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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs. Appeal No.: 15 AP 1799-CR

ANTHONY R. PICO,

Defendant-Respondent.

BRIEF AND SUPPLEMENTAL APPENDIX OF DEFENDANT-RESPONDENT

ON APPEAL FROM A FINAL ORDER ENTERED ON JULY 23, 2015 IN THE CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE MICHAEL O. BOHREN PRESIDING.

Respectfully submitted,

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Defendant-Respondent

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TABLE OF CONTENTS

Supplemental Appendix

TABLE OF AUTHORITIES

Cases Cited

Cases

Statutes

STATEMENT OF THE ISSUES

I. LEGAL PRINCIPLES AND STANDARD OF REVIEW.

A. Standard of Review.

B. General Ineffective Assistance of Counsel Standards.

II. THE CIRCUIT COURT PROPERLY ADMITTED AND RELIED UPON THE LIMITED TESTIMONY OF ATTORNEY FINCKE, AND THE DECISION WOULD HAVE BEEN THE SAME HAD FINCKE NOT TESTIFIED.

A. The testimony was permissible as limited, and the State waived any argument on appeal as to that limited testimony by failing to object and by using Fincke's testimony to support its case.

B. The State does not argue that the circuit court would have found differently had Fincke not testified, and its rulings clearly establish the finding of ineffectiveness was independent of what was testified to by the expert.

III. INEFFECTIVENESS FOR FAILURE TO INVESTIGATE RECORDS OR TO CALLAN EXPERT RELATING TO PICO'S TRAUMATIC BRAIN INJURY.

IV. INEFFECTIVENESS FOR THE FAILURE TO CALL OR CONSULT AN EXPERT AS TO REID INTERROGATION TECHNIQUE.

V. INEFFECTIVENESS DUE TO THE FAILURE TO CALL AN EXPERT TO CHALLENGE THE CARE CENTER INTERVIEW AND TESTIMONY.

VI. INEFFECTIVENESS DUE TO IMPROPER VOUCHING.

VII. INEFFECTIVENESS DUE TO THE FAILURE TO OBJECT TO EXPERT TESTIMONY UNDER ***DAUBERT***.

VIII. INEFFECTIVENESS DUE TO THE FAILURE TO REVIEW GOOD TOUCH/BAD TOUCH MATERIALS AND CALLING A WITNESS AS TO THE LEG RUBBING EVIDENCE.

IX. INEFFECTIVENESS DUE TO THE FAILURE TO OBJECT TO THE CHARACTERIZATION OF THE PRIOR.

X. THE TRIAL COURT ERRED IN NOT PERMITTING CHARACTER EVIDENCE.

XI. THE TRIAL COURT ERRED AT SENTENCING WITH NO OBJECTION FROM THE DEFENSE.

STATEMENT ON PUBLICATION

Defendant-respondent does not request publication of the opinion in this appeal.

STATEMENT ON ORAL ARGUMENT

Defendant-respondent does not request oral argument.

STATEMENT OF THE CASE AND FACTS

The State appeals from the final order of the trial court which states in relevant part: "THEREFORE, the court grants the defendant's Postconviction Motion for reasons stated on the record. The Court orders a new trial and vacates the sentence previously imposed on February 25, 2013." (73). As Respondent, Mr. Pico exercises his option not to present a full statement of the case. *See:* Wis. Stat. sec. 809.19(3)(a)2. Additional facts beyond those in the State's brief will be presented in the argument portion of this brief.

ARGUMENT

I. LEGAL PRINCIPLES AND STANDARD OF REVIEW.

A. Standard of Review.

"Appellate review of a claim of ineffective assistance of counsel presents a mixed question of law and fact." ***State v. Champlain***, 307 Wis. 2d 232, 744 N.W.2d 889 (Ct. App. 2008). A trial court's findings of fact are reviewed for clear error, but whether counsel's performance is constitutionally infirm is a question of law reviewed *de novo*. ***Id.*** Evidentiary issues are reviewed under the erroneous exercise of discretion standard. ***State v. Tabor***, 191 Wis. 2d 482, 488, 529 N.W.2d 915 (Ct. App. 1995).

B. General Ineffective Assistance of Counsel Standards.

A defendant pleading ineffective assistance of counsel must satisfy a two-part test showing that (1) counsel performed deficiently, and (2) that the deficient performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show that his counsel's representation "fell below an objective standard of reasonableness" considering the totality of the circumstances. ***State v. Carter***, 324 Wis. 2d 640, 658–59, 782 N.W.2d 695 (2010) (quoting ***Strickland*** *at* 688 (1984)). "Just as a reviewing court should

not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer." ***Davis v. Lambert***, 388 F.3d 1052, 1064 (7th Cir. 2004) (quoting ***Harris v. Reed***, 894 F.2d 871, 878 (7th Cir. 1990)).

A single unreasonable error is sufficient to a finding of ineffectiveness. ***Kimmelman v. Morrison***, 477 U.S. 365, 383 (1986); ***United States v. Cronic***, 466 U.S. 648, 657 n.20 (1984). "[T]he right to effective assistance of counsel...may in a particular case be violated by even an isolated error...if that error is sufficiently egregious and prejudicial." ***Murray v. Carrier***, 477 U.S. 478, 496 (1986). Although the Court must presume that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," ***Strickland, supra*** at 690, the defendant overcomes that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." ***Kimmelman, supra*** at 384, *citing* ***Strickland, supra*** at 688-89. "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error

and in light of all the circumstances." ***Id.***, *citing* ***Strickland, supra*** at 689.

The deficiency prong is met when counsel's oversight or inattention caused the error, instead of a reasoned defense strategy. *See* ***Wiggins v. Smith***, 539 U.S. 510, 534 (2003); ***Kimmelman, supra*** at 385; ***Dixon v. Snyder***, 266 F.3d 693, 703 (7th Cir. 2001); ***State v. Moffett***, 147 Wis. 2d 343, 433 N.W.2d 572, 576 (1989). Strategic decisions made after a less than complete investigation of law and facts may still be adjudged reasonable. ***Strickland***, 466 U.S. at 690–91. But "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." ***Id.*** at 691.

The defendant must also demonstrate that trial counsel's deficient performance was prejudicial. ***Id.*** at 687. The Wisconsin Supreme Court explicitly applies the "cumulative effect" approach to decide whether trial counsel's deficient performance prejudiced the defendant. ***State v. Thiel***, 264 Wis. 2d 571, 603–05, 665 N.W.2d 305 (2003) (citing, *inter alia*, ***Washington v. Smith***, 219 F.3d 620, 634–35 (7th Cir. 2000) ("Evaluated individually, these errors may or may not have been prejudicial to Washington, but we must assess 'the totality of the omitted evidence' under ***Strickland***, rather than the

individual errors."); see also ***Strickland supra*** at 695-6. "The defendant is not required to show 'that counsel's deficient conduct more likely than not altered the outcome of the case.'" ***Moffett, supra*** at 576, *quoting* ***Strickland, supra*** at 693. Rather, "[t]he question on review is whether there is a reasonable probability" of a different result but for counsel's deficient performance. ***Moffett, supra*** at 577. "Reasonable probability," under this standard is defined as "'probability sufficient to undermine confidence in the outcome.'" ***Id.***, *quoting* ***Strickland, supra*** at 694. In addressing this issue, the Court normally must consider the totality of the circumstances. ***Strickland, supra*** at 695.

II. THE CIRCUIT COURT PROPERLY ADMITTED AND RELIED UPON THE LIMITED TESTIMONY OF ATTORNEY FINCKE, AND THE DECISION WOULD HAVE BEEN THE SAME HAD FINCKE NOT TESTIFIED.

A. The testimony was permissible as limited, and the State waived any argument on appeal as to that limited testimony by failing to object and by using Fincke's testimony to support its case.

Prior to the postconviction hearing in this case, the State objected to testimony from expert witness Waring Fincke by letter. In pertinent part, that letter stated "It is the State's position that criminal defense experts should not be permitted to testify as to whether another attorney was constitutionally ineffective, as that is

the job of this Court to determine." (61). The State did not raise a ***Daubert***[1] challenge in that letter or in any of the proceedings. Thus, it may not raise that for the first time on appeal. ***In re Guardianship of Willa L.***, 2011 WI App 160, ¶25, 338 Wis. 2d 114, 126, 808 N.W.2d 155, 161. Moreover, the State did not request any offer of proof or ask the court to engage in a relevance determination. There was no dispute Fincke was a qualified legal expert—the only dispute was over how his testimony would be limited. The defense agreed in a responsive letter because the ultimate issue of ineffectiveness is the decision of the court, the defense would agree to limit Fincke's testimony to "factual matters to show what a reasonable attorney versed in the criminal law would and should do under the circumstances at issue in this case." (62). That letter cited ***State v. Harper***, 57 Wis. 2d 543, 205 N.W.2d 1 (1973), which discussed the American Bar Association Project on Standards For Criminal Justice, Standards Relating to The Prosecution Function and The Defense Function.

The court then circled that portion of the defense letter and wrote "So Ordered." (62). Thus, Fincke was not to testify as to the ultimate issue of ineffectiveness. Notably the State did not object to

[1] ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993).

proceeding in this fashion either before the motion hearing or at the hearing. Thus, the State implicitly agreed with proceeding in this fashion by not objecting to the defense suggestion the testimony be limited to factual matters whether by letter prior to the hearing or during the hearing. There was no objection during Fincke's testimony that any question or testimony was outside of the agreement proposed by the defense and agreed to by the trial court. Both sides then used Fincke's testimony to support its case. (ex. 96:107). Moreover, the State did not object to the trial court's consideration of Fincke's testimony in its brief after the postconviction hearing. Instead, the State's brief attempted to use Fincke's testimony to strengthen its case. (69:28).

