double jeopardy.

The court of appeals held that Ms. Steinhardt's postconviction motion was insufficient to entitle her to a hearing.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has deemed this case appropriate for both oral argument and publication.

STATEMENT OF THE CASE AND FACTS

On April 1, 2013, Walter Steinhardt ("Walter") sexually assaulted F.G. in the presence of his wife, Heather Steinhardt. At the time of the assault, F.G., the daughter of Ms. Steinhardt and the stepdaughter of Walter, was twelve years old. (1:1).

According to Ms. Steinhardt, Walter was a heavy drinker and abusive to her throughout the course of their marriage. (29:8). On April 1, 2013, Walter demanded a sexual encounter with F.G., and Ms. Steinhardt submitted to his demands. Ms. Steinhardt brought F.G. into the bedroom she and Walter shared. (1:2). While Ms. Steinhardt sat on the bed, Walter told F.G. to get undressed and proceeded to sexually assault F.G., digitally penetrating her, having her engage in oral sex with him, and engaging in penis to vagina sexual intercourse with her. (1:2). Afterward, Ms. Steinhardt followed F.G. into the bathroom where F.G. took a shower. (1:2).

Two months later, F.G. disclosed the details of the assault to a family member who contacted authorities on her behalf. (29:2). There were no other allegations of assault.

The State initially charged Ms. Steinhardt with failure to act and first-degree sexual assault of a child as party to a crime, but after Ms. Steinhardt waived her preliminary hearing, an information was filed that added a third count of child enticement, pursuant to Wis. Stat. § 948.07. (1; 9) (App. 175-177).

On May 13, 2014, the circuit court accepted Ms. Steinhardt's no contest pleas to all three counts as alleged in the information. (66:10). There were no amendments and no read-in offenses. During the hearing, the court relied upon the facts in the criminal complaint as a basis for the findings of guilt, without objection from either party. (66:11). There was no request from the State to supplement the factual record orally at the plea hearing.

On June 19, 2014, the court sentenced Ms. Steinhardt to prison terms totaling 37.5 years, 22.5 years initial incarceration (IC) followed by 15 years extended supervision (ES), broken down as follows:

> Count 1, failure to act: 12.5 years imprisonment (7.5 years IC, 5 years ES);
>
> Count 2, first-degree sexual assault as party to a crime: 25 years imprisonment (15 years IC, 10 years ES), consecutive to Count 1; and
>
> Count 3, child enticement: 25 years imprisonment (15 years IC, 10 years ES), concurrent to Count 2, but consecutive to Count 1.

(67:42-43).

Ms. Steinhardt subsequently filed a postconviction motion, raising two claims. (44). First, she alleged that her convictions on Counts 1 and 2 were multiplicitous and violated double jeopardy protections. (44:2). Second, she alleged ineffective assistance of counsel based on her trial attorney's failure to advise her of this double jeopardy violation prior to her plea to all charges. (44:7). Ms. Steinhardt alleged that, had she known about the viable double jeopardy claim, she would not have pled no contest to both Counts 1 and 2. As a result, she asked the circuit court to vacate the failure to act conviction and sentence because this was the less-serious of the two counts.

The circuit court held a hearing on the postconviction motion. On the day of the hearing, the defense was prepared to present testimony from both trial counsel and Ms. Steinhardt. Prior to the testimony, however, the court concluded that Counts 1 and 2 were not multiplicitous and that therefore, testimony was unnecessary. (51; 68:28) (App. 175, App. 177). The court accepted an offer of proof that Ms. Steinhardt's trial attorney had not recognized the multiplicity issue and, therefore, had no strategic reason for failing to advise her about that issue or failing to object on that ground. (68:30). The offer of proof also set forth that Ms. Steinhardt planned to testify that she would not have pled to the charges if she had known there was a double jeopardy claim. (68:30). The State made no objection to the offers of proof, stating, "I think that sounds fair." (68:30).

Ms. Steinhardt appealed. The court of appeals affirmed the circuit court ruling in a per curiam decision issued January 21, 2016. (App. 101-106). In its decision, the court first held that Ms. Steinhardt's double jeopardy claim could not be resolved solely on the record and therefore, by entering no contest pleas to both charges, she "relinquished

the right to direct review of her double jeopardy claim." (Slip op. at ¶8, citing ***State v. Kelty***, 2006 WI 101, 294 Wis. 2d 62, 716 N.W.2d 886). Second, as to the claim of ineffective assistance of counsel, the court held that Ms. Steinhardt's postconviction motion failed to sufficiently allege prejudice and that therefore, she was not entitled to an evidentiary hearing. (Slip op. at ¶¶11-12, citing ***State v. Bentley***, 201 Wis. 2d 303, 313-18, 548 N.W.2d 50 (1996)). Ms. Steinhardt petitioned for review of the court of appeals holding. This court granted the petition.

ARGUMENT

I. Ms. Steinhardt's Convictions For Failure To Act And First-Degree Sexual Assault Of A Child Are Multiplicitous, Because Counts 1 And 2 Are Identical In Both Law And Fact. In the Alternative, By Enacting Wis. Stat. § 939.66(2p), the Legislature Intended To Prohibit Simultaneous Convictions For § 948.02 Offenses When the Conduct Is Identical In Fact And Therefore, Counts 1 And 2 Are Multiplicitous.

