STATE OF WISCONSIN
IN SUPREME COURT

STATE OF WISCONSIN,

Plaintiff-Appellant,

v. Appeal No.: 15 AP 1799-CR

ANTHONY R. PICO,

Defendant-Respondent-Petitioner.

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

BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT-PETITIONER

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has indicated that both oral argument and publication are appropriate in this matter.

STATEMENT OF CASE

This Brief comes after a divided Court of Appeals, District II, reversed the Honorable Michael Bohren's decision vacating Pico's conviction and sentence and ordering a new trial on the basis of ineffective assistance of trial counsel. Judge Reilly dissented in the Court of Appeals. This Court accepted Pico's Petition for Review.

Anthony Pico (Pico) has been married for 20 years and is the father of two children, a boy and a girl. He is a veteran of the U.S. Marine Corps and was medically discharged in 1993 after a motorcycle accident left him hospitalized in a coma with severe head trauma. (97:13,197,209;83:Exh.3).

This appeal arises out of a jury verdict convicting Anthony Pico of first degree sexual assault of a child, D.T., then an eight-year-old. (43). Pico was sentenced to six years of initial confinement and ten years extended supervision. (43). The original trial was presided over by Judge William J. Domina. (90).

Pico filed a postconviction motion alleging ineffective assistance of trial counsel, Jonathan LaVoy (LaVoy) and plain error at sentencing. Judge Bohren presided over the ***Machner***[1] hearing and

[1] ***State v. Machner***, 101 Wis. 2d 79, 303 N.W.2d 633 (1981).

found LaVoy to be ineffective, vacated the conviction and sentence and ordered a new trial. (98). The State appealed.

Because Pico wears an eye patch and has vision problems due to a serious motorcycle accident years earlier, postconviction counsel retrieved Pico's 1992 medical records from the hospitalization following his accident. (57). Given the severity of the brain damage from that accident, Pico alleged in his postconviction motion that LaVoy should have gotten the records and reviewed what impact the injury would have had on the case.

At the postconviction motion hearing, Dr. Horacio Capote (Capote), the Director of the Division of Neuropsychiatry at the Dent Neurologic Institute in Buffalo, New York, testified that he diagnosed frontal lobe syndrome in Pico due to the brain damage from his motorcycle accident. (97:83). Pico had "problems with the third cranial nerve, therefore, double vision for which an eye patch became necessary to maintain vision." (97:9). Pico also suffered a significant decrease in IQ. (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, impulsivity, and not being able to recognize when people are not interested in the stories. (97:10, 25).

Pico was alleged to have touched D.T.'s vagina while he was working as a classroom volunteer for D.T.'s and his daughter's class. D.T. alleged Pico rubbed her leg, and she made various inconsistent statements both in a CARE interview, performed by Sarah Flayter, and at trial that varied from claiming Pico touched her where she "goes to the potty" (83:Exh.2) to denying such touching. (90:253–73). D.T. said his hand went "down" her pants and circled an area including hips, crotch, and left leg to indicate where the touching happened. (Id. at 10:17:00–42; 31:Exh. 4).

Detective Andrew Rich interrogated Pico, and the tape of the interrogation was played at trial. (91:84–87) (31:Exh.12;83:Exh.H) During the interrogation, Rich lied to Pico and told him a student said he inappropriately touched her and that there was DNA proof, video proof, and a student witness. (91:81–82, 900–91, 98–100) (83:Exh.H 3–5). During the interview, he said that D.T. was very credible, but that Pico was deceptive. (31:Exh.12, 4:91:87, 82–83:Exh.3; 92:139–41; 83:Exh.1; 96:24; 98:16).

Pico was confused by the interrogation technique (the Reid technique) and made various inculpatory statements the State was able to successfully use in its argument to the jury to convict—including giving in to Rich's interrogation and saying everything D.T. said was possible. (92:139–41:83:Exh.1,H3;96:24;98:6–7,16,20;91:174). Rich

subsequently admitted his statements to Pico about DNA, video evidence, and a witness were false and were used as an interrogation technique. (91:81–82,98–100). Dr. Yuille confirmed at the postconviction hearing that the interrogation technique used here was the Reid technique, and it is known to lead to false confessions. (96:136). Dr. Capote confirmed that such a technique would cause someone with Pico's brain injury to "give in" to what police suggested. (97:14,49).

Other witnesses to D.T.'s statements testified at trial, as did Flayter. Pico called no witnesses, and LaVoy presented no evidence. (91:133). His defense was reasonable doubt. (91:149).

At the postconviction motion hearing, LaVoy testified; along with Sarah Flayter (Flayter), who had conducted the forensic interview of D.T. and testified at trial; Rich; and Dr. Craig Schoenecker (Schoenecker), a forensic psychologist. Pico called Waring Fincke (Fincke), an attorney; Dr. John Yuille (Yuille), who developed the Step-Wise protocol used by Flayter; Pico's wife Michelle Pico (Michelle); and Capote. Fincke testified about the standards for a competent attorney. The State objected to Fincke testifying as to whether LaVoy was ineffective. The defense agreed to limit Fincke's testimony to factual questions not about the ultimate issue, and Judge Bohren permitted Fincke to testify about proper

actions for a defense attorney in such a case. (61–62). Yuille testified about the Step-Wise protocol used by Flayter, as well as the Reid technique used by Rich in interviewing Pico. Michelle testified about her husband's symptoms from the brain injury and how they often massaged their own daughter's leg to comfort her because of her sensory disorder. Capote testified about Pico's brain injury. (96–98).