The defense limited its questions to factual matters regarding what steps a reasonable attorney versed in criminal law should take and whether LaVoy took those steps in accordance with ABA standards. The defense did not ask Fincke for an opinion on the ultimate issue of whether LaVoy was ineffective; however, the prosecution chose to ask that ultimate opinion question. The prosecutor asked twice if LaVoy was "constitutionally adequate" (96:162). Fincke would not answer the prosecutor's question, as he believed it violated the court order that there be no testimony as to

the ultimate issue. In response to those questions, Fincke stated, "I would have to look to Judge Bohren because you've ruled, sir, I can't go there. I wouldn't want to contravene your order." (96:162). The prosecutor then stated she was not asking whether LaVoy was ineffective but whether he was constitutionally adequate but did not explain how she views the two as different. Fincke then again asked, "Can I answer that question, sir?" Judge Bohren responded, "Well, you've been asked and there's no objection." Fincke then testified, "I don't believe he was." (96:163).

Thus, not only did the State fail to object to proceeding in the fashion suggested by the defense; it was the only party to elicit questions concerning the ultimate question of whether LaVoy's representation was constitutionally adequate. The court found there was no objection to this type of testimony, and the State's brief on appeal does not argue that the court's finding was clearly erroneous. Thus, the State waived any argument on appeal that testimony should have been excluded. To now argue that the more limited testimony was impermissible is improper, as any such objection has been waived by the State for failing to raise it at the trial court level. ***Willa, supra; Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.***, 90 Wis. 2d 97, 297 N.W.2d 493 (Ct. App. 1979). Moreover,

the trial court has the discretion to receive such evidence it deems helpful to its determination of the issues; and the State has not shown there was an abuse of discretion here.

As limited by the defense, the testimony of Fincke was factual testimony, not testimony as to the ultimate issue. In ***State v. McDowell***, 266 Wis. 2d 599, 669 N.W.2d 204 (Ct. App. 2003), the Court of Appeals stated in a footnote:

> Our conclusion is consistent with that of the late Dean of the Marquette University Law School, Howard Eisenberg, who testified at the *Machner* hearing. Dean Eisenberg opined that, *given Mr. Langford's undisputed account of the events*, his shift to narrative questioning was "inappropriate."
>
> Dean Eisenberg was called by McDowell to testify as an expert witness, see WIS. STAT. § 907.02, and give his opinion on the legal issue of whether Mr. Langford rendered effective assistance of counsel. Although we appreciate the salutary motives behind calling Dean Eisenberg, we reiterate that no witness may testify as an expert on issues of domestic law; "the only 'expert' on domestic law is the court." *McDowell, supra*, fn. 10.

This dicta in the footnote from the decision agreed with Dean Eisenberg's testimony but merely cautioned that the Court was the expert as to domestic law. There was no finding that the testimony about the reasonableness of counsel's actions was inadmissible, and the Court of Appeals' decision expressly agreed with that testimony, just as Judge Bohren agreed Fincke's testimony. Thus, the Court of

Appeals did not hold that the testimony given by the Dean would be inadmissible. The Court was noting the ultimate decision is with the Court. Furthermore, there is no case holding that expert testimony is prohibited at a hearing relating to whether an attorney provided adequate counsel. In fact, there are cases where an attorney testified in malpractice and ineffectiveness hearings as to the representation by another attorney. ***Earp v. Cullen***, 623 F.3d 1065, 1073 (9th Cir. 2010) (a trial court can prevent another attorney from testifying as to the ultimate legal conclusion and limit testimony only to "what trial counsel should have done"); ***Weddell v. Weber***, 2000 S.D. 3, 604 N.W.2d 274, 282 (attorney testified it was ineffective assistance of counsel for trial counsel to fail to secure the services of an expert pathologist); ***Banks v. Reynolds***, 54 F.3d 1508; 1513 (10th Cir. 1995) (attorney testified as an expert on attorney ineffectiveness); ***Helmbrecht v. St. Paul Insurance Co.***, 122 Wis. 2d 94, 112 (1985) (attorneys permitted to testify as experts concerning standard of care by another attorney); ***Pierce v. Colwell***, 209 Wis. 2d 355, 362, 563 N.W.2d 166 (Ct. App. 1997) (expert testimony will generally be required to prove an attorney did not meet a standard of care in malpractice cases). Even in ***Provenzano v. Singletary***, 148 F.3d 1327 (11th Cir. 1998), cited in the State's brief, there was no finding

that testimony by an attorney expert would be inadmissible; the Court merely held that the question of law is to be decided by the Court. The affidavit from the attorney expert was not found inadmissible there but was found to be insufficient to establish ineffectiveness.

B. The State does not argue that the circuit court would have found differently had Fincke not testified, and its rulings clearly establish the finding of ineffectiveness was independent of what was testified to by the expert.

The State does not argue that the trial court would have found differently had Fincke not testified. The trial court judge simply agreed with many of Fincke's statements about what a reasonable attorney would do and then made his own findings and conclusions. The court's statements were, by and large, the same asserted in Pico's postconviction motion. As to many of its findings, the circuit court did not reference Fincke's testimony at all but referenced other witnesses such as Dr. Capote, Dr. Yuille, and Dr. Schoenecker in finding LaVoy deficient. (98:14-15,17;19,20,21,28). The court clearly would have found the same way with or without the testimony the State complains of at this juncture. Thus, even if this Court finds an error in the admission of Fincke's testimony, that error was harmless.

III. INEFFECTIVENESS FOR FAILURE TO INVESTIGATE RECORDS OR TO CALL AN EXPERT RELATING TO PICO'S TRAUMATIC BRAIN INJURY.

The State argues the trial court did not completely defer to trial counsel's strategic decisions; however, as noted above, such deference requires that trial counsel first make reasonable investigations or make a reasonable decision that makes such investigations unnecessary. ***Strickland, supra*** at 691. Under the circumstances of this case, the trial attorney, LaVoy, was aware of an accident resulting in Pico still having to wear an eye patch. He discussed deficits with the family, noted Pico's confusion during interrogation, noted an inability of Pico to respond appropriately and that he would become easily flustered. (96:10,11,12,15,19,47) LaVoy considered a NGI plea and considered getting a neurologist. (96:66) The fact Pico still has vision problems requiring an eye patch and his inability to respond appropriately are signs of frontal lobe damage and frontal lobe syndrome. (97:8-13;27,41-2). Yet, LaVoy decided to not get the records of the injury, to not consult a neurologist or other doctor, to dismiss the possibility of a NGI plea without consultation with the client or his family, and to not let his client testify due to an inability to appropriately respond to

interrogation. This lack of proper defense is the hallmark of ineffective assistance of counsel claims.

The fact Pico suffered severe brain trauma resulting in frontal lobe damage as a result of a motorcycle accident is not disputed in this case, although the State continually minimizes the traumatic brain injury by calling it a mere "head injury" and "a dormant head injury." (State's.br.p.8,26). The damage to Pico's brain was so severe that images taken of Pico's brain in 1992 showed obvious brain damage, even though the imagining technology at the time was primitive at that time. (97:8-9). According to Dr. Horacio Capote, the neuropsychiatrist called by the defense at the postconviction hearing, the level of damage to Pico's brain was so "stunning" that it showed up on even primitive imagining technology. (97:9). The trial attorney, however, decided not to get the records. (96:11). Dr. Capote is the Director of the Division of Neuropsychiatry at the Dent Neurologic Institute in Buffalo, New York. (97:6). Contrary to the State's claim that no witness testified that an eye patch and double vision is a symptom of brain damage (State's.br.p.22), Dr. Capote testified that the scans and reports he reviewed show "problems with the third cranial nerve, therefore, double vision for which an eye patch became necessary to maintain vision". (97:9). There was also a

significant decrease in IQ as evidenced by reports of neuropsychological testing. (97:9-10). Symptoms of the type of frontal lobe damage Pico suffered include deficits in cognitive, emotional, and behavioral functioning, the tendency to not read social cues well, perseverance, not being able to adapt to changes, a tendency to talk in unusual ways, telling boring stories, and not being able to recognize when people are not interested in the stories. (97:10). Impulsivity is a symptom of such damage. (97:25). The damage to the pons varolii Pico suffered results in the inhibition of affective expression and emotions "popping out for no particular reason" (97:13). Frontal lobe syndrome was diagnosed. (97:83).

Based upon Dr. Capote's diagnosis as a result of the medical records and imaging of Pico's brain trauma, he formed the opinion Pico did not have an ability to appreciate the wrongfulness of his conduct due to his brain damage. (97:14). Dr. Capote also opined that the damage to the brain influenced Pico's responses to the detective's interrogation in that Pico would have agreed to just about anything the detective said to "just end the situation". (97:14). One example occurred where Pico says "It may have." to the question from the detective "Do you remember your hand going down or into her pants the second time?" The doctor characterized that as going

along with what the detective was saying (97:49). Similarly, when Pico said "well, I'm thinking now that this is a problem", that intimated to Dr. Capote that Pico was noting it was a problem that someone (the detective) was "bothering" him. (97:49). Additionally, the doctor noted that Pico would not be cognizant of the fact it would be inappropriate to rub the leg of his daughter's friend (D.T.) since he was trained to rub his own daughter's leg to calm her sensory disorder. As Dr. Capote noted "[It's a behavior he usually engaged in, it never brought any problems, it was well received and would not have thought that something was out of place." (97:15-16).