A. Introduction and standard of review

Both the Fifth Amendment to the United States Constitution and Article 1, sec. 8 of the Wisconsin Constitution protect an individual from twice being placed in jeopardy for a single offense. Long-standing case law has established that this protection includes a prohibition against subjecting a defendant to multiple punishments for the same offense. ***State v. Sauceda***, 168 Wis. 2d 486, 492, 485 N.W.2d 1 (1992); ***State v. Grayson***, 172 Wis. 2d 156, 159, 493 N.W.2d 23 (1992) (Multiple convictions and punishments arising from a single criminal act "are impermissible because they violate the double jeopardy

provisions of the Wisconsin and United States Constitutions.").

The Wisconsin legislature has also adopted a statutory scheme intended to prevent simultaneous convictions for multiple counts of certain offenses, including violations of Wis. Stat. §948.02. Wis. Stat. § 939.66(2p).[1] Wis. Stat. § 939.66(2p) specifically prohibits numerous and simultaneous convictions for violations of Wis. Stat. § 948.02. Section 948.02 criminalizes all types of sexual assault against children ages 16 and under, outlining the penalty structure for offenses by age of the victim and sexual act performed. This section also criminalizes failure to act[2] to prevent any child sexual assault outlined in that section.

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[1] **939.66. Conviction of included crime permitted.** Upon prosecution for a crime, the actor may be convicted of *either the crime charged or an included crime, but not both*. An included crime may be any of the following:

….

(2p) A crime which is a less serious or equally serious type of violation under s. 948.02 than the one charged.

[2] The relevant sections of Wis. Stat. § 948.02 provide:

(1) FIRST DEGREE SEXUAL ASSAULT.

…

(e) Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of a Class B felony.

(3) FAILURE TO ACT. A person responsible for the welfare of a child who has not attained the age of 16 years is guilty of a Class F felony if that person has knowledge that another person intends to have, is having or has had sexual intercourse or sexual contact with the child, is physically and emotionally capable of taking action which will prevent the intercourse or contact from taking place or being repeated, fails to take that action and the failure to act exposes the child to an

(continued)

When assessing double jeopardy claims, Wisconsin courts have traditionally utilized a two-prong test: (1) whether the charged offenses are identical in law and fact; and (2) if the offenses are not identical in law and fact, whether the legislature intended the multiple offenses to be brought as a single count. ***State v. Anderson***, 219 Wis. 2d 739, 746, 580 N.W.2d 329, 333 (1998).

Whether simultaneous convictions for multiple offenses violate a defendant's double jeopardy rights under the Wisconsin and U.S. Constitution is a question of law, and therefore, the standard of review is de novo. This Court need not give any deference to the holdings of the lower courts on this issue. ***Sauceda,*** 168 Wis. 2d at 492.

B. Applying the two-prong test set forth in ***Anderson***, Counts 1 and 2 are multiplicitous and convictions for both violate double jeopardy protections

1. Prong One: Counts 1 and 2 are identical in law and fact.

a. The offenses are identical in law.

The first component of the two-prong analysis in double jeopardy cases involves the application of the ***Blockburger***[3] elements-only test. According to ***Blockburger***, an offense is a lesser-included offense if all of its statutory elements can be demonstrated without proof of any fact or element in addition to those which must be proved for the

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unreasonable risk that intercourse or contact may occur between the child and the other person or facilitates the intercourse or contact that does occur between the child and the other person.

[3] ***Blockburger v. United States***, 284 U.S. 299 (1932).

greater offense. ***Blockburger v. U.S.***, 284 U.S. 299, 304 (1932). In Ms. Steinhardt's case, the elements of the two proscribed statutes are different, and thus her offenses are not identical in law under the ***Blockburger*** test.[4]

This would normally end the first-prong of the inquiry, but given the statutory provision of Wis. Stat. § 939.66(2p),

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[4] The crime of sexual assault of a child, failure to act, has seven elements, summarized as follows:

1. The defendant was a person responsible for the child's welfare.
2. The child was under 16 at the time of the alleged offense.
3. An individual intended to have, was having, or had sexual intercourse or contact with the child.
4. The defendant knew that the individual either intended to have, was having, or had sexual intercourse or contact with the child.
5. The defendant was physically and emotionally capable of taking action which would have prevented the sexual intercourse or contact from taking place or being repeated.
6. The defendant failed to take action that would have prevented the sexual intercourse or contact from occurring or being repeated.
7. The defendant's alleged failure to act either exposed the child to an unreasonable risk that sexual intercourse or contact may occur or facilitated the sexual intercourse or contact that did occur between the child and the person.

Wis. JI-Criminal 2106, 1-2 (2009).

The crime of first degree sexual assault of a child, contact, as party to a crime, has two elements, summarized as follows:

1. The defendant, as party to a crime, had sexual contact with a child.
2. The child was under the age of 13 years at the time of the alleged sexual contact.