In his decision granting the defense motion, Judge Bohren made findings and agreed with Fincke that LaVoy's choice not to get Pico's medical records was an unreasonable failure to investigate. (98:8–15; 17–19, 28–30). Judge Bohren relied on ***State v. Felton,*** 110 Wis. 2d 485, 329 N.W.2d 161 (1983), where an attorney was held ineffective for abandoning a NGI defense without a proper and thorough investigation. Judge Bohren noted that Pico's brain damage contributed to his inculpatory admissions to police and disagreed with LaVoy's opinion that Pico resisted the police in his interrogation and denied involvement. Judge Bohren found Pico did not make adamant denials and was equivocal at best. (98:20–21). He found Pico involuntarily acquiesced to police authority—an issue not addressed prior to trial because LaVoy withdrew his motion to suppress. (*Id.*; 96:18). LaVoy said Pico denied the touching but admitted Pico made statements during the interrogation that hurt the defense. (98:6–7; 91:149;96:24). In a case such as this where the alleged victim

vacillates in testimony, the ability to explain the statements of Pico was important.

Judge Bohren found that Schoenecker largely agreed with Capote's diagnosis but that Schoenecker disagreed on the NGI portion of the opinion. (98:11). Judge Bohren found that the records should have been ordered at a minimum, noted Capote could have testified as to susceptibility and suggestibility, and said the suppression motion could have been filed, along with a motion in limine to prevent Rich from testifying about his opinion that Pico was deceptive and that Flayter and D.T. were credible. (98:13, 19–20). The court found that Pico's 1992 injury had broad impact on the case, and it should have impacted LaVoy's strategy as well as the development of the theory of the case. (98:13, 21). Judge Bohren found that LaVoy did not discuss the brain injury with Pico or his family, contrary to LaVoy's testimony that he did discuss it. (98:12:96:11). Failure to investigate and consult left the defense with nothing but an inculpatory interview of Pico, cross-examination, and argument. (98:15). Given Pico's personal characteristics due to his brain injury, LaVoy should have gotten the records and examined this interrogation technique relative to Pico's injury. The court noted that LaVoy's failure to call a witness as to the Reid technique and how it can lead to false confessions was also deficient, given Pico's brain injury. (98:15–17).

Judge Bohren concluded that further investigation is required when an attorney decides not to call the defendant to testify in a case like this. (98:14–15, 29–30). LaVoy stated he did not call Pico because he felt he gets easily flustered and would make a bad witness. The attorney failed to call an expert to explain Pico's behavior and how he would feel flustered due to brain damage. He also did not call an expert like Yuille who noted problems with the child interview. Judge Bohren found LaVoy deficient for not consulting an expert on how to examine the interviewer. (98:19). Yuille would have also testified that false allegations increase after good touch/bad touch units D.T. had just learned in school, which could explain why D.T. might make a false report. (98:21). The court further found LaVoy deficient for failing to redact the interrogation by the detective where he notes that D.T. was credible, but Pico was lying. (98:19–20). He found that in a case like this where there was only cross-examination, the decision to not investigate was not entitled to deference because LaVoy needed to investigate to determine the effect of the brain injury on the theory of the case to make that decision. (98:12–14, 21).

Judge Bohren was concerned that the sentencing court may have improperly required an admission of leniency in contravention of ***Scales v. State***, 64 Wis. 2d 485, 495, 219 N.W.2d 286 (1974) but did not seem to find plain error in this regard. (98:27–28).

After a two-day ***Machner*** hearing, Judge Bohren issued an oral decision granting the motion, vacating the judgment of conviction, and ordering a new trial on grounds of ineffective assistance of counsel. (98). A written order stating the same followed. (98). The State appealed, and the Court of Appeals reversed with Judge Reilly dissenting. The Court of Appeals ruled that Judge Bohren's findings of fact were clearly erroneous and that he erred in finding prejudice. ***State v. Pico***, 2017 WI App 41, ¶122 (2017). The Court also ruled that Pico waived his Fifth Amendment challenge by not filing a cross-appeal. ***Id.*** The decision did not address Fincke's testimony. This Court then granted Pico's petition for review.

Additional facts will be noted in Pico's argument.

ARGUMENT

I. THE COURT OF APPEALS IMPROPERLY FAILED TO APPLY THE STANDARD OF REVIEW, WHICH IS DEFERENCE TO THE TRIAL COURT UNLESS THERE IS CLEAR ERROR, TO THE TRIAL COURT'S FACTUAL FINDINGS.

Trial counsel did no more than look at his client, wearing an eye patch because of a serious head injury years earlier, and decide there were no deficits worth examining in the client's medical records or otherwise investigating. However, after hearing expert opinion and other testimony, on thorough findings of fact and credibility, and considering the effect of Pico's injury to the facts of the case and on his susceptibility to a police detective's false claims during an interrogation that elicited inculpatory statements, Judge Bohren held this was ineffective assistance of counsel and granted Pico a new trial. The Court of Appeals incorrectly substituted its own factual findings for Judge Bohren's.

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***, 2008 WI App 5, ¶ 19, 307 Wis. 2d 232, 744 N.W.2d 889. 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.***

B. General Ineffective Assistance of Counsel Standards.

A defendant pleading ineffective assistance of counsel must satisfy a two-part test showing (1) that counsel performed deficiently, and (2) that deficient performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show his counsel's representation "fell below an objective standard of reasonableness" under the totality of the circumstances. ***State v. Carter***, 2010 WI 40, ¶ 22, 324 Wis. 2d 640, 782 N.W.2d 695 (2010), *quoting* ***Strickland***, 466 U.S. at 688.