Dr. Capote noted that it would have been preferable to meet Pico in person and evaluate him in making his report. Had he been hired by the trial attorney, he could have examined Pico to determine which symptoms of the brain trauma he was currently experiencing. (97:45). But he also noted "when brain cells die, they're gone. It's the one organ that doesn't regenerate. So, any deficits that would have been there in 1992, could at least be the same, if not worse by today." (97:46). He testified that if such clear signs of brain trauma were present in the scans from 1992, it would mean under current technology, many more deficits would be noted. (97:9,44). Thus, this was not a "dormant" head injury. It is a permanent one, and Dr.

Capote was able to diagnose frontal lobe syndrome from the obvious medical imaging records.[2]

Dr. Schoenecker, the psychiatrist called by the State, disagreed with Dr. Capote and did not feel that Pico lacked substantial capacity to appreciate the wrongfulness of his action or to conform his conduct to the law based upon the records he reviewed. (97:60). He did not disagree with Capote's recitation of the brain injuries sustained by Pico, however, and noted Dr. Capote's description was a good one of the syndrome of injuries he diagnosed in Pico. (97:83-4). He also agreed with Dr. Capote's recitation of symptoms such as short-attention span, poor memory, difficulty in planning or reasoning, environmental dependence syndrome, perseveration, inappropriate sexual behavior, inappropriate humor "and telling of pointless or boring stories, which I think he explained earlier, is in regards to difficulties reading social cues." (97:84). He

[2] In a footnote at p. 28 of its brief, the State cites ***Ayala v. Hatch***, 530 F.Appx 697, 701-2 (10th Cir. 2013), an unpublished case, saying the defendant did not prove there he had a disease. The defendant, however, was alleging the victim had a disease there. The claim failed for lack of any medical testimony or records. Those are both in the record here. Also cited is ***Brown v. Sternes***, 304 F. 3d 677 (7th Cir. 2002), which found an attorney ineffective for failure to investigate mental health records. That case does not hold that a neuropsychiatrist cannot diagnose a medical condition from medical records. The Court actually stated "Attorneys have an obligation to explore all readily available sources of evidence that might benefit their clients. Id. at 693. The failure to investigate when there's a history of a problem is ineffective. ***Id***. at 694. Both cases support Pico.

agreed that once there is a diagnosis of frontal lobe damage, a person always has it. (97:84). He noted that the extent of injuries is determined from looking at records, medical imaging scans, talking with the defendant, and talking with the people who know him well. (97:86). He didn't have any evidence "currently available" to say that Pico's brain injury affected his conduct in this case. (97:92). He noted he did see that Pico was discharged from the military based upon his medical diagnosis. (97:96). Much of his review was based only off a previous psychosexual evaluation. (97:96). He noted that telling pointless boring stories again and again could be a symptom of frontal lobe syndrome, as can impulsivity, trying to avoid conflict, shutting down in frustrating situations, difficulty reading social cues, irrational anger, short attention span, memory difficulties, and inappropriate or different humor. Thus, he agreed on many points with Dr. Capote. (97:98-100).

Most importantly, he agreed, as Dr. Capote did, that had he been hired prior to trial to do an evaluation, the family members could have been contacted and other sources of information reviewed to see if any of these symptoms were present for a full evaluation to be conducted. (97:100).

The fact the two doctors disagreed as to what effect Pico's injuries could have on this case shows how the introduction of evidence of Pico's brain injury could have affected the case. The case may well have turned into a battle of the experts, whether in the NGI context or in the criminal context, but the fact this evidence is so important both sides called experts on it at the postconviction hearing establishes that it would have made a difference to the jury. When a trial comes down to a battle of experts, there is oftentimes reasonable doubt. The failure to call an expert or even get the records was, thus, prejudicial. In the trial court, the State merely argued LaVoy was not deficient for failure to investigate the brain injury but did not argue that any deficiency in that respect did not prejudice Pico's case. The State improperly raises that argument for the first time on appeal. ***Willa, supra***. Moreover, that argument is premised on the idea that because no doctor examined Pico, no diagnosis could be made; however, testimony from both the neuropsychiatrist and the regular psychiatrist agreed that a diagnosis of this type of injury could be made by looking at the medical imaging of the brain trauma. Once the damage occurs, it is always there.

LaVoy said he knew Pico had had a serious accident resulting in a head injury and felt that "head injury" was a better way to

describe the injury than "frontal lobe damage". (96:11). He, thus, disagreed with both doctors and minimized the injury. He admitted he did not get the medical records relating to that injury. (96:11). He noted that the family members had talked with him about Pico having a different kind of a sense of humor than most people. (96:11). He said he chose not to get the records because Pico "didn't really bring up anything to me" in response to questioning about the eye patch. (96:12). He decided no investigation was necessary. Even if he had known that a psychiatric neurologist felt the injuries could have led to a NGI plea or to an explanation of why Pico would not realize that rubbing the leg of an unrelated child was inappropriate, he would not have gotten the records or consulted an expert because he did not see signs of things that could lead to a NGI plea. He did admit, however, that a neurologist may see something more as far as symptoms of deficits in a neurological sense than the attorney would. (96:13-14). He testified that he considered the NGI, but he ultimately decided on his own it was inappropriate for Pico. (96:66). This was his "lay" opinion based upon his observation of Pico. (96:85). This decision was not discussed with Pico or his family, however, as the trial court found because the attorney just dismissed the idea himself. His testimony was clear that he alone determined whether that plea

would be entered and whether to explore that plea. Nowhere in his statements such as "I don't enter an NGI plea in a case unless I think there's a reason to do so…In this case I didn't even find (talking to a doctor) to be necessary because I just didn't see any things to explore" does he allow for the possibility of consulting the client in his decisions. (96:66;68). He also did not list consulting with the client as to the decision in his list of what he does in deciding whether to raise a NGI defense. (96:56). He decided it was an inappropriate defense to Pico. (96:66).

LaVoy noted he felt the accident was something

> certainly worth further questions of him and so it was on my mind that somebody was in an accident that could cause problems, but in this situation nothing ever developed that caused me to believe that he was having any ongoing problems or symptoms or issues and it just never became an issue. It was never brought up by his family and it just never became an issue. If it would have, I would have absolutely had him interviewed.

(96:71). Again, LaVoy decided not to discuss anything with the family or Pico because they did not bring it up to him. Thus, LaVoy knew this was something that should be investigated, but he chose not to because the family did not ask him to investigate any ramifications of the accident on the case.

LaVoy did note that Pico showed signs of confusion during his interrogation by detective Rich. He said he considered that might be a result of the brain injury, but he decided the confusion was due to Pico not knowing why police were there and due to the severe nature of the questioning. (96:15). Once again, LaVoy noted a problem and considered it being due to the brain injury, but dismissed that possibility and decided not to investigate. In stating why Pico should not testify, LaVoy said "He was not sure of himself when asked tough questions. He was very nervous. He constantly went back to the, I can't believe I did this, you know, I can't believe I made her feel upset. He was just very, very flustered." (96:92-3). Each one of these is a sign of frontal lobe syndrome, and expert testimony could have explained them. Additionally, LaVoy did recall Judge Domina talking about the difference in personality of Pico at sentencing but said he did not consider even then bringing out the brain injury. (96:17;92:43). The accident and resulting brain injury was clearly something brought up by Pico and his family because LaVoy admitted to considering that injury as a possibility for a NGI plea and as part of the defense. The State somehow faults Pico for not fully explaining to LaVoy how the brain injury could help the case. That is the attorney's job to investigate, however, not Pico's.

Notably, the State did not raise the argument that LaVoy was not required to get the medical records because he was not told to do so by Pico in the trial court. That is being raised for the first time on appeal and thus forfeited. ***Willa***, ***supra.*** Even if not forfeited, to require a person with brain damage sufficient to rise to the level of NGI to raise the issue with his attorney, and put no onus on the attorney, is absurd.

The parties agreed that ABA standards require that strategic and tactical decisions be made by defense counsel after consultation with the client. (69:9). That is one clear problem in this case, as almost every decision was made unilaterally by LaVoy without consulting Pico. LaVoy testified he considered a NGI defense, considered getting the medical records, consulting a neurologist, getting the good touch/bad touch material from the school, and hiring an expert to challenge the Step-Wise interview and the interrogation. He did not discuss his decision to not follow through with any of these things with the client or his family. With respect to the head injury, LaVoy decided Pico had recovered and did not even consult the records even though he was still wearing an eye patch and exhibiting signs of frontal lobe syndrome during the meetings (i.e. his getting flustered). LaVoy is an attorney and not a medical

expert, so he should take care to get the information from someone who knows something about the situation. He didn't even request the records.

Attorney Fincke, who was called as an expert on standards of attorney performance, noted LaVoy should have gotten the records of the brain injury. He noted the discharge summary from the VA raised a red flag because this case "presents a disconnect between what {D.T.} says happened and what Mr. Pico says happened and those two things can't be squared…" (96:101-2). He also noted Judge Domina's concerns at sentencing. He said the records were necessary for possible secondary explanations, given the serious head injury.

Fincke testified that a trial attorney should get such records and cannot make a judgement about something like a head injury based on the attorney's own experience and how a person presents. Stating what should be obvious to any criminal defense attorney, he said:

> You really need to have the benefit of the medical records, and even with the medical records then you got to have somebody who understands what they mean… and tell you what they mean, but you can't make that judgement, in my opinion, just based on appearances. You got to go chase the records if you know they're there. (96:102).