Wis. JI-Criminal 2102E, (2009).

additional analysis is necessary. In its response in opposition to Ms. Steinhardt's petition for review, the State acknowledges that the two offenses charged in Counts 1 and 2 are identical in law under Wis. Stat. § 939.66(2p). (App. 165). Because the legislature has specifically articulated that one cannot be convicted of both the lesser and more serious violation of Wis. Stat. § 948.02 for the same conduct and because failure to act is a Class F felony while sexual assault of a child under thirteen, contact, is a Class B felony, failure to act is a lesser-included offense of sexual assault of a child by statutory rule. Therefore, as the State acknowledges, under Wis. Stat. § 939.66(2p), the offenses are identical in law in the context of the double jeopardy analysis. The next question is then whether the offenses are also identical in fact.

b. Ms. Steinhardt committed a single act and therefore, Counts 1 and 2 are identical in fact.

The question of whether the charges in the present case are identical in fact turns on the nature of the allegations and factual basis supporting the two charged offenses. The allegations at issue surround a single incident that occurred on April 1, 2013. Ms. Steinhardt's actions in assisting Walter in the sexual assault were identical to her actions in failing to protect F.G. from the sexual assault – she sat on the bed and did nothing to intervene while Walter sexually assaulted F.G. Wisconsin courts have addressed double jeopardy questions related to multiple counts arising from one stream of acts in many different contexts, including in both failure to act and sexual assault cases.

i. Multiplicity in failure to act cases

In ***Carol M.D.***, the defendant was charged with nine counts of failure to act to prevent the sexual assault of a child, contrary to Wis. Stat. § 948.02(3). Each count related to a separate occasion in which she left her son with her boyfriend, whom her son had previously told her had been sexually assaulting him. ***Carol M.D.***, 198 Wis. 2d 162, 167-168, 542 N.W.2d 476 (Ct. App. 1995). The date of violation for each count was at minimum, several weeks apart. ***Id.*** at 170. Carol M.D. claimed that the trial court had erred in denying her motion to dismiss eight of the nine counts she alleged were multiplicitous. ***Id.*** at 168. While she was ultimately unsuccessful in her appeal as the court affirmed her convictions, concluding the charges were not multiplicitous, the analysis engaged in by the court provides important insight in the instant case.

In its discussion of the facts of the case, the court of appeals started by concluding that the nine counts of failure to act were clearly identical in law, as they were all charged under the same statutory offense. The court turned to the next step in the analysis, stating, "Offenses are different in fact if they are either significantly different in nature or separated in time." ***Carol M.D.***, 198 Wis. 2d at 170, (citing ***State v. Eisch***, 96 Wis.2d 25, 31, 291 N.W.2d 800, 803 (1980)).

In addressing the difference in time between the dates, Carol M.D. had argued that the time span between the incidents was irrelevant because she only formed the *mens rea* of the failure to act one time, as she was only told once by her son of the prior sexual assaults, not each time that she subsequently left him alone with his perpetrator. ***Id.***, 198 Wis. 2d at 171. She claimed that multiple counts under the

same statute may only be charged as different offenses when the defendant has formed a new *mens rea* for each individual crime. ***Id.*** **(**citing ***State v. Grayson***, 172 Wis. 2d 156, 165, 493 N.W.2d 23, 28 (1992)).

The court agreed with Carol M.D.'s premise, "that the State must prove the formation of a separate *mens rea* for each crime charged for the charges to be different in nature." ***Id.*** When applying that standard to the facts of her particular case, however, the court concluded that the defendant had formed new and distinct *mens rea* each time she left her child alone with her boyfriend. Each act was separated substantially in time and she would have had to make a clear and distinct new decision to leave her son. The court of appeal continued, stating that the *mens rea* is not linked only to the knowledge of the assault, but the crime of failure to act involves "the existence of that knowledge accompanied by the circumstance of a failure to act that exposes the victim again." ***Id.*** The court's reliance on the substantial passage of time between the incidents in its *mens rea* analysis is of particular relevance to this case, where there was no passage in time between incidents and F.G. was exposed to only one period of assault by Walter.

ii. Multiplicity in sexual assault cases

This Court should also look to the body of case law involving claims of double jeopardy made by actual perpetrators in sexual assault cases. Where there is insufficient evidence that the defendant engaged in separate volitional acts, Wisconsin courts have held that multiple counts are multiplicitous. For example, in ***State v. Hirsch***, 140 Wis. 2d 468, 474, 410 N.W.2d 638 (Ct. App. 1987), the court of appeals found that sexual assault charges were

multiplicitous when the conduct spanned "no more than a few minutes" and involved the defendant moving his hand from the victim's vagina to her anus and back again. The court in ***Hirsch*** noted that, based on the allegations in the complaint, which did not allege the precise length of time of the assault, there was no reason to believe there was any significant lapse in time between the acts**.** ***Hirsch***, 140 Wis. 2d at 475.

Similarly in ***State v. Church***[5], 223 Wis. 2d 641, 645-46, 589 N.W.2d 638 (Ct. App. 1998), the defendant was charged with two counts of child enticement under Wis. Stat. § 948.07, based on Church's intent to cause a child to expose a sex organ and on his intent to give a controlled substance to a child. The court of appeals held that despite the fact that Church simultaneously intended two subsequent wrongful acts, the offenses were not related to different and new volitional acts. The court of appeals concluded the charges were identical in fact and therefore multiplicitous. ***Church***, 223 Wis. 2d at 658-59.