A single unreasonable error can constitute 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) (reversed on other grounds). Although the Court must presume that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," ***Strickland*** 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***, 477 U.S. at 384, *citing* ***Strickland***, at 688–89.

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***, at 385; ***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***, at 690–91. But "[C]ounsel 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 trial counsel's deficient performance was prejudicial. ***Id.*** at 687. The Wisconsin Supreme Court applies the "cumulative effect" approach to decide whether trial counsel's deficient performance prejudiced the defendant. ***State v. Thiel***, 2003 WI 111, ¶ 59, 264 Wis. 2d 571, 665 N.W.2d 305 (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."). "The defendant is not required to show 'that counsel's deficient conduct more likely than not altered the outcome of the case.'" ***Moffett***, 433 N.W.2d at 576, *quoting* ***Strickland***, 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***, at 577. "Reasonable probability" under this standard is defined as "'probability sufficient to undermine confidence in the outcome.'" ***Id.***, *quoting* ***Strickland***, at 694. In addressing this issue, the Court normally must consider the totality of the circumstances. ***Strickland***, at 695.

C. The Court of Appeals Was Required to Defer to the Trial Court's Factual Findings.

The Court of Appeals' decision rejected Judge Bohren's careful factual and legal findings and found trial counsel had no duty to investigate because he did not know the full extent of Pico's brain damage. This holding is contrary to the decision of this Court in ***State v. Felton***, 110 Wis. 2d 485, 329 N.W.2d 161 (1983), which Judge Bohren's decision relied upon and which the Court of Appeals failed to mention or cite.

The Court of Appeals similarly disagreed with all of Judge Bohren's factual and other findings involving the failure of the attorney to redact the recording of the interrogation where the

detective bolstered the credibility of the child while saying Pico was deceptive and failing to object to the detective vouching for the ability of Flayter in conducting child sexual assault interviews.

The Court of Appeals also disagreed with Judge Bohren in his finding that proper investigation was not done by the attorney, who failed to get medical records or to consult or call any expert. The Court of Appeals found no deficiency, contrary to this Court's requirement that an attorney make reasonable investigations. *See* ***State v. Thiel***, 2003 WI 111, 264 Wis. 2d 571, 665 N.W.2d 305 (2003).

By substituting its own factual and credibility findings for those of the trial court and by characterizing those findings of the trial court as clearly erroneous, the Court of Appeals did not follow the rule of ***State v. Searcy***, 2006 WI App 8, ¶ 35, 288 Wis. 2d 804, 709 N.W.2d 497, which held that a reviewing court is to defer to the circuit court as to the weight it puts on evidence. The ***Searcy*** court held:

> It is well settled that the weight of the testimony and the credibility of the witnesses are matters peculiarly within the province of the trial court acting as the trier of fact. The reason for such deference is the superior opportunity of the trial court to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony. Moreover, when more than one reasonable inference can be drawn from the credible evidence, this court must accept the inference drawn by the trial court.

Id. (internal citations omitted); s*ee also* ***State v. Peppertree Resort Villas, Inc***., 2002 WI App 207, ¶ 19, 257 Wis. 2d 421, 651 N.W.2d

345 (holding the circuit court "is the ultimate arbiter of the credibility of the witnesses and the weight given to each witness's testimony.").

"The function of [the appellate] court is not to exercise discretion in the first instance but to review a circuit court's exercise of discretion." ***In re Cesar G.***, 2004 WI 61, ¶ 42, 272 Wis. 2d 22, 682 N.W.2d 1 (2004). By changing Judge Bohren's factual findings, the Court of Appeals tried to exercise its discretion instead of reviewing the discretion exercised by Judge Bohren, an experienced Waukesha County trial judge, who made factual findings over the course of an extended ***Machner*** hearing.

Judge Bohren's findings were disregarded even though they were not clearly erroneous. Judge Reilly's dissent discusses this exact issue—that the Court of Appeals' decision rejected Judge Bohren's factual and credibility findings in favor of factual findings of two Court of Appeals judges, even though the findings were not clearly erroneous. Judge Bohren was in the best position to assess the credibility of the witnesses, determine whether counsel was deficient, and whether the failures of counsel prejudiced Pico. His findings were entitled to the deference normally given to trial courts.

The State argued, and the Court of Appeals agreed, that Judge Bohren did not completely defer to trial counsel's strategic decisions about his refusal to get Pico's medical records or consult with experts

about the ramifications of his injury. Deferring to counsel's purported "strategic decision," however, requires that trial counsel first make reasonable investigations, or make a reasonable decision that makes such investigations unnecessary. ***Strickland***, at 691. Judge Bohren found that LaVoy chose not to undertake a reasonable investigation. Judge Bohren found LaVoy only "passively looked at" the impact the injury had on the case and further found the issue was "not evaluated with the seriousness" it merited from the testimony of the witnesses. (98:28). Judge Bohren found that given Pico's injury, the attorney should have recognized how much that injury impacted the case and should have investigated accordingly. (98:28–29). LaVoy was aware Pico still had to wear an eye patch from the old injury, was aware of Pico's confusion and inability to respond to questions clearly, and was aware he was easily flustered. (96:10,11,12,15,19,47). These are signs of frontal lobe damage and frontal lobe syndrome. (97:8–13,27,41–42). LaVoy chose not to investigate. (96:66). He also dismissed the possibility of a NGI plea without consultation with the client and advised his client not to testify due to an inability to appropriately respond to interrogation. Counsel's decision not to investigate was not good advocacy; it demonstrated a lack of diligence and is entitled to no deference.