Fincke felt LaVoy overlooked that Pico clearly showed symptomology of something, given the eye patch and double vision. That is a sign of an abnormality in his head. (96:103). He noted investigating the records would have been beneficial to the case prior to trial to present options for Pico. Fincke noted LaVoy said Pico was easily flustered and has difficulty expressing himself. (96:104). It would have been helpful to have an explanation for the jury. "People who suffer from traumatic brain injury don't want to be seen as abnormal. So, it behooves the lawyer to go underneath and find out what is going on." (96:104). The trial court agreed with Fincke's assessment, just as the ***McDowell*** Court agreed with Dean Eisenberg after making its own individual review.

LaVoy should have gotten an evaluation to determine if NGI or an explanation for confession and the rubbing of the leg could have been raised. (96:107-108). Fincke also noted the issue should have been raised at sentencing, given the court's concern about dual personality. (96:108). Michelle Pico, the defendant's wife, testified about their daughter's sensory processing disorder. (96:197). She testified how the family would rub the daughter's leg to relieve her anxiety. (96:200). Additionally, she testified about Anthony's difficulty in understanding other people's points of view and

impulsivity. She gave an example of him getting into a woman's car at the grocery store to move her vehicle without thinking there may be something wrong with that behavior. (96:202-203). He also had a problem getting a job after an interview in spite of having experience. (96:203). She described how Pico shuts down when faced with frustration (96:203); he often goes off telling long boring stories and repeating the same stories again and again. (96:206). He retreats and shuts down in conflict and avoids confrontation; and he acquiesces to what people want. (96:208-209). Each one of these things were testified to by the physicians as signs of frontal lobe syndrome. Had LaVoy called a doctor to do an evaluation and ask appropriate questions of the family, Pico's on-going frontal lobe syndrome would have been obvious.

If an expert could be helpful and one is available to testify, counsel must at least consult with that expert. *See:* ***Ellison v. Acevedo***, 593 F.3d 625, 634 (7th Cir. 2010). Counsel's decision to not contact an expert, or even to get the records relating to Pico's head injuries because LaVoy did not know it would be helpful cannot be called a strategic one when the decision was based upon a lack of knowledge as to the extent of the brain damage and a lack of knowledge that a NGI defense was possible. As discussed more

below, the inculpatory statements could have been explained by the injury, and an explanation for rubbing D.T.'s leg would have been given. This behavior, which could be viewed as abhorrent to the jury, would seem normal to Pico, because he was taught to engage in that behavior with his daughter to ease her sensory disorder. His lack of realization that doing it to an unrelated individual was inappropriate was not due to pedophilia but to a lack of awareness of societal norms and impulsivity due to his injuries. Moreover, LaVoy's decision to not have Pico testify was based upon inadequate information because no expert was consulted and no medical records reviewed. An expert would have explained why Pico gets easily flustered and gives inappropriate responses. Even when the trial court essentially asked for an explanation of Pico's strange dichotomy in personality at sentencing, none was given, as no records had been obtained and no expert consulted. (92:44). None of these options were explored because LaVoy saw no need to review the records.

The trial court decision relied upon ***State v. Felton***, 110 Wis. 2d 485, 329 N.W.2d 161 (1983). (98:8). Notably, the State's appellate brief fails to discuss that case. In ***Felton***, the Wisconsin Supreme Court held that the fact the attorney entered a NGI plea

without consulting the client and then later withdrew it without consultation was deficient and prejudicial. The Court noted that even the failure to fully investigate a NGI plea and consult with the client was deficient. Here, LaVoy considered that potential plea, didn't talk with any expert or review any records, and then decided against filing the plea. That, in and of itself, given the testimony of Dr. Capote, is enough for a new trial under ***Felton, supra***.

The State argued in the trial court that unless a defendant admits the conduct, there is no need to investigate NGI. No case holds as such. The State took a quote within ***Felton*** and tried to make it a holding. In fact, it is counsel's duty to investigate NGI if there is any reason to believe the defendant may fit into that category—whether or not he admits to committing the offense. In this case, the State certainly seized upon Pico's statements in the interrogation, such as "I shouldn't have done it," his feeling "sick," etc. (92:140-141), and the entire interrogation was incriminating (83:Ex.1).

The two doctors called at the postconviction hearing differed as to whether that plea would have been successful in front of a jury based upon the records given to each. They both agreed that a final determination should, however, be made in person and with the help

of interviews of family members. Neither doctor had the opportunity to confer with Pico's wife, Michelle. Her testimony clearly established that Anthony was, at the time of this incident, suffering from frontal lobe syndrome, and that condition continues. As noted above, the State's own psychiatrist, Schoenecker, admitted that if things like perseverance, telling long boring stories, and impulsivity are present, they would be a sign of frontal lobe syndrome. (97:98-100) He did not hear Michelle's testimony, however, and did not interview her. Michelle established that Pico had and still has all of those symptoms. The doctor had no evidence given to him by the State as to whether or not Pico was currently showing any of these symptoms. Michelle's testimony showed that the syndrome as a result of the brain injury is still present. Thus, a NGI plea would have been possible and likely successful.

The argument that the defense failed to allege what the investigation into the medical records would have revealed is both forfeited for being raised for the first time on appeal (*See:* ***Willa, supra***) and also not correct. Dr. Capote clearly testified Pico was suffering from frontal lobe syndrome at the time of the incident; and he could have raised a successful NGI defense. An in-person examination was not required because the brain injury scans from

1992 showed permanent deficits from which a person cannot recover. This was agreed to by both doctors. Both doctors agreed an in-person examination is appropriate before the full NGI defense is brought at trial, but it is not necessary to show that the records should have been gotten and reviewed by an expert.[3] Moreover, LaVoy could have moved to suppress or explain the inculpatory statements Pico made. Finally, the defense could have explained how Pico would not have believed the rubbing of another child's leg to be inappropriate since he was taught to do the same thing with his own daughter; and his injury would have prevented him from making any distinction between what was appropriate and what was not. For all of the above reasons, the trial court's decision that LaVoy was ineffective was correct.

IV. INEFFECTIVENESS FOR THE FAILURE TO CALL OR CONSULT AN EXPERT AS TO REID INTERROGATION TECHNIQUE.

Counsel was also deficient for failing to call an expert as to the unreliability of the "Reid" technique for questioning suspects. *See:* Police "Science" in the Interrogation Room: Seventy Years of

[3] The State, again for the first time on appeal, raises a ***Daubert*** challenge in a footnote at p. 27 to Dr. Capote's testimony; however, even the State's own witness agreed with Dr. Capote's reading of the scans as showing the traumatic brain injury. No witness with more experience than Dr. Capote testified he was incorrect in his diagnosis of the injury. This argument is forfeited as not raised in the trial court and not based upon the record. (***Willa, supra***).

Pseudo-Psychological Interrogation Methods to Obtain Inadmissible Confessions. (83:Ex.A).

Dr. Yuille testified for the defense. He is an expert in police interviewing procedures and helped develop protocols to interview suspects in the wake of research about the unreliability of the Reid technique and the likelihood of false confessions with that technique.

He noted that the interrogation of Pico by detective Rich was an example of the usage of that technique. (96:136). He noted that Rich's use of components of that technique–for example, the use of false or misleading information about the quality or quantity of evidence against the suspect-was part of the Reid technique. That particular component, the use of false or misleading information in interrogation, has come under attack. He noted the Reid organization itself now says this approach should only be used when "there is convincing evidence of the guilt of the suspect" including corroborating information. (96:136-7).

In Pico's interrogation, the detective told Pico there was a videotape, other witnesses, and physical evidence of the assault. (96:137). This was all false information. In addition to requiring strong evidence and corroborating evidence prior to use of false or misleading information, Reid and Associates suggests officers

should conduct a behavioral assessment interview to look at the kinds of behavior manifested in the suspect being interviewed. That was not done here. Thus, there was no baseline to determine what Pico looked like when exhibiting signs of guilt versus what he looked like when not exhibiting signs of guilt. This could have led to the detective misinterpreting Pico's behavioral change as a sign of guilt. (96:138). Moreover, the frontal lobe damage in this case lead to a susceptibility to false confession. (96:140).

Dr. Yuille noted the detective's introduction of DNA evidence and cameras in the school, along with other witnesses, which were not factual are high risk factors in leading to false confessions; and those factors occurred in Pico's interrogation. (96:141). The State does not challenge this evidence. Thus, this interrogation technique was one likely to lead to a false confession in a regular person. A person with abnormal susceptibility due to his brain injury would be even more likely to make a false confession.

If the motion to suppress statements had not been withdrawn but had been denied, the jury needed an explanation of how the Reid technique works and the potential for false confessions. Experts should have been called to explain first what the Reid Technique is and then to talk about Pico's head injury. (96:109). Knowledge of

Pico's injury and deficits would have been useful in the jury presentation particularly when discussing his answers and behavior in the interrogation. (96:110).

Had an expert been called as to the likelihood of the Reid technique causing false confessions or inculpatory statements, and a specialist been called to explain the exact symptoms Pico experiences due to his brain trauma lead to great susceptibility, the jury would have not relied so heavily on the problematic statements Pico made in the interrogation, even had those statements been admitted. Moreover, there is a good likelihood that a motion to suppress such statements due to that susceptibility would have been granted. Without those statements, there would be no evidence in this case other than D.T.'s testimony at trial, which vacillated between saying Pico sexually assaulted her and saying he did not. LaVoy felt he dealt with that problem by filing the motion in limine asking for the defense to be able to present character witnesses, but that was denied by the court. (96:25). No further motion to suppress based upon the Reid technique was filed after the motion to present character evidence was denied.

LaVoy did not seek an expert to testify about the Reid technique because he felt his client resisted it by not confessing.