In contrast, Wisconsin courts have also held that a continuing course of conduct in a sexual assault case can be separated into multiple counts without violating the double jeopardy doctrine. Courts have permitted multiple charges when the factual scenario alleged in the complaint details behaviors that are clearly distinct volitional acts, requiring a decision to perpetrate each separate crime or sexual act. *See* ***State v. Eisch,*** 96 Wis. 2d 26, 291 N.W.2d 800 (1980) (the court upheld the convictions when the defendant was convicted of four counts of second-degree sexual assault, one

[5] ***State v. Church*** has a complicated procedural history, but the applicable holding regarding multiplicity is still good law. *See* ***State v. Church***, 2003 WI 74, ¶¶ 5-16, 262 Wis. 2d 678, 665 N.W.2d 141.

for each executed sexual act, stemming from an incident that spanned two-and-a-half hours).

iii. Ms. Steinhardt's conduct constitutes one singular act.

A reading of the criminal complaint establishes that Ms. Steinhardt's conduct as charged constituted one continuous act, and did not represent separate volitional acts. The allegations contained in the complaint are simply stated and straight-forward. (1). There was no trial, no preliminary hearing and no testimony taken in any motion hearing in this matter. The only description of the conduct alleged by the State that was presented at the time of Ms. Steinhardt's plea was set forth in the criminal complaint. (1) (App. 175-176). There was no oral supplement to the record by either party. The probable cause section of the complaint is comprised of a total of six sentences, summarized below:

> On April 1, 2013:
>
> 1. Ms. Steinhardt knew that Walter was interested in having sexual intercourse with F.G. and he had asked Ms. Steinhardt to facilitate the act that evening.
>
> 2. Ms. Steinhardt brought F.G. from one room in the home into the bedroom where Walter was lying on the bed, under the covers; Ms. Steinhardt sat on the bed.
>
> 3. In Ms. Steinhardt's presence and as she was seated on the bed, Walter told F.G. to take her clothes off.
>
> 4. Walter engaged in digital penetration with F.G. while Ms. Steinhardt remained on the bed.

> 5. Walter engaged in oral sex and then penis to vagina intercourse with F.G. while Ms. Steinhardt remained on the bed.
>
> 6. After the incident, F.G. left the room to take a shower and Ms. Steinhardt followed.

(1).

The criminal complaint describes one continuous stream of conduct and Ms. Steinhardt's role in the assault can only logically be divided into two parts. First, Ms. Steinhardt walked F.G. into the bedroom to Walter for the purpose of a sexual assault and, second, she sat on the bed and remained in that position during the incident. The State charged Ms. Steinhardt with a third count, child enticement,[6] specifically based on her conduct in bringing F.G. to the bedroom. (1). Because Count 3 specifically addresses Ms. Steinhardt's conduct in bringing F.G. to the bedroom, the other two counts must account for separate behavior. The only other action alleged in the complaint was that Ms. Steinhardt sat on the bed and remained in that position while Walter sexually assaulted F.G. (1:2).

Again, at no time during the plea or any other court hearing preceding the plea was there a representation made by the State alleging any division of the conduct as it applied to Counts 1 and 2. During the plea hearing, the circuit court found that a factual basis existed based solely on the facts as

[6] In Count 3, it was alleged that Ms. Steinhardt, "with the intent to have sexual intercourse with the child in violation of Section 948.02, Wis. Stat., did cause a child, F.G., DOB 11/26/2000, who had not attained the age of 18 years to go into a room, contrary to sec. 948.07(1), 939.50(3)(d) Wis. Stats.…" (1). Ms. Steinhardt did not challenge Count 3 on appeal.

set forth in the complaint. (66:11). For these reasons, the allegations supporting Counts 1 and 2 as represented in the criminal complaint are identical in fact.

To divide a singular act of Ms. Steinhardt sitting on the bed into separate units of prosecution based on the volitional acts of another is misguided, contrary to the intent of the failure to act statutory scheme and the intentions of the State at the time the case was charged.

Unlike the separate *mens rea* and failure to act in ***Carol M.D.***, here the criminal complaint fails to show that Ms. Steinhardt formed a new *mens rea* for both the failure to act and the first-degree sexual assault of a child while she sat on the bed during Walter's sexual assault of F.G. (1). This case is very different factually than ***Carol M.D.***, in which the defendant's actions occurred weeks or months apart, rather than during a singular and continuous sexual assault.

Ms. Steinhardt's actions were also very different from those described in ***Eisch***, and more like the behavior in ***Hirsch*** and ***Church***. There is nothing in the complaint that indicates that Ms. Steinhardt's failure to act occurred on more than one occasion or for an extended period of time. Nor is there any evidence that Ms. Steinhardt's assistance to Walter in the sexual assault by not intervening consisted of a volitional act separate from her failure to protect F.G. from Walter's sexual assault. Ms. Steinhardt's actions in assisting Walter in the sexual assault were precisely the same as her actions in failing to protect F.G. from the sexual assault – she sat on the bed and did nothing to intervene while Walter sexually assaulted F.G.

2. Prong Two: If the court concludes that failure to act and first-degree sexual assault of a child as party to a crime are not identical in law, Ms. Steinhardt contends that the legislature did not intend for multiple simultaneous convictions for violations of Wis. Stat. § 948.02 and therefore, convictions for both Counts 1 and 2 violate the double jeopardy clause.