Judge Bohren disagreed with LaVoy's minimization of Pico's injury and, based on Capote's testimony, ruled this was an extensive injury resulting in permanent brain damage leading to an acquiescence to police questioning and leading Pico to not realize it would be inappropriate to rub D.T.'s leg since he was trained to do the same with his daughter. (98:7,9–15;97:9–10,14,25,83; 97:15–16).

Capote 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). Thus, his testimony was that Pico's injury is permanent.

Schoenecker, the psychiatrist called by the State, disagreed with Capote only in that he did not feel that Pico lacked substantial capacity to appreciate the wrongfulness of his action or to conform his conduct to the law for a NGI plea.[2] (97:83–84). Judge Bohren found that the two doctors agreed as to the extent of Pico's injuries. (98:11). The Court of Appeals disagreed with this factual finding.

Schoenecker felt interviewing the family would have been helpful in deciding whether a NGI plea was appropriate, had he been given that opportunity. (97:100). He did not know that Michelle testified that Pico shows many of the symptoms of frontal lobe

[2] Wis. Stat. § 971.15.

syndrome, but Judge Bohren did. (97:98–100). Schoenecker's interview with the family would have revealed valuable information that would have helped LaVoy argue NGI or use the injury in other ways helpful to the defense.

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 admitted that he did not obtain Pico's medical records relating to his injury. (96:11). He said he chose not to get the records because Pico "didn't really bring up anything to me." (96:12). As noted above, LaVoy unilaterally decided a NGI plea was inappropriate for Pico. (96:66). This decision was never discussed with Pico or his family, as Judge Bohren found, because the attorney admitted dismissing the idea himself. (96:85; 98:12). He failed to get the records or contact an expert. (96:56, 66, 68). The Court of Appeals found this factual finding to be clearly erroneous.

The Court of Appeals disagreed with Judge Bohren that LaVoy should have investigated this issue. According to the Court of Appeals, because Pico knew touching a child was wrong, a NGI plea was not warranted. The Court of Appeals also found Judge Bohren's factual findings to be clearly erroneous, such as that the trial attorney did not discuss the brain injury with the family. Thus, the Court of

Appeals did not defer to the trial court's credibility or factual findings as has been required in prior caselaw. ***Searcy***, 2006 WI App 8, ¶ 33. The Court substituted its belief that because there was no proof that the family or Pico told LaVoy about the significance of the brain damage, he had no duty to investigate. Again, the Court of Appeals disregarded the factual finding of Judge Bohren that the attorney decided not to investigate even knowing about the injury and the VA medical discharge due to its severity. That deficiency led to the conviction. Had the Court of Appeals properly deferred to the trial court, Judge Bohren's decision would have been affirmed, as he was the only judge to have had the benefit of the testimony from all the witnesses at the postconviction motion hearing.

Instead of deferring to Judge Bohren's findings of fact and weight to be placed on the testimony from the postconviction hearing, however, the Court of Appeals disagreed with every one of Judge Bohren's findings and substituted its own findings of fact and weight to be placed on the evidence contrary to ***Searcy*** and ***Peppertree Resort Villas***.

II. THE TRIAL COURT WAS CORRECT THAT COUNSEL'S FAILURE TO INVESTIGATE A SERIOUS HEAD INJURY WAS A CONSTITUTIONALLY DEFICIENT PERFORMANCE THAT CAUSED PREJUDICE TO PICO BOTH IN PRETRIAL PROCEEDINGS AND AT TRIAL.

A. The Failure to Obtain the Medical Records.

The Court of Appeals agreed with the State that 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***, at 691. LaVoy was aware of an accident resulting in Pico still having to wear an eye patch. He noted the eye patch and knew there was an injury; he noted Pico's confusion during interrogation; he noted Pico's inability to respond appropriately; he noted that Pico 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 that Pico still has vision problems requiring an eye patch and has an inability to respond appropriately are signs of frontal lobe damage and frontal lobe syndrome. (97:8–13, 27, 41–42). 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 advise Pico to not testify due to an inability to appropriately respond to interrogation.

Pico's severe brain trauma and frontal lobe damage as a result of a motorcycle accident is not disputed in this case, although the State, trial attorney and even the Court of Appeals decision minimized the traumatic brain injury by calling it a mere "head injury" and "a dormant head injury." (State's App. Br. p.8, 26; Ct. App. Decision, p. 12, note 4). According to Capote, the level of damage to Pico's brain was so "stunning" that it showed up on even primitive imagining technology. (97:9). As noted, the medical records showed "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, along with other symptoms Pico currently exhibits. (97:10, 25). Frontal lobe syndrome was diagnosed. (97:83).

Based upon 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). Capote also opined Pico's

brain damage influenced his 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).

As noted in the previous section, Capote noted that the brain injury would still be present or worse in Pico, and Schoenecker agreed with that conclusion. (97:46). 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 due to the frontal lobe syndrome. (97:9,44). Schoenecker also agreed with Capote's recitation of symptoms such as short-attention span, poor memory, difficulty in planning or reasoning, environmental dependence syndrome, perseveration, 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 agreed that once there is a diagnosis of frontal lobe damage, a person always has it. (97:84). He noted 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 Pico's brain injury affected his conduct in this case. (97:92). He noted he did see Pico was discharged from the military based upon his medical diagnosis. (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 Capote, contrary to the Court of Appeals' finding. (97:98–100).