(96:74). The statements Pico made were inculpatory; however, and the prosecution used them to secure a conviction. (i.e.91:139). LaVoy then admitted the statements hurt the defense case. (96:24). He said he withdrew the motion challenging Pico's statements because what Pico said in the interrogation was similar to what he'd testify to, and that meant he did not need to be called at trial. (96:19). He said it was a strategic move even though the decision to not have Pico testify was not made until trial. (96:20). Thus, the decision to withdraw the motion to suppress statements was clearly made prior to the decision to not have Pico testify. LaVoy did not consider that the symptoms of the brain injury could help in a motion to challenge the admissibility of statements. (96:20). The failure to raise that issue in a motion to suppress was not a strategy call but was simply overlooked.

LaVoy had to withdraw the statements motion because he did not get the relevant records, and he needed a denial in front of the jury. However, had he gotten the records which highlighted the deficits in judgment, impulsivity and other symptoms, those issues could have been raised. (96:110-111).

LaVoy agreed Pico said he felt "bad" during interrogation. That may or may not have been in response to the detective

suggesting that to Pico. (96:88-9). This was one example of Pico's susceptibility due to his brain injury.

LaVoy noted he did not want to call an expert when he thought he could get the same defense in through character witnesses. (96:92). Judge Domina, however, previously ordered that such character testimony would not be permitted. LaVoy did not seek an expert after that ruling. No explanation was given as to why this issue was not revisited.

LaVoy agreed that when the detective asked "Once you walked out of that class I bet you were—well, you were probably just sick to your stomach. Does that make sense?" (96:96;31;Ex.12; 83:Ex. H,p.19), Pico responded "Yes." This was another example of Pico acquiescing to what the detective stated, and no attempt to explain why he might respond that way was made by the attorney. Fincke noted that Dr. Capote's report would have been helpful in seeking suppression of the statements. The issues of suggestibility and susceptibility require expert testimony. Because LaVoy had not contacted an expert, he was not able to prove either. (96:105). The fact that the Reid technique was used on a person whose brain injury makes him more susceptible to suggestion than the normal person shows that a suppression motion would have likely been granted.

Additionally, Dr. Capote or another expert could have been called to explain why Pico would have made incriminating statements in response to the Reid technique used by the detective if he were not guilty of the assault. Every single one of his inculpatory statements were a result of him acquiescing to police authority—a "giving in" which both doctors agree is a possible symptom of such brain trauma. Moreover, an expert could have explained why Pico would rub the leg of a child and not realize it was inappropriate or that D.T. might view it as such. Additionally, LaVoy did not testify that the failure to consult with a neurologist was because LaVoy did not think he could get that evidence in—LaVoy felt it was unnecessary.

Pico did not admit to touching the vagina, but he made many incriminating statements. His statements were not unequivocal as the State claims. They were strong evidence used against him at trial. It would have been helpful to the jury to hear evidence from an expert that the use of the Reid Technique in this case caused Pico to make false incriminating statements. His constant acquiescing or giving in showed that the detective's technique worked.

The State seized upon Pico's incriminating statements throughout the case, contrary to the State's argument that Pico didn't

confess. (State's.br.p.26). As an example, in the closing argument, the prosecutor argued:

> He also doesn't remember if it was two times, but he says it shouldn't have happened the first time. You're right. You shouldn't have touched her the first time, and maybe you thought it was all one and you don't remember the second time. I doubt it. As Detective Rich said to him, you put your hands in her pants twice and rubbed that area and you don't remember? Come on. And also remember that he said or agreed with Detective Rich, it made me sick when I left the classroom. It made him sick to his stomach. Do you get sick to your stomach when somebody touches you or did he pat a little girl on the leg or something? Is that what would make you sick to your stomach when you left the classroom? He was sick to his stomach. He was sorry because he knows what he did, and as Detective Rich says it's hard to sit down and admit to these things.

(91:140-141). The prosecutor further argued in rebuttal:

> The defendant didn't adamantly deny in this case, and I'm glad you had a chance to hear it, that he touched her. An adamant denial is not no, maybe, I can't remember, no I didn't touch it. That's not an adamant denial of what happened…

(91:174).

The failure to call an expert as to the controversial Reid technique used in this case, coupled with Pico's susceptibility due to his brain injury, was not a reasonable strategy in the totality of the circumstances. The State only argues that the brain problems were not proven, but medical testimony established otherwise. That failure

prejudiced the defense because had an expert been called and/or a motion to suppress been filed, Pico would not have been convicted.

V. INEFFECTIVENESS DUE TO THE FAILURE TO CALL AN EXPERT TO CHALLENGE THE CARE CENTER INTERVIEW AND TESTIMONY.

Trial counsel was ineffective for failing to call an expert or otherwise challenge the interview of D.T. and testimony about that interview by Sarah (Bertram) Flayter, who conducted the Care Center interview. The State argues that while the trial court found LaVoy deficient in this regard, it did not make an individual prejudice assessment. But the court clearly laid out all those areas that were considered both deficient and prejudicial; thus, this finding is implicit in the court's decision. Moreover, the court found the defense to be ineffective based upon numerous deficiencies. This is not an area of law where courts demand magic words with each category where the trial court found error—it is clear the trial court found both deficient representation and prejudice.

Dr. John Yuille, who is widely regarded as the expert on interviewing children in possible child sexual assault cases, and who is the person who developed the Step-Wise protocol for such interviews, was called by the defense at the postconviction motion

hearing. Sarah Flayter used the Step-Wise protocol developed by Dr. Yuille in interviewing the alleged victim, D.T., in this case.

Dr. Yuille testified that while the interview seemed to be adequate in terms of the steps, "there were problems in the interview in terms of it not adhering to the spirit of some critical aspects of Step-Wise interviewing of children." (96:130). The first critical problem noted was the lack of "multiple hypothesis testing," a technique intended to minimize bias in child interviews. (96:130). The interviewer is supposed to generate alternative explanations for the fact pattern, not having a favorite hypothesis. He testified that was not done in this interview. (96:131). Dr. Yuille also noted there was no clarification of what the child meant by the word "down," as in "down the pants." It is important to note that while the child did use diagrams, the child first pointed to her hip at two places in the videotaped interview. She gestured near the waistband of her pants. (83:ex.2 at 10:05,10:07). LaVoy also conceded Flayter did not clarify that phrase in the interview. (96:94). Because there were differing possibilities, the alternative explanations should have been explored by the interviewer.

Moreover, Dr. Yuille testified that while the child said she was uncomfortable, the interviewer did not ask her to explain what it was that caused her discomfort. (96:132). Dr. Yuille further testified:

> Well, in my opinion the interview did not succeed in a determination of what may or may not have happened to this particular child, which is of course, ultimately the whole purpose of the interview, that it was left vague and indeterminant. (96:132).

When asked about the significance of a good touch/bad touch unit being taught at school during the time period of the alleged assault, Dr. Yuille testified that there's a "spate of disclosures of child sexual abuse after these good touch/bad touch programs…Of course, some of the disclosures are valid and some are not." (96:133). Dr. Yuille testified the interviewer could have dealt with that issue, but "more importantly" she should have first tried to find out what the child "was actually alleging had or hadn't happened." (96:133).

Dr. Yuille further noted that Flayter's testimony at trial that suggestibility is mainly a problem for preschoolers is not true. (96:133). He noted suggestibility is a problem for all people. He said it was not appropriate to say that suggestibility is mainly a problem in children younger than the second grader in the case at bar. He said:

> There's nothing in the literature to support such a statement at all. In fact, the literature shows just the contrary, that suggestibility is an issue at all ages and certainly it is with eight-year-olds. (96:134).

Dr. Yuille also noted that D.T.'s testimony at trial indicated her suggestibility due to the way she responded to questions. She agreed with both the prosecutor and the defense attorney. (96:135). He noted the interviewer could have tested that by asking leading or suggestive questions of the child unrelated to the issue being investigated. He gave an example:

> So, for example, if you're interviewing a little girl, say, an eight-year-old girl and you found out from her mother that the previous day she was at the pool and in shorts, you could ask a question such as you wore a red dress yesterday, didn't you? And you could prearrange several of these kinds of questions to see if the child will acquiesce to the leading nature or is able to resist.

(96:135). Contrary to the State's assertion in its brief at p. 31, that suggestibility check was not done in this case, showing how the failure to call an expert to challenge the interview prejudiced the defense.

Flayter admitted she was trained based upon protocols developed by Dr. Yuille. (96:175;90:218). She said at the postconviction hearing she really meant that preschoolers are suggestible. She may have meant that, but that is not what she said in

front of the jury. It is true that preschoolers are suggestible, but so are eight-year-olds. Flayter testified without objection that suggestibility is "mainly a concern for preschool children." (90:227). That implied it is not a concern with someone of D.T.'s age. LaVoy should have objected, and an expert should have been called to rebut this statement, as well as to show the problems with the interview. The failure to do so was prejudicial, as Flayter's testimony assured the jury that D.T. was credible and should be believed. Since D.T.'s testimony was the most important facet in this sexual assault case, the failure to attack her credibility was prejudicial. ***State v. Marty***, 137 Wis. 2d 352, 365, 404 N.W.2d 120, 126 (Ct. App. 1987) *overruled on other grounds by* ***State v. Sanchez***, 201 Wis. 2d 219, 548 N.W.2d 69 (1996).

Flayter also disagreed with Dr. Yuille's assessment that she should have asked some leading questions unrelated to the investigation to establish lack of bias. (96:181). Had LaVoy called Dr. Yuille during trial, the jury could have made the determination as to who had more expertise in the area—Flayter or the person who came up with the protocol she was attempting to use. It is likely the jury would have found Dr. Yuille's testimony to be more credible and, thus, found D.T.'s testimony and interview not credible.