As discussed earlier, the State concedes that Counts 1 and 2 are multiple counts of the same statutory offense and are therefore identical in law under Wis. Stat. § 939.66(2p). If the Court, however, disagrees and concludes that the ***Blockburger*** test is the only relevant inquiry for the first prong of the test on double jeopardy, the inquiry then turns to ***Anderson***'s second prong - whether the legislature intended multiple punishments for a single offense.[7] ***State v. Anderson***, 219 Wis. 2d 739, 580 N.W.2d 329 (1998).

When assessing legislative intent, it is to be presumed that the legislature intended to allow for multiple punishments for the offenses charged under different statutes, unless there is evidence of contrary intent. ***State v. Sauceda***, 168 Wis. 2d 486, 496-497, 485 N.W.2d 1, 5 (1992), citing ***State v. Kuntz***, 160 Wis. 2d 722, 756, 467 N.W.2d 531, 545 (1991). In the instant case, there is ample support for Ms. Steinhardt's

[7] The second prong of the double jeopardy analysis also considers whether the allegations supporting the convictions in question are identical in fact. Ms. Steinhardt contends that the facts supporting both Counts 1 and 2 are identical in fact as alleged in the complaint and the record. This is discussed in great detail in Section I.B.1.b. of this brief and for that reason, the argument will not be restated here.

argument that the legislature did not intend multiple punishments for Counts 1 and 2. The legislature has directly addressed this situation by the passage of statutory Wis. Stat. § 939.66.

The failure to act offense under Wis. Stat. § 948.02(3) is a Class F felony and is therefore a less serious type of violation under Wis. Stat. § 948.02 than first-degree sexual assault of a child, which was charged as a Class B felony under Wis. Stat. § 948.02(1)(e). *See* Wis. Stat. § 939.66(2p). Because the facts supporting Counts 1 and 2 are identical and the legislature specifically intended to prevent multiple convictions for singular act charged in Wis. Stat. § 948.02, the convictions are multiplicitous, violate the double jeopardy protections of the state and federal constitutions and the lesser of the two convictions, that resulting from Count 1, failure to act, should be vacated accordingly.

II. Ms. Steinhardt Did Not Waive Her Right To Assert A Multiplicity Claim By Pleading No Contest.

If this Court agrees that Ms. Steinhardt's double jeopardy rights were violated as argued above, it must then consider whether she waived her right to assert her claim by entering her pleas of no contest to both counts. The court of appeals held that she relinquished her double jeopardy claim by entering her pleas. Citing ***State v. Kelty***, 2006 WI 101, 294 Wis. 2d 62, 716 N.W.2d 886, the court held that Ms. Steinhardt's double jeopardy claim could not be resolved without venturing beyond the record. (Slip. op. at ¶¶8-9). The court of appeals' analysis on this issue was incorrect and inconsistent with the holding in ***Kelty***.

A. Introduction and standard of review

The "general rule is that a guilty, no contest, or Alford plea 'waives all nonjurisdictional defects, including constitutional claims.'" ***State v. Multaler***, 2002 WI 35, ¶54, 252 Wis. 2d 54, 643 N.W.2d 437. In ***State v. Kelty***, 2006 WI 101, ¶39, 294 Wis. 2d 62, 716 N.W.2d 886, this Court considered whether that rule applies to double jeopardy challenges, looking to the United States Supreme Court decision in ***U.S. v. Broce***, 488 U.S. 563 (1989), for guidance. The ***Kelty*** analysis involves questions of waiver and the effect of a guilty plea upon double jeopardy protections, which are questions of law this Court reviews de novo. ***Kelty*** at ¶ 13.

In ***Kelty***, the defendant pled no contest to two counts of intentionally causing great bodily harm to a child, in violation of Wis. Stat. § 948.03(2)(a). ***Kelty*** at ¶5. In her postconviction motion and on appeal, Kelty argued that she should be permitted to withdraw her plea because the two counts were multiplicitous. ***Id.*** at ¶11. This Court ultimately held that Kelty had in fact "relinquished her opportunity to have a court determine the merits of her multiplicity challenge" when she entered her pleas because Kelty could not establish that there was a double jeopardy violation from a review of the record alone. ***Id.*** at ¶51.

The ***Kelty*** court adopted the holding in ***U.S. v. Broce*** as the law in Wisconsin. ***U.S. v. Broce***, 488 U.S. 563 (1989). In developing the holding, this court relied on language from the U.S. Supreme Court, stating:

> We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waive a claim that-*judged on its face*-the charge is one which the State may not constitutionally prosecute.

Kelty at ¶24, citing ***Broce***, 488 U.S. at 576, quoting ***Menna v. New York***, 423 U.S. 61, 63, n. 2 (1975) (emphasis added). The court concluded that the decision as to whether there is a viable double jeopardy claim that has survived a plea is to be decided on its face, solely on the facts known to the court at the time of the plea. ***Id.***

In applying this rule to the record before it, the ***Kelty*** court looked at the complaint, as well as the substantial evidence presented during the preliminary hearing, specifically the testimony of the surgeon who treated the child victim in that case. The surgeon's detailed testimony established that there were two separate points of injury to the child's skull which were caused by two separate blows to the head. The court ultimately held:

> The record contains evidence to support the charges, but we cannot determine with certainty from the record exactly how Kelty inflicted the baby's injuries. In other words, we cannot determine with certainty whether Kelty's two convictions for first-degree reckless injury were multiplicitous. All we know is that the State had the power to prosecute both counts on the evidence available; the defendant pled guilty to both counts after hearing the charges and the evidence, and after conferring in detail with her attorney; and the court, after a very thorough plea colloquy, had the power to convict and sentence the defendant on both counts. Without additional fact-finding, we could not learn more than we know now.