Both doctors agreed that, had LaVoy hired them prior to trial, the family members could have been contacted to see if any of these symptoms were present for a full evaluation to be completed. (97:100). Michelle's testimony showed that, had a doctor been consulted, she would have established Pico has ongoing frontal lobe syndrome. 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 failed to get the medical records relating to that injury. (96:11). He noted the family members had talked with him about Pico having a different kind of a sense of humor than most people. (96:11). LaVoy

tried to place the burden of getting the records on the person suffering from the illness, noting Pico "didn't really bring up anything to me" in response to questioning about the eye patch. (96:12). He did no investigation. 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). As noted above, LaVoy considered and unilaterally decided a NGI plea was inappropriate for Pico. (96:66). This decision was never discussed with Pico or his family, as Judge Bohren found, because the attorney admitted dismissed the idea himself. Nowhere in his statements did 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 for 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 … It was never brought up by his family." (96:71). LaVoy did note Pico showed signs of confusion during his interrogation by 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 whether it was due to the brain injury but dismissed that possibility and failed 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.

(96:92–93). There was abundant evidence of frontal lobe syndrome, and expert testimony could have explained how that syndrome led to what LaVoy noted. Thus, Judge Bohren found LaVoy deficient in this respect. Additionally, LaVoy did recall Judge Domina talking about Pico's inconsistent personality 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. The State and Court of Appeals decision faulted Pico and his family for not fully explaining to LaVoy how the brain injury could help the case. But investigating an injury and explaining how it might affect the case was LaVoy's job, not Pico's. 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 was raised for the first time on appeal and thus forfeited. ***In re Willa L.***, 2011 WI App 160, ¶ 27, 338 Wis. 2d 114, 808 N.W.2d 155**.** The Court of Appeals did not address

forfeiture and adopted the State's argument. Even if not forfeited, it is absurd 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.

ABA standards require strategic and tactical decisions be made by defense counsel after consultation with the client. (69:9). But in this case, 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 did not even request the records.

Fincke, who was called as an expert on standards of criminal attorney performance, testified that 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[.]" (96:101–02). 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 judgment about something like a head injury based on the attorney's own experience and how a person presents. (96:102). Fincke felt LaVoy overlooked that Pico clearly showed symptomology of something, given the eye patch and double vision. (96:103). He testified that 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). Judge Bohren agreed with these reasonable statements.

LaVoy should have gotten an evaluation to determine if NGI or an explanation for the inculpatory statements and the rubbing of the leg could have been raised. (96:107–08). Michelle testified about their

daughter's sensory processing disorder. (96:197). She discussed how the family would rub the daughter's leg to relieve her anxiety. (96:200). Additionally, she testified about Pico's difficulty in understanding other people's points of view and his impulsivity. She described how Pico shuts down when faced with frustration, and how he often goes off telling long, boring stories and repeating the same stories again and again. (96:203, 206). He retreats and shuts down in conflict and avoids confrontation, and he acquiesces to what people want. (96:208–09). 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 ongoing 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 cannot be called a strategic one when the decision was based upon a lack of knowledge as to the extent of the brain damage because he failed to obtain the records. As discussed more below, the inculpatory statements could have been explained by the injury. They would also shed light on why he rubbed D.T.'s leg. This behavior, which could be viewed by the jury as inappropriate, was 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 due to a lack of awareness of societal norms and impulsivity caused by 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. 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 failed 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 Court of Appeals ignored that decision. In ***Felton***, the Wisconsin Supreme Court held the fact the attorney entered a NGI plea without consulting the client and then later withdrew it without consultation was deficient and prejudicial. ***Id.*** at 516. The Court noted that even the failure to fully investigate a NGI plea and consult with the client was deficient. ***Id.*** Here, LaVoy considered that potential plea, did not talk with any expert or review any records, and then decided against filing the plea. That, given the testimony of Capote, is enough for a new trial under ***Felton***.

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 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 the condition continues. As noted above, the State's 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, but Judge Bohren did. Once again, the Court of Appeals disagreed with Judge Bohren's finding that the two doctors largely agreed; however, the testimony shows they did.

Judge Bohren found LaVoy should have investigated the impact of the frontal lobe injury and the decreased cognitive skills because those issues had a significant impact in this case. (98:15). The Court of Appeals disagreed with Judge Bohren that LaVoy should have investigated this issue because Pico knew touching a child was wrong; thus, a NGI plea was not warranted. The Court also found Judge Bohren's factual finding that the trial attorney did not discuss

the brain injury with the family as he claimed to be clearly erroneous. Thus, the Court did not defer to the trial court's factual findings. The Court of Appeals found because there was no proof the family or Pico told LaVoy about the significance of the brain damage, he had no duty to investigate or raise the issue in any way. Again, the Court of Appeals disregarded the factual finding of Judge Bohren that the attorney decided not to investigate, and that deficiency led to the conviction. Had the Court of Appeals properly deferred to the trial court, Judge Bohren's decision would have been affirmed.

B. Failure to Call or Consult with an Expert on the Reid Technique.

Counsel was also deficient for failing to call an expert as to the unreliability of the "Reid" technique for questioning suspects. *See* Brian Gallini, *Police "Science" in the Interrogation Room: Seventy Years of Pseudo-Psychological Interrogation Methods to Obtain Inadmissible Confessions*, 61 Hastings L. Rev. 529 (2010). (83:Exh.A).

Yuille testified at the ***Machner*** hearing. 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 the interrogation of Pico by Rich was an example of the usage of that technique. (96:136). He pointed out 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 by researchers. 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. (96:136–37).