Finally, Flayter disagreed that a good touch/bad touch unit was important to know about, but she said she has many kids who disclose (sexual assaults) after they have those units. (96:189-90). That is the problem as noted by Dr. Yuille—it brings out disclosures—true and false. It is important to try and determine which type of disclosure this was. That was not done here.

LaVoy testified he did not object to Flayter's testimony that suggestibility is only seen in preschool children because he believed preschool children are more suggestible. He did not want to draw attention to the testimony and felt D.T.'s testimony established how suggestible she was. (96:27). This statement makes no sense because D.T. testified after the DVD of the interview by Flayter was played for the jury and after Flayter testified. Thus, his strategy to not object because D.T.'s testimony showed how suggestible she was, was in fact an impossibility, as D.T. had not yet testified. (90:210). He did agree that Flayter's testimony about suggestibility stood out to him at trial, but he did not think there was anything he could do at that point. (96:27). True—during trial, all he could have done was object (which he didn't). He should have hired an expert before the trial to deal with the challenge to Flayter and her interview. An expert could have also explained how suggestible eight-year-olds are.

With respect to why an expert was not called to review whether the Step-Wise protocol was followed, LaVoy testified there was nothing in the interview to cause concern. (96:26). It should be noted that he did argue the opposite at closing that Flayter did not look at alternative hypotheses. (91:154). As Fincke testified, an expert should have been consulted to see whether the protocol was followed and whether the "hand down the pants" statement should have been clarified. He testified that had LaVoy called Dr. Yuille during the trial, it would have helped the defense case. (96:112-113). Additionally, he noted an expert would have been helpful to explain the issue of suggestibility with respect to the Step-Wise protocol.

LaVoy's strategy to not call an expert based upon D.T.'s testimony at trial showing her suggestibility makes no sense. That decision would have necessarily had to have been made pretrial. Dr. Yuille would have contradicted claims that suggestibility does not apply to someone D.T.'s age. He would have pointed out that false allegations of sexual assault are common after the teaching of good touch/bad touch in school. He would have also pointed out that the interviewer did not clarify the child's statements as to exactly where she was touched—even the diagram at trial differed from the statements. Finally, he would have noted there was no attempt to see

if the child herself was suggestible. There was no reason not to call such an expert.

When LaVoy was asked if the jury had been told by an expert that eight-year-olds are also suggestible and when they agree with all questions like D.T. did whether that shows suggestibility, he agreed that can influence the jury verdict. He said he argued that in closing. (96:36). What he did not do was present any evidence on the issue, however.

VI. INEFFECTIVENESS DUE TO IMPROPER VOUCHING.

Trial counsel was ineffective for failing to object when Detective Rich opined that child interviewer Flayter was "among the best in the state." (91:79). The State argues LaVoy was acting reasonably by not objecting and calling attention to it. He admitted not filing a specific motion in limine to prevent the witness from so testifying either. (91:31). No general motion to prevent witnesses from opining as to credibility of other witnesses was filed; and no reason was given by LaVoy for this failure.

The credibility of a witness is ordinarily something a lay juror can knowledgeably determine without the help of an expert opinion. "[T]he jury is the lie detector in the courtroom." ***United States v. Barnard***, 490 F.2d 907, 912 (9th Cir. 1973); ***Hampton v. State***, 92

Wis. 2d 450, 460-61, 285 N.W.2d 868, 873 (1979). In ***State v. Romero***, 147 Wis. 2d 264, 432 N.W.2d 899 (1988), a witness testified as to the credibility of another witness in a sexual assault trial, resulting in a reversal and new trial. The Court stated: "The testimony in this case was not helpful to the jury. Rather, it tended to usurp the jury's role. The credibility of a witness is left to the jury's judgment." ***State v. Friedrich***, 135 Wis. 2d 1, 16, 398 N.W.2d 763 (1987). As the Court of Appeals declared in ***State v. Haseltine***, 120 Wis.2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984), "[n]o witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." In ***Haseltine*** the Court of Appeals concluded that the admission of psychiatric testimony that a complainant in a rape case was telling the truth was prejudicial error. ***Id.*** Other state courts, likewise, have rejected testimony which interferes with the role of the jury by assessing the credibility of a complaining witness. *See, e.g.*, ***State v. Middleton***, 294 Or. 427, 438, 657 P.2d 1215 (1983); ***State v. Chul Yun Kim***, 318 N.C. 614, 621, 350 S.E.2d 347 (1986).

This testimony enhancing Flayter's credibility as an interviewer was a ***Haseltine*** violation. The failure to object was not a reasonable strategy call—the issue was big enough that the attorney

noted it; it is unreasonable to assume the jury did not. Thus, ignoring it to not call attention to it was an unreasonable decision, as the jury already paid attention to the testimony. This prejudiced Pico's defense.

It is presumed the jury considered all evidence, and any evidence tending to enhance the credibility of the testimony in support of the victim's version makes a difference. The trial court also noted the importance of this statement to the State's case. (98:20). *See:* ***Marty, supra***; *See also:* ***State v. Jeannie M.P.***, 286 Wis. 2d 721, 703 N.W.2d 694 (Ct. App. 2005) (in a case of he said/she said, "The defendant need only demonstrate to the court that the outcome is suspect, but need not establish that the final result of the proceeding would have been different."), citing ***State v. Smith***, 207 Wis. 2d 258, 275, 558 N.W.2d 379 (1997). Moreover, the rule against such vouching applies to both lay and expert witnesses. ***State v. Echols***, 348 Wis. 2d 81, 831 N.W.2d 768 (Ct. App. 2013); ***State v. Kleser***, 328 Wis. 2d 42, 86-88, 786 N.W.2d 144 (2010).

VII. INEFFECTIVENESS DUE TO THE FAILURE TO OBJECT TO EXPERT TESTIMONY UNDER *DAUBERT*.

Wis. Stat. § 907.02(1) states,

> if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

The detective, by saying D.T. "comes across as extremely credible" and also noting that "Her story has been consistent since the moment she told her mom" in the taped interrogation which was played for the jury, was permitted to testify as an expert on when a sexual assault victim is telling the truth. (31:Ex.12,p.4).

LaVoy admitted not trying to redact the interrogation or object to the detective's claim to Pico that D.T. was credible. (96:28-9). LaVoy did not believe that was challengeable, and the trial court found that failure deficient. (98:20-21). Implicit in the court's ruling as to that deficiency is the fact the court would have permitted redaction of the tape if requested. There was no reason given for failing to challenge that statement which prejudiced Pico's

defense, as it was yet another witness attesting to the credibility of D.T.

Trial counsel failed to object to the detective's testifying as an expert and failed to request a ***Daubert*** hearing as to whether he should be permitted to testify as an expert with respect to how to determine when a suspect is deceptive or lying during interrogations. Not only did Rich vouch for D.T.'s credibility in his questioning of Pico, which was played for the jury (31;Ex.12;83:Ex.H,p.4), he also testified he saw deception or lies in his interview with Pico. (91:82).

LaVoy said he remembers the detective testifying he can tell if someone is being deceptive during interrogations. (96:31). He thought the detective was not talking about Pico. (96:32). However, at trial, the detective specifically said "Where that manifests itself to an investigator is in deception or lies, and that's where I saw it in this case." (91:82). That was a direct statement to the jury indicating the detective saw deception in Pico's interview. LaVoy did admit then what the detective said was tied specifically to the claim that Pico was being deceptive. (96:32). LaVoy apparently missed that at trial. As the Court of Appeals found in ***Echols, supra*** at 100:

> Analogous to *Haseltine*, in which the testimony at issue was an implicit opinion that the victim was telling the truth, the safety director's testimony in the case before us is an improper

> opinion that Echols always stutters when he lies. In other words, she cannot vouch for when Echols is not telling the truth.

The State's brief fails to address ***Echols*** and cites ***State v. Miller***, 341 Wis. 2d 737, 816 N.W.2d 331 (Ct. App. 2012), which found no ***Haseltine*** violation in a detective calling a defendant a liar on a taped interrogation. It should be noted the ***Miller*** argument is again being raised for the first time on appeal and should be deemed forfeited. Moreover, the Court in ***Miller*** clarified the statement was made only in the tape and was not intending to attest to untruthfulness of the defendant. The judge also instructed the jury that the statements were not to be taken as true. In the case at bar, however, the detective not only made statements in the interrogation played for the jury, he clarified to the jury at trial that what he saw during that interrogation told him Pico was lying. No limiting instruction was given.

The failure to move to redact the recording or request a ***Daubert*** hearing was both deficient and prejudicial in this case. Those failures served to enhance D.T.'s credibility which, in a case like this, is the most important testimony. ***Marty, supra***.

As Fincke noted, a motion in limine to prevent witnesses from vouching for credibility would resolve this issue, and no such motion

in limine was filed here. (96:119). Both Rich and Flayter made statements vouching that D.T. acted like a credible sexual assault victim. (31:Ex 12; 83:Ex H,p.4). Thus, they vouched for D.T.'s credibility, and Rich testified Pico was not credible. (96:117). The distinction between interrogation versus direct testimony does not excuse the fact it was let in without objection. If the statement came in even if LaVoy had asked to redact the confession, he could have asked for an instruction to tell the jury the vouching cannot be considered for the untruthfulness of Pico but only as an investigative technique as in ***Miller, supra***. LaVoy chose not to object to these statements either. He should have at least objected because the jury heard the statements and relied upon them in reaching a verdict. In a credibility case such as this one, the jury would either believe the denial through the interrogation or D.T., so anything impacting the credibility determination on either side makes a difference.