Id. at ¶51.

Further, this Court noted the trial court specifically asked Kelty whether she was aware of the doctor report classifying the two injuries to the child and that the injuries were alleged to be the result of two blows to the head. Kelty

acknowledged on two occasions that she understood this allegation. ***Id***. at ¶7-8.

The court also found it significant that Kelty received substantial consideration during the plea negotiations in her case. In exchange for her plea to the two counts (as well as multiple other counts from various incidents), several remaining charges were to be dismissed, and Kelty's exposure was reduced by more than half, from 128 years to 61.5 years confinement. ***Id***. at ¶40-41. The court concluded that granting an evidentiary hearing on Kelty's claim would, in effect, allow her to have a small trial on the facts of the case, while receiving the benefit of a plea bargain, as she could fully litigate the allegations without any of the risks that would have come with a trial. ***Id***. at ¶41.

B. Ms. Steinhardt's double jeopardy claim can be resolved on its face based on a review of the record.

Here, Ms. Steinhardt's no contest pleas did not relinquish her opportunity to raise her multiplicity claim. Unlike Kelty, she has not, and does not contest any of the facts set forth in the criminal complaint. On these facts, there is a clear double jeopardy violation from a review of the complaint, the only supporting document in the record at the time of the plea. As discussed in great detail Section I of this brief, Counts 1 and 2 are identical in law, identical in fact and the legislature specifically provided that a defendant not be prosecuted for multiple violations of Wis. Stat. § 948.02 for a singular act. *See* Wis. Stat. § 939.66. When properly applying the ***Kelty*** standard, this case is clear and straightforward. The complaint alleges only one volitional act and therefore, Counts 1 and 2 are multiplicitous as charged.

Ms. Steinhardt contends the ***Kelty*** standard requiring the court to decide a double jeopardy claim on appeal only when it can be "resolved on the record" has been misinterpreted by the court of appeals here and by the State in its various arguments on appeal. The decision of the court of appeals suggests that one must look outside of the record to determine whether additional facts that may be used to counter a double jeopardy claim are available. This seems counter to the holding in ***Kelty***, however.

In rejecting Ms. Steinhardt's double jeopardy claim, the court of appeals noted that the criminal complaint is silent "as to how much time passed during and between events" and generally provides very limited background on the alleged crimes. (Slip op. at ¶8). That conclusion is accurate. The complaint is silent on the length of the assault and is quite short generally, but this fact is irrelevant to the waiver issue. The holdings in ***Kelty*** and ***Broce*** require that the appellate court decide the multiplicity claim solely on its face. The ***Kelty*** court says nothing that would lead one to the conclusion that the State may supplement the record with additional evidence on appeal. If supplementation of the facts by the State were permitted, there would rarely, if ever, be a situation in which a double jeopardy claim would prevail on appeal. The State could merely request to supplement, in postconviction proceedings, the plea hearing record in an attempt to establish multiple offenses. The State is attempting to do just that in this matter.[8] This was clearly not the intent of this court in issuing its decision in ***Kelty***.

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[8] In its brief to the court of appeals, it was the State's position that Ms. Steinhardt's conduct which resulted in the charging of Counts 1 and 2 was based on two separate and distinct acts. The State alleged that any perceived double jeopardy violation is in fact harmless, arguing it (continued)

First, it is fundamentally unfair that post-plea, the facts supporting the charge could change dramatically in nature without the consent of the defendant. This undermines any confidence the court could have that the plea was knowing and voluntary. The problem created under this type of procedure can easily be identified in this case.

For example, had the State filed a new complaint or amended the complaint prior to entry of the plea in a matter consistent with the claim on appeal (see fn. 9), there is no

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could have corrected the record at the time of the plea. Specifically, the State claimed Count 1 could have and was intended to be charged due to Ms. Steinhardt's failure to stop Walter's digital penetration of F.G. (App. 149-150). The State went on to allege that Count 2 could have been and was intended to be related to Ms. Steinhardt allegedly advising F.G. to take off her clothing, which the State claims aided and abetted the acts of fellatio and sexual intercourse forced upon F.G. (App. 149-150). This argument is based on allegations that were not available to the court at the time of the plea and were not part of the complaint. The brief acknowledged this, but argued the following:

> Although the criminal complaint recites that Walter told F.G. to remove her clothes (1:2), that information came from Steinhardt's version of the assaults. In contrast, the PSI reports that F.G. told a social worker and a detective on June 16, 2013, that it was her mother who told her to remove her clothes (29:2). During the sentencing hearing, the prosecutor attributed this statement to Steinhardt, and the defense did not object (*see* 67:10). Had Steinhardt raised a multiplicity claim before pleading no contest, the prosecutor could have clarified the matter.

(App. 150).

reason to assume that Ms. Steinhardt would have entered pleas to all charges. As the State noted on appeal, there was an unpled allegation waged by F.G. that her mother instructed her to remove her clothing. (App. 150). However, that claim is something that Ms. Steinhardt adamantly denied throughout the entirety of the case, including to police during the initial investigation and in the presentence investigation report interview, which occurred after the plea. (29).