In Pico's interrogation, Rich told Pico a series of lies. He said there was a videotape, other witnesses, and physical evidence of the assault. (96:137). This was all false. 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).

Yuille noted the detective's lies about DNA evidence and cameras in the school, along with other witnesses constitute high risk factors in leading to false confessions. (96:141). 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.

Judge Bohren found a motion to suppress statements should have been filed because in this particular case, the usage of the Reid technique on Pico led to him making involuntary statements. Thus, the Court of Appeals' finding that there was no showing that such a motion to suppress would have been successful is incorrect, as the trial court determined at the postconviction hearing that the motion would have been successful in its finding of involuntariness by faulting LaVoy for not pursuing it. (98:13). The court further faulted the attorney for not investigating or either calling a witness or learning enough about the Reid technique for cross-examination. (98:17).

In any event, the jury needed an explanation of how the Reid technique works and its 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 called to explain the susceptibility Pico experiences due to his brain trauma, the jury would have not relied so heavily on Pico's problematic statements. As noted, there is a strong likelihood a motion to suppress such statements 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 the 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, and no explanation for the lack of follow up was given.

Judge Bohren found since LaVoy relied upon Pico not testifying, he needed "further investigation, witness development, concept development, to present other witnesses to address the issue of that type of interview or to have knowledge of how to address it in

cross-examination in putting on a case would have been necessary for a viable defense[.]" (98:17).

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 emphasized them to the jury. (*see, e.g.*, 91:139). LaVoy also admitted the statements hurt the defense case. (96:24). The Court of Appeals decision found that Pico did not confess and withstood the Reid technique, but his constant changing of his story, admission he might have touched D.T. under her underwear, that he could not recall if he touched her vagina and similar statements establish how inculpatory they were. (83,H,App.A-80). LaVoy said he withdrew the motion challenging Pico's statements because what Pico said in the interrogation was similar to what he would testify to, and that meant he did not need to be called at trial. (96:19). He claimed it was a strategic move even though the decision to not have Pico testify was not made until trial. (96:20). Thus, LaVoy did not consider whether 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 motion because he did not get the relevant records even after admitting the statements showed susceptibility, 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. (96:88–89;110–11).

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,Exh.1,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 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 the Reid technique was used on a person whose brain injury makes him more susceptible to suggestion than the normal person shows a suppression motion would have likely been granted.

Additionally, 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.

Pico's statements were hurtful to his case, contrary to the Court of Appeals' ruling. 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 the detective's technique worked.

The State seized upon Pico's incriminating statements throughout the case. 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 … 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…He was sorry because he knows what he did…

(91:140–41). The prosecutor further argued in rebuttal:

> The defendant didn't adamantly deny…that he touched her. An adamant denial is not no, maybe, I can't remember…That's not an adamant denial of what happened…

(91:174).

Had an expert been called as to the likelihood of the Reid technique causing false confessions or inculpatory statements and had an expert been called to explain the symptoms Pico experiences due to his frontal lobe syndrome, the jury would not have relied so heavily on the statements Pico made during the interrogation.

LaVoy felt he could deal with Pico's statements at trial by presenting character witnesses and filed a motion in limine asking permission to present said witnesses. That motion was denied.[3] (96:25). LaVoy testified that he did not want to call an expert when he thought he could get the same defense in through character witnesses. (96:92). He provided no explanation as to why the admissibility of Pico's statement was not revisited in light of the court denying his motion to present character witnesses.

The Court of Appeals' decision reversed the factual finding of Judge Bohren and concluded LaVoy had seen no symptoms of any injury or deficit that could affect his trial strategy. The Court of Appeals also agreed with LaVoy that Pico had made consistent

[3] The Court of Appeals refused to consider Pico's challenge to the court's refusal to admit character evidence because it was not raised in the trial court. This assertion is incorrect. The Court of Appeals decision itself notes Pico claimed, "the circuit court erred when it denied Pico's motion in limine to present character evidence." Thus, the issue was raised and denied in the circuit court, but it was denied by the circuit court. Even if it were not raised in the postconviction motion, it was properly preserved for appeal. *See* Wis. Stat. § 974.02(2). It was also raised in both the postconviction motion and in trial court briefing. (57,8; 71:2).

denials to police, showing he did not acquiesce to police. The prosecutor, the experts, and Judge Bohren saw that differently. Furthermore, the Court of Appeals found that because no cases establish the involuntary statements would have been suppressed because of the Reid technique, such a motion would not have been successful. Judge Bohren, however, found the motion should have been filed because the statements were involuntary. *See, e.g.*, ***Missouri v. Seibert***, 542 U.S. 600, 617 (2004) (police's use of the Reid technique threated to thwart *Miranda*'s purpose of reducing coerced confessions); ***State v. Eskew***, 390 P.3d 129, 135–36 (Mt. 2017) (statements involuntary when given by a mother to police who said they were seeking treatment information)**;** ***Bumper v. North Carolina***, 391 U.S. 543, 548 (1968) (consent cannot be voluntarily given after police assert they have a warrant); ***State v. Hoppe***, 2003 WI 43, ¶ 59, 261 Wis. 2d 294, 661 N.W.2d 407 (2003) (defendant's statements to police were involuntary because of the coercive technique and the defendant's personal characteristics).

The failure to call an expert on the controversial Reid technique, coupled with Pico's susceptibility due to his brain injury, was not a reasonable strategy in the totality of the circumstances. That failure prejudiced the defense because if an expert had been called and

a motion to suppress been filed, then Pico would not have been convicted.