The State maintains that Rich was not holding himself out as an expert. Again, making an argument for the first time on appeal, the State ignores the fact that the detective talked at length about his experience, discussed his interrogation expertise, talked about the ability to discern who the best child interviewers were, and told the jury he was able to discern Pico was lying because of his expertise.

That is precisely the type of evidence prohibited by ***Echols***. (91:82). Rich was clearly stating he has an ability to tell when a suspect is lying; he confirmed Pico lied. This testimony should have been objected to or handled through a motion in limine. A general jury instruction on credibility does not take care of the problem, as the trial verdict depended on whose version was more credible—D.T.'s or Pico's. When the detective said Pico was lying (and further noted how credible D.T. was in the interview), the guilty verdict was a given.

VIII. INEFFECTIVENESS DUE TO THE FAILURE TO REVIEW GOOD TOUCH/BAD TOUCH MATERIALS AND CALLING A WITNESS AS TO THE LEG RUBBING EVIDENCE.

LaVoy testified he considered introducing evidence that D.T.'s class was being taught the good touch/bad touch unit at school the same week of the allegation. (96:34). He did not try to get the records thinking it would be "a dangerous road to go down." When asked if he might have changed his mind and considered using the school materials if he got them to see what they actually showed, he responded that would not have changed his mind because "I have young school children. I know the stuff they've gone through so I generally know the general concepts of good touch bad touch in schools so I didn't need to see the written materials." (96:36). To

make decisions in a child sexual assault case based upon what your own children learn in their schools is not reasonable. As Fincke testified, "I've had small children, and you know, I wouldn't base the decision on what to do in one of my cases on what my kids did." (96:120). There would be no downside to getting the materials, reviewing what was taught, and then making a decision with the client as to whether to introduce that topic or not.

The mere fact that D.T. was learning this unit made it more likely she would falsely report a sexual assault and made it more likely that she would misread a touch on the leg as "inappropriate" (a word she actually used—ostensibly from that unit).

An expert like Dr. Yuille who testified that many disclosures, true and false, follow these units would tell the jury that many of these disclosures are false. Thus, D.T. may have made this false disclosure due to that unit. (96:133). Failure to introduce that evidence was both deficient and prejudicial, as that would have been reasonable doubt.

As to failing to call a witness such as Michelle Pico to testify that Pico learned to rub the leg of his own special-needs child as a way of calming her; thus, explaining why he would have rubbed another child's leg inappropriately, the trial court found that this was

tied to Pico's "mental health status" but the "omission" was not a "significant error." (98:22). This indicates the court found that failure deficient but not necessarily prejudicial in and of itself. However, when tied in with all the other failures, prejudice was cumulatively established.

Michelle did tell LaVoy someone should testify how Pico rubbed his daughter's leg as a part of her treatment. (96:213). LaVoy did not call Pico to the stand because he was concerned about the rubbing of the leg, and thought it would raise tough questions. (96:77). LaVoy did not claim he did not think that evidence was inadmissible—he rejected it. He did not introduce evidence about how Pico would touch his own child's leg because it would open up a "Pandora's Box." (96:80). His trial strategy was, however, that Pico did not touch the vagina, but he rubbed or touched the leg. (96:87). Thus, LaVoy made a decision not to discuss why Pico would be rubbing the leg when part of his defense was that he rubbed the leg and not the private part of D.T. It made no sense. LaVoy also argued at closing that while the leg touching of D.T. was inappropriate, it was not a sexual assault. (91:149). Thus, LaVoy brought that issue up himself with no explanation as to why Pico

would do this. His decision to not explain to the jury why this happened or in what context was not reasonable.

Fincke noted that LaVoy should have called someone to explain how Pico's touching of his own daughter on the leg to soothe her anxiety disorder would have provided

> a reasonable explanation for why this behavior was done, coupled with the head injury, as to why that may not be appropriate and the judgement issues as to why it may not be appropriate to do with someone who is not your own child I think puts it in a broader context that makes it easier for a jury to understand. I don't see any downside to doing that.

(96:122).

As noted above, Michelle Pico testified at the postconviction motion hearing both as to how she and Anthony rub their daughter's leg to soothe her sensory disorder and as to the symptoms of frontal lobe syndrome Anthony exhibits. Because the entire theory of the defense was that Pico just rubbed D.T.'s leg and not the vaginal area, LaVoy's belief he should ignore the reasons Pico was rubbing the leg was not reasonable. That issue was out there in front of the jury, and it should have been answered. The fact that is what he does with his own daughter, coupled with the brain injury that would make him not realize this may be construed as inappropriate for another child, would have put this in context for the jury and would have resulted

in an acquittal. Furthermore, Michelle Pico established that Pico was still in the throes on frontal lobe syndrome. Had Dr. Schoenecker known that, he would have concluded along with Dr. Capote that a NGI plea was possible and that Pico may have given inculpatory statements due to his brain injury.

Additionally, the evidence of Pico being medically trained to rub his own daughter's leg is not intended to show that because he did not sexually assault his own daughter, that means he didn't sexually assault D.T., which would be prohibited. It would be admissible to show his state of mind when he was doing what all parties agreed to—rubbing D.T.'s leg. Thus, this was not character evidence, and that evidence was not brought up specifically in the pretrial motion which requested permission to talk about Pico's appropriateness and playfulness with children. (18). LaVoy called attention to the inappropriate action of rubbing the child's leg at closing but left the evidence of that inappropriate behavior out there for the jury with zero explanation. The explanation would both have been admissible, when coupled with the information on Pico's brain injury, and would have been helpful to the defense.

IX. INEFFECTIVENESS DUE TO THE FAILURE TO OBJECT TO THE CHARACTERIZATION OF THE PRIOR.

The court presentence report characterized the California prior incident as a sexual assault conviction. (36:presentence, p.17).[4] The writer noted that Pico's prior conviction for the same crime led her to believe his risk of reoffending is unknown. For that reason, prison in lieu of probation was required. (36:presentence, p.18). Pico was, however, convicted of "disturbing the peace," a low level misdemeanor for which his sentence was suspended, and the case was ultimately discharged. His conviction was for violating California Penal Code Section 415(3), a crime akin to a disorderly conduct violation with a maximum possible sentence of $400 and 90 days' jail. (57:100-103; 96:45). No objection was made to this misinformation in the presentence report. The trial court felt the conviction should not have been included in the presentence report but felt it did not have any impact on the sentence. (98:32).

LaVoy testified he believed the prior offense was for either

[4] Although the only written order from which an appeal can be taken in this case granted Mr. Pico's motion and vacated the sentence, the two sentencing issues raised in the postconviction motion are raised again in this brief should this Court determine the trial court ruling to be in error with respect to the issues raised on appeal by the State. (73). Only written orders may be appealed. *See:* ***Ramsthal Advert. Agency v. Energy Miser, Inc.***, 90 Wis. 2d 74, 75, 279 N.W.2d 491 (Ct. App. 1979). Wis. Stat. §§ 806.06(1)(a) 808.03(1)(a).

annoying a child or disturbing the peace. (96:41). He thought the record looked official and did not see the need to clarify that charge or look at the California statute. He did admit at the postconviction hearing that the records showed Pico was convicted of subsection three of the California penal code Section 415 which states: "any person who uses offensive words in a public place which are inherently likely to provoke an immediate violent reaction." (96:45). Thus, Pico was convicted of the offensive words portion of the statute. There was nothing in the actual statute under which he was convicted about children at all. The printout of the case disposition stated: "On people's motion, court orders complaint amended by interlineation to add violation 415(3) pc misd as count 03."[5] This was an error on the part of LaVoy to not to get the records and object to that portion of the presentence report and to not bring this mistake

[5] California Penal Code Section 415 states in its entirety:

> Any of the following persons shall be punished by imprisonment in the county jail for a period of not more than 90 days, a fine of not more than four hundred dollars ($400), or both such imprisonment and fine: (1) Any person who unlawfully fights in a public place or challenges another person in a public place to fight. (2) Any person who maliciously and willfully disturbs another person by loud and unreasonable noise. (3) Any person who uses offensive words in a public place which are inherently likely to provoke an immediate violent reaction.

up in the sentencing court, especially when the court relied upon that presentence and its conclusion that given the prior sexual assault conviction, the possibility of reoffending merited prison.

The State conceded in the trial court that the presentence was incorrect in characterizing the California prior incident as a sexual assault conviction and conceded the trial attorney did not get the correct records to the sentencing court. The State further conceded the prior was a low level misdemeanor for disturbing the peace only. (69:43).

The State argued, however, that the court did not rely on this inaccurate information at sentencing. The Court of Appeals stated in response to a similar argument in ***State v. Anderson***, 222 Wis. 2d 403, 410, 588 N.W.2d 75 (Ct. App. 1998).

> [the State argues that the portion of the PSI to which Anderson objected (allegations of sexual assault which were later recanted) was not actually relied upon by the trial court at sentencing and constituted only a small portion of the lengthy PSI. Therefore, the State reasons, Anderson was not sentenced on the basis of inaccurate information. We disagree.

In ***State v. Travis***, 347 Wis. 2d 142, 832 N.W.2d 491 (2013), the Wisconsin Supreme Court noted that a new sentencing is required if there was inaccurate information at sentencing and if the sentencing court relied upon it. To determine the latter, there should

be some reference in the sentencing transcript to the information later found to be inaccurate.

> In accordance with *Tiepelman*, we examine the record to determine whether the circuit court gave "explicit attention" or "specific consideration" to the inaccurate information so that the inaccurate information "formed part of the basis for the sentence."