There should be no assumption that Ms. Steinhardt had intended to admit to that behavior when she entered pleas to the allegations in the complaint, and that therefore the double jeopardy was harmless and could have been simply corrected by oral amendment. This allegation was something that Ms. Steinhardt clearly and repeatedly denied. The State should not now be permitted to claim that this is how they intended to charge the case. The State certainly had the opportunity to charge the case in that manner, but chose not to.

Second, courts regularly conduct closed reviews like that mandated by ***Kelty*** when faced with questions surrounding sufficiency of the evidence supporting a complaint, a search warrant, a bindover determination, etc. *See* ***State v. Haugen***, 52 Wis. 2d 791, 191 N.W.2d 12 (1971) (a criminal complaint is a self-contained charge and only the facts alleged in the four corners of the criminal complaint may be considered when assessing whether probable cause exists); ***State ex rel. Funmaker v. Klamm***, 106 Wis. 2d 624, 629, 317 N.W.2d 458, 461 (1982) (the trial court may only review the record as it stands created at a preliminary hearing on a challenge of a court commissioner's bindover decision). In those instances, the State is not permitted to simply tell the court it has more information that it could have included, but did not. The court instead decides these types of questions solely on the record before the court.

While some may disagree with the strict record review standard, in preference for a quicker, more streamlined approach that permits the State to change its position at will rather than go through the proper steps to cure an error, the state and federal constitution mandates fairness and equity for the accused, not the least complicated process for the State. For these reasons, Ms. Steinhardt asks the court to follow the procedures set forth in ***Kelty*** and ***Broce*** and to conclude after reviewing the record on its face and is it stands, without supplement by the State, that her conviction for both Counts 1 and 2 violate the double jeopardy clause and to vacate the conviction for Count 1 accordingly.

III. In the Alternative, Ms. Steinhardt Is Entitled To a ***Bentley*** Hearing On Her Claim Of Ineffective Assistance Of Counsel And the Case Should Be Remanded To the Trial Court Accordingly.

In her postconviction motion, Ms. Steinhardt alleged that trial counsel was ineffective for failing to inform her of the multiplicitous nature of Counts 1 and 2, and that this failure interfered with her right to enter a knowing and voluntary plea. She claimed that had she known that she could not legally be convicted of both counts as charged, that she would not have entered her pleas as she did. For that reasons, Ms. Steinhardt argued that she be allowed to withdraw her plea and asked for an evidentiary hearing on the issue. (44:7-8).

The circuit court did not reach this question as it concluded that the charges were not, in fact, multiplicitous and therefore, there was no need to address the ineffective assistance claim. On appeal, the court of appeals noted that ***State v. Kelty*** recognized that a double jeopardy claim may survive plea even when it is not able to be resolved on its face

when the defendant alleges ineffective assistance of counsel and challenges the plea. However, the court concluded that Ms. Steinhardt failed to sufficiently allege prejudice in her postconviction motion and she was therefore not entitled to a hearing under ***State v. Bentley***, 201 Wis. 2d 303, 313-318, 548 N.W.2d 50 (1996). (Slip op. at ¶¶11-12). This ruling is inconsistent with longstanding case law dealing with claims of ineffective assistance of counsel. *See* ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996); ***Strickland v. Washington***, 466 U.S. 668 (1984).

A. Introduction and standard of review

In ***State v. Kelty***, the court spent a significant amount of time setting forth the legal standard for determining whether the entry of a plea waives a postconviction double jeopardy challenge. The court also pointed out that there was a second consideration in a postconviction challenge to multiple convictions that appear to violate the double jeopardy clause. ***Kelty*** at ¶43. The ***Kelty*** court concluded that postconviction challenges to multiplicitous charges may also be resolved through the lens of ineffective assistance of counsel, with the question being whether the defendant knowingly and voluntarily entered her plea. ***Id***. The court held:

> A guilty plea waives constitutional trial rights, but does not waive Fourteenth Amendment due process rights or the Sixth Amendment right to counsel, which are implicated in a challenge that a guilty plea is not knowing, intelligent, and voluntary, and a challenge that the defendant received ineffective assistance of counsel.

Id. If trial counsel did not inform the defendant of the possibility of challenging the charges as multiplicitous and what effect that would have in terms of conviction and

punishment prior to entry of the plea, this may constitute ineffective representation and the defendant could be entitled to plea withdrawal. To pursue this type of relief, the defendant must allege that counsel's performance was deficient and that the deficiency prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

A postconviction motion alleging ineffective assistance of counsel must set forth sufficient material facts that will allow a court to meaningfully assess a defendant's claims. ***State v. Allen***, 2004 WI 104, ¶14, 274 Wis. 2d 568, 682 N.W.2d 443. The defendant's allegations must not be conclusory. ***Id.***, at ¶15. The record must show "facts from which a court could conclude that counsel's representation was below the objective standard of reasonableness." ***State v. Wesley***, 2009 WI App 118, ¶23, 321 Wis. 2d 151, 772 N.W.2d 232. The defendant must then show prejudice by alleging "facts from which a court could conclude that its confidence in a fair result is undermined." ***Id***. In the context of a plea withdrawal case, a defendant is required to establish that there is "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty." ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985).