C. Failure to Call an Expert to Challenge the CARE Center Interview.

Trial counsel was ineffective for failing to call an expert or otherwise challenge the interview of D.T. and testimony about the interview by Sarah (Bertram) Flayter, who conducted the Care Center interview. Again, Judge Bohren 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 created the Step-Wise protocol ostensibly followed in this case, 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 Flayter's 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. He testified that was not done in this interview. (96:131). 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. One gesture was near the waistband of her pants. (83:Exh.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, 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). 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, Yuille testified 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). 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" given the conflicting statements and the lack of bias testing. (96:133).

Yuille further noted 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, including the second grader in this case. 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).

Yuille also noted the interviewer could have tested suggestibility by asking leading or suggestive questions of the child unrelated to the issue being investigated. (96:135). 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 on protocols developed by Yuille. (96:175; 90:218). She said at the postconviction hearing she really meant that preschoolers are especially 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 neither objected nor called an expert who could have rebutted this statement and shown 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, (Ct. App. 1987) *reversed on other grounds by* ***State v. Sanchez***, 201 Wis. 2d 219, 548 N.W.2d 69 (1996).

Flayter also disagreed with Yuille's assessment she should have asked some leading questions unrelated to the investigation to establish lack of bias. (96:181). Had LaVoy called 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. The Court of Appeals' decision intimates that Flayter's version was correct without addressing the fact that a witness who would testify as to deficiencies in the interview would have been helpful to the defense. It is likely the jury would have found Yuille's testimony more credible and found D.T.'s testimony and interview not credible.

Finally, Flayter disagreed 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; 98:21). This is precisely the problem as noted by 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. The content of

the teachings in the unit was not the important facet here—it was the fact D.T. had just been taught that unit that could explain her false allegation. Both true and false allegations are higher after these units, and the jury would have likely believed hers was in the latter category, after hearing all the evidence.

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 reasoning 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). 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). But he argued the exact opposite in closing—that Flayter did not look at alternative hypotheses. (91:154). As the trial court found, 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 had LaVoy called Yuille during the trial, it would have helped the defense case. (96:112–13). Additionally, he noted that an expert would have been helpful to explain the issue of suggestibility with respect to the Step-Wise protocol. The Court of Appeals disagreed.

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. 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 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 thus no reason not to call such an expert.

D. Failure to Object to Improper Testimony by Rich.

Trial counsel was ineffective for failing to object when Rich opined that child interviewer Flayter was "among the best in the state." (91:79). LaVoy admitted not filing a specific motion in limine

to prevent the witness from so testifying either. (91:31). Judge Bohren found him deficient in both respects.

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." *See also* ***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." Other state courts have likewise 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).

The failure to object was not a reasonable strategy call—the issue was big enough 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. 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:* ***State v. Marty***, 137 Wis. 2d 352; *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***, 2013 WI App 58, 348 Wis. 2d 81, 831 N.W.2d 768; ***State v. Kleser***, 2010 WI 88, 328 Wis. 2d 42, 86–88, 786 N.W.2d 144. The Court of Appeals decision implied this type of vouching is permissible in Wisconsin courts. But that decision did not address cases to the contrary.

The detective, by saying that D.T. "comes across as extremely credible" and 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 without LaVoy requesting a Wis. Stat. § 907.02(1) determination. (31:Exh.12, p.4). Rich 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). As the Court of Appeals found in ***Echols***, 386 Wis. 2d 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.

LaVoy admitted not trying to redact the interrogation or object to the detective's claim that D.T. was credible. (96:28-29). 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 recording if requested. Trial counsel failed to object to the detective's testifying as an expert.

The Court of Appeals did cite ***State v. Miller***, 2012 WI App 68, 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 was raised by the State for the first time on appeal and should be deemed forfeited. *See* ***In re Willa L.***, 2011 WI App 160, ¶ 27; *see also* ***State v. Caban***, 210 Wis. 2d 597, 563 N.W.2d 501 (1997).

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 the statements were not to be taken as true. In this case, 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.

As Fincke noted and found by Judge Bohren, 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. (31:4, 12). Thus, they vouched for D.T.'s credibility. Rich also 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. The

court's postconviction decision also noted that redaction would have been granted. (98:21). Even if the statement came in, LaVoy 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***. 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 was of utmost importance.

Rich was clearly stating he has an ability to tell when a suspect is lying; he confirmed Pico lied. (91:82). That is precisely the type of evidence prohibited by ***Echols***. When the detective said Pico was lying (and further noted how credible D.T. was in the interview), the guilty verdict was a given.

Judge Bohren again found this performance by LaVoy to be constitutionally deficient, and the Court of Appeals substituted its beliefs for those of the judge who listened to the testimony at the hearing and reversed on a theory and case introduced by the State for the first time on appeal.

E. Failure to Review Good Touch/Bad Touch Materials or to Call Michelle Pico at Trial.

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 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.

The mere fact D.T. was learning this unit made it more likely she would falsely report a sexual assault and made it more likely she would misread a touch on the leg as "inappropriate" (a word she actually used—ostensibly from the school unit). This is what Judge Bohren found and faulted LaVoy for not raising the issue or getting the materials. He found because of the unit, she was more likely to act in an "alarmist" fashion. (98:21).