Travis, supra at ¶31. In cases such as ***Travis*** and ***Anderson***, it is clear that any mention of the improper information at sentencing is enough to merit a resentencing.

In ***Travis,*** the State even called the sentencing judge at the postconviction motion hearing to testify his decision would not have changed if the incorrect information had been corrected in court. The Supreme Court still reversed because it was impossible to determine later what effect the correct information would have had on the sentencing court had it been properly presented at the time. The sentencing judge was not called here to say had he been told Pico's prior was not a sexual assault but was a low level disorderly conduct, it would not have made a difference.

The sentencing court here did discuss this prior conviction and stated it was being considered in the sentence. (92:41-46). The court questioned how much weight to put on the prior and had

concerns about the risk to reoffend, similar to the presentence, which called the disorderly conduct charge a sexual assault.

There were numerous references to the California prior conviction at sentencing. With respect to that prior conviction, the court stated:

> If I accept it as fact, and I have no basis not to because there's no contrary information, you're dressed up as a character at a theme park. The contact that was alleged is different, but it does have a common thread, opportunity. This is not someone who thinks through. This is not someone who plots and plans." (92:41). (emphasis supplied).

Thus, the court was essentially inviting the attorney to provide evidence contradicting the presentence report's statements about that prior being a sexual assault, but LaVoy failed to provide the accurate information at that time.

The court then went on to note that the fact the Department of Corrections in the presentence noted the uncertainty in the risk to offend based upon this past prior conviction actually hurt Pico's chance to remain in the community, as that uncertainty as the risk to offend "doesn't come out necessarily in the defendant's benefit." (92:46). The court also noted it was taking the prior convictions (and not just one—the disturbing the peace) into account. That statement also was not corrected by LaVoy. (92:46).

LaVoy should have objected prior to the sentence. His failure was both deficient and prejudicial, as the court considered that prior in sentencing Pico to prison.

X. THE TRIAL COURT ERRED IN NOT PERMITTING CHARACTER EVIDENCE.

Judge Domina denied a motion in limine to permit character evidence that Pico was appropriate with children, was playful and was a well-respected parent helper, gregarious, and other similar traits. Wis. Stat. § 904.04(1)(a) allows an accused to offer evidence of a pertinent trait of his character. The trial court denied the motion under ***Tabor, supra*** finding the evidence was impermissible propensity evidence. However:

> When the defendant elects to initiate a **character** inquiry…What commonly is called '**character evidence**' is only such when '**character**' is employed as a synonym for 'reputation'… He may introduce affirmative testimony that the general estimate of his character is so favorable that the jury may infer that he would not be likely to commit the offense charged.

Michelson v. U.S., 335 U.S. 469, 477 (1948). The Wisconsin Supreme Court also held in a murder case that the defendant was entitled to offer both opinion and expert testimony concerning his general character trait of nonaggressiveness and nonhostility. ***King v. State***, 75 Wis. 2d 26, 248 N.W.2d 458 (1977). Similarly, in a case

such as this where the defense was that Pico was rubbing a leg but not committing a sexual assault, evidence of his general nature with kids, along with evidence he was trained to rub the leg of his special needs daughter, would have explained to the jury why this arguably inappropriate rubbing of the leg occurred.

The evidence offered by Pico was not impermissible character evidence. It was relevant evidence as to his general nature and was not intended to show that because he did not sexually assault others, he did not assault D.T. The ***Tabor*** evidence prohibition applies only when a defendant seeks to introduce evidence to show that because he did not sexually assault one person that means he could not have done the sexual assault in question. That was not what Pico was offering, and the court erroneously exercised its discretion by not permitting that evidence. This was not propensity evidence but permissible evidence that Pico had a good reputation while helping at school and otherwise with parents and kids.

The error in not permitting this evidence was not harmless. LaVoy recognized the character evidence was an important part of his defense strategy. (96:25,38-40,87,92-3). To not permit this evidence made an already limited defense even worse, especially given that LaVoy admitted how important to the defense this

evidence was. This case was a credibility contest. Thus, this evidence was vital. *See:* ***Edgington v. United States***, 164 U.S. 361, 366 (1896) (evidence of a good character, standing alone, may be sufficient to create a reasonable doubt).

XI. THE TRIAL COURT ERRED AT SENTENCING WITH NO OBJECTION FROM THE DEFENSE.

Another issue raised via postconviction motion was that the sentencing court erred at sentencing by requiring Pico to admit to his conduct in order to not receive a harsher sentence. LaVoy was ineffective for failing to object. The State says the trial court found no merit to this claim; however, the court vacillated in whether this was court error or not. Because Pico was granted a new trial, that issue was essentially mooted. (98:27-28).

Pico's right to silence did not end with the trial verdict, and he was punished more harshly because he failed to admit to sexual contact. Additionally, trial counsel was deficient for failing to object to that violation of Pico's right against self-incrimination.

The Wisconsin Supreme Court has stated: "The right against self-incrimination is a fundamental right guaranteed by both art. I, sec. 8, Wis. Const., and by the U.S. Const., amend. V." ***State v. Marks***, 194 Wis.2d 79, 89, 533 N.W.2d 730, 732 (1995).

This Court stated at sentencing:

> THE COURT: What I mean when I say that is acknowledging your conduct before this forum, before your family, before the Timmers in order to allow your children to hear it and to know what you've done is important, and I will consider whether or not you demonstrate remorse as a part of my sentence. Do you understand that, sir?
>
> …
>
> THE COURT: Is there anything else you wish to say today?
>
> THE DEFENDANT: I'm sorry to the Timmer family, sorry to my family.
>
> THE COURT: All right, Mr. Pico. You can stop talking now. I'm gonna do some talking because I sat through the trial.

(92:38). The Court later stated:

> . . .Mr. Pico, and frankly I'm offended that you don't have the courage to recognize, and don't give me a half story of I touched her but not enough, I didn't touch her in the way she said. I don't accept it, Mr. Pico. That's half a loaf.

(92:40). Later the Court stated:

> What I appreciate about the Timmer's presentation is they tried to strike a balance. They want to know that you did this. That's what Darien wants to know. They don't want and she doesn't want half a loaf. She wants you to state what you did.
>
> [you're in essence calling her a liar by not admitting what you did, and I understand that difficulty for them.
>
> Now, they wanted to go so far as to hinge as to whether or not you'll be in the community versus whether or not you'll be housed in prison, and our system is more

> complicated than that. I have more things to consider in reaching that decision.

(92:44). It is clear that the sentence was based, in part, on Pico's failure to admit at sentencing that he sexually assaulted D.T. This should not have been a factor at all at sentencing, as it was violative of Pico's right to silence.

As Judge Bohren noted in the postconviction motion oral ruling, Judge Domina's statements at sentencing were extremely close to those words in the case of ***Scales v. State***, 64 Wis. 2d 485, 495, 219 N.W.2d 286 (1974), where the court ordered imprisonment due to the defendant's lack of remorse. As Judge Bohren said in deciding whether the instant case was more like the case of ***Williams v. State***, 79 Wis. 2d 235, 255 N.W.2d 504 (1977) or ***Scales, supra***. "This case is more attuned to the Scales case as to what happened." (98:27). The court also stated:

> The comments, though, in the sentencing transcript this Court believes are certainly problematic. Then I look at all of the items I talked about this afternoon, I'm satisfied that Mr. LaVoy's performance as a defense lawyer was deficient. I'm satisfied that the deficiencies did prejudice the defense case for the reasons stated.

(98:28).

In ***Scales***, the Wisconsin Supreme Court remanded for a new sentencing because the sentence was based upon the defendant's lack

of remorse. Pico's lack of remorse was used as a reason to impose the severe sentence in this case: thus, a new sentencing is warranted. LaVoy was ineffective for failing to object to the sentencing judge requiring Pico to admit to his conduct to avoid a harsh sentence. LaVoy and the court were on notice that Pico was denying guilt, so LaVoy should have submitted a sentencing memorandum or objected to imposing a higher sentence for failure to admit guilt in violation of ***Scales, supra***.

The court also erred by requiring Pico to give up his right to silence at sentencing. No finding of ineffectiveness is necessary to a decision as to whether or not this was an error on the part of the court. That is a sentencing error requiring reversal, whether or not LaVoy objected. *See:* ***Scales, supra.***

Pico is entitled to a new sentencing as a result of the court's reliance upon inaccurate information at sentencing, its requirement that Pico give up his Fifth Amendment right against self-incrimination at sentencing to avoid a harsh sentence, and due to ineffective assistance of counsel at sentencing due to the failure to present accurate information as to the prior, the failure to object to the inaccurate information in the presentence, the failure to call an expert to explain Pico's dichotomous personality as noted by the

sentencing court, and the failure to object to the Fifth Amendment violation.

CONCLUSION

Both the individual errors and their cumulative effect denied Pico of a fair trial and a fair sentencing. *See:* ***Thiel***, ***supra*** at 311; ***State v. Kemble***, 238 P.3d 251 (S.Ct. Kansas 2010). Counsel's errors in the instant case both individually and in the aggregate lead to a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland, supra*** at 694. Moreover, the court's errors in refusing Pico's request to admit character evidence and at sentencing require reversal. Thus, Pico is entitled to a new trial and a new sentencing hearing. He respectfully requests this Court affirm the Order of Judge Bohren granting him a new trial and vacating the sentence herein.

Dated at Madison, Wisconsin, _____, 2016.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 200 dots per inch, 13-point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 14,922 words.

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_____
TRACEY A. WOOD
State Bar No. 1020766

CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(3)(b).

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

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

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TABLE OF CONTENTS