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 a hearing. ***State v. Sulla***, 2016 WI 46, ¶6, 369 Wis. 2d 225, 880 N.W.2d 659.

B. Trial counsel was ineffective in failing to advise Ms. Steinhardt of the double jeopardy violation, the deficiency caused clear prejudice and the postconviction motion alleged sufficient facts to warrant an evidentiary hearing.

Ms. Steinhardt alleges that trial counsel was ineffective for failing to advise her that Counts 1 and 2 violated the double jeopardy protections and therefore, she should not have been convicted of both counts. Further, Ms. Steinhardt argues that this failure of trial counsel was clearly prejudicial.

The court of appeals erred in finding that the postconviction motion was insufficient under ***Bentley*** and its progeny. In Claim 2 of her postconviction motion, Ms. Steinhardt alleged that her trial attorney was ineffective for failing to inform her that the charges in Counts 1 and 2 were multiplicitous. (44:8). She asserted:

- That trial counsel failed to inform her of the multiplicitous nature of the failure to act and first degree sexual assault of a child charges.
- That trial counsel would testify that he had no strategic reasons for not informing her of the multiplicitous nature of her charges.
- That she would testify that she would not have pled to the failure to act charge had she known that the charges violated double jeopardy.

(44:8). The court of appeals found this to be an insufficient statement regarding prejudice. In doing so, the court of appeals too strictly adhered to the holding in ***Bentley*** without recognizing the significant differences in the facts between the two cases.

In ***Bentley***, the defendant sought to withdraw his guilty plea on the ground that, before entering his plea, his attorney erroneously informed him that his minimum parole eligibility, a discretionary determination, would be 11 years and 5 months. In reality, his eligibility date was 13 years, 4 months. ***Bentley***, 201 Wis. 2d at 307. The Wisconsin Supreme Court found that Bentley's conclusory allegation that he would not have pled had he known of the actual parole eligibility date was insufficient. ***Id.*** at 316. Such a holding makes sense in that case because it is difficult to understand why a two-year difference in one's parole eligibility date would make a decisive difference in Bentley's decision to plead guilty. As Bentley's postconviction motion failed to allege why this made a difference, his motion was insufficient.

The ***Bentley*** doctrine makes sense in a number of contexts beyond one's knowledge of his parole eligibility date, and requires defendants to support their postconviction pleadings with facts that can explain *why* they would not have pled but for counsel's ineffectiveness. Moreover, there are situations in which a defendant is not entitled to a hearing when the record conclusively establishes that she is not entitled to relief. ***Sulla***, 316 Wis. 2d 225 at ¶7 (record establishes that, despite his claims to the contrary, defendant was correctly informed of the effect of read-in charges). But such a requirement should note extend to situations where, as here, the reason the defendant would not have pled but for counsel's deficiencies are obvious on their face.

Unlike the scenario in ***Bentley***, the facts of this case as reflected in Ms. Steinhardt's postconviction motion provide clear reasons why Ms. Steinhardt would not have pled to the failure to act charge, had counsel apprised her of the multiplicity claim. First, a claim of a double jeopardy violation by definition alleges that a defendant was illegally

subjected to two or more punishments when the law mandated only one. That a defendant would desire to limit his exposure to a single penalty rather than multiple penalties, is too obvious to require specific articulation.

Second, the record, which was cited heavily by both parties on appeal, conclusively demonstrates that Ms. Steinhardt received no strategic benefit by pleading to both Counts 1 and 2. The plea transcript reflects Ms. Steinhardt entered pleas to all three counts as charged. (3). The record is clear that there was no negotiated sentence recommendation from the State. Both sides were free to argue as to penalty without restriction, and so she received no strategic benefit from the negotiation. (2).

Third, Ms. Steinhardt was exposed to substantially more incarceration as a result of her plea to both Counts 1 and 2. The failure to act charge carried the potential for an additional 12½ years in prison (7½ years IC, 5 years ES). Here, the circuit court, in fact, imposed the maximum 12-1/2 year prison term on that count and it was set to run consecutively to the sexual assault charge. (67:42). Thus, it is plain that she was in fact prejudiced by the imposition of consecutive penalties for both the failure to act and the first-degree sexual assault charges that were multiplicitous.

To require a postconviction motion to specifically allege information which is obvious and can be readily gleaned from the record elevates form over substance, and creates an unreasonable result. This Court should find that Ms. Steinhardt's postconviction motion sufficiently alleged prejudice and remand the case to the circuit court for an evidentiary hearing on her claim of ineffective assistance of counsel.

CONCLUSION

For these reasons, Ms. Steinhardt respectfully requests that this Court conclude that Counts 1 and 2 are, on their face, multiplicitous, and reverse the decision of the court of appeals and vacate her conviction and sentence for failure to act. Alternatively, she asks this Court to conclude that Counts 1 and 2 are multiplicitous and to remand the case to the circuit court for a hearing on her claim of ineffective assistance of counsel.

Dated this 22nd day of December, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: 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 and maximum of 60 characters per line of body text. The length of the brief is 7,917 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

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

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

Dated this 22nd day of December, 2016.

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CERTIFICATION AS TO APPENDIX

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; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) 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 one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including 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.

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