An expert like Yuille who testified many disclosures, true and false, occur after these classroom units would tell the jury that many of these disclosures are false. Thus, D.T. may have made this false disclosure due to the 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, 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 it to be an error but not one 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, but he refused. (96:80, 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). He did not introduce evidence about how Pico would touch his own child's leg because it would open a "Pandora's Box." (96:80). His trial strategy was, however, to argue that Pico did not touch the vagina, but he rubbed or touched the leg. (96:87). Thus, LaVoy decided 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 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 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 explained. The fact that Pico was taught to do this with his own daughter, coupled with his brain injury, would make him not realize this may be construed as inappropriate with another child.

III. THE SENTENCING COURT ERRED BY REQUIRING PICO TO ADMIT GUILT IN RETURN FOR LENIENCY.

At sentencing, the trial judge told Pico:

> What I mean when I say that is acknowledging your conduct … I will consider whether or not you demonstrate remorse as a part of my sentence.
>
> …
>
> 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.

(92:38–40).

When Pico maintained innocence, as he had at trial, the court gave Pico six years of initial confinement in prison rather than sending him home that day, as the trial court intimated it might if Pico confessed at sentencing. The sentencing court, thus, impermissibly burdened Pico's Fifth Amendment privilege against self-incrimination, applied to the states through the Fourteenth Amendment, and the corresponding provision of the Wisconsin Constitution. LaVoy was ineffective for failing to object.

Judge Bohren later vacillated in whether this was court error or not. Because Pico was granted a new trial, that issue was essentially moot. (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 (1995).

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 235255 N.W.2d 504 (1977) or ***Scales***: "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 knew and the court was 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***.

No finding of ineffectiveness is necessary to a decision as to whether this was an error on the part of the court. That is a sentencing error requiring reversal, whether or not LaVoy objected. ***Scales***, 64 Wis. 2d at 497.

Judge Bohren granted a new trial but also vacated the sentence, concluding the sentencing court's statements were "problematic" but (apparently) not a constitutional violation. (98:27–28). As discussed more below, the Court of Appeals did not address this issue.[4] This Court should reverse and order a new sentencing.

IV. PICO WAIVED NO ISSUES ON APPEAL.

Judge Bohren entered an order granting Pico all the relief he sought: both a new trial and a new sentencing, implicitly in the

[4] This Court, however, has the power of discretionary reversal as to any claim the Court of Appeals did not address under Wis. Stat. (Rule) 751.06.

alternative. For that reason, Pico could not properly cross-appeal. No modification of the judgment or order from which the State appealed would have aided him. Wis. Stat. (Rule) 809.10(2)(b). Under these circumstances, the Court of Appeals denied Pico due process under the Fourteenth Amendment and the corresponding Wisconsin constitutional provision and erred as a matter of law in concluding that he waived issues not raised by cross-appeal.

With respect to the Court of Appeals' holding Pico needed to file a cross-appeal to raise sentencing issues, there was no order from which he could appeal, and any cross-appeal would have been dismissed. Only written orders may be the basis for appeal. ***Ramsthal Advert. Agency v. Energy Miser, Inc.***, 90 Wis. 2d 74, 75, 279 N.W.2d 491 (Ct. App. 1979). Furthermore, a decision favorable to Pico would simply support the trial court judgment vacating the conviction and sentence. Wis. Stat. § 809.12(2)(b).

Additionally, in ***Auric v. Continental Casualty Co***., this Court held:

> It is also true that a respondent may raise an issue in his briefs without filing a cross-appeal "when all that is sought is the raising of an error which, if corrected, would sustain the judgment..."

111 Wis. 2d 507, 516, 331 N.W.2d 325 (1983), citing ***State v. Alles***, 106 Wis. 2d 368, 390, 316 N.W.2d 378 (Wis. 1982). It is well-settled that the party who prevailed at the trial court level

need not file a cross-appeal. There is no basis to file a cross-appeal unless the party is seeking a more beneficial order than given by the trial court. Here, the trial court granted a new trial. Hence, there was no adverse decision from which Pico could appeal. An order for a new sentencing hearing is a lesser remedy than that granted by Judge Bohren—a new trial. Pico got the highest level of relief from the circuit court by getting a new trial. There is no resentencing when there is a new trial; thus, there was no legal basis for Pico to cross-appeal. The ruling on the sentencing issue was essentially dicta until the Court of Appeals reversed the order for a new trial. A party has no right to appeal language it does not agree with that has no impact on the results. *See, e.g.*, Rule 809.62(1g) (defining "adverse decision"); ***Neely v. State***, 89 Wis. 2d 755, 757–58, 279 NW.2d 255 (1979).

V. 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***[5] challenge in that letter or in any of the proceedings. Thus, it may not raise that for the first time on appeal. ***In re Willa L.***, 2011 WI App 160, ¶ 27.

In addition, 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

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

"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 proceeding in this fashion either before the motion hearing or at the hearing; 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. (*see, e.g.*, 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 he 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. Judge Bohren found there was no objection to this type of testimony. Thus, the State waived any argument on appeal that testimony should have been

excluded. To now argue 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. ***In re Willa L.***, 2011 WI App 160, ¶ 27; ***Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.***, 90 Wis. 2d 97, 109, 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***, the Court of Appeals stated in a footnote:

> [W]e reiterate that no witness may testify as an expert on issues of domestic law; "[T]he only 'expert' on domestic law is the court."

2003 WI App 168, ¶ 62 n.20, 266 Wis. 2d 599, 669 N.W.2d 204. This footnote dicta 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 here expressly agreed with that testimony, just as Judge Bohren agreed with Fincke's testimony. Thus, the Court of Appeals did not hold the testimony given by the Dean would be inadmissible. The Court was noting the ultimate decision is with the

court. This Court revisited this issue of expert attorney opinion testimony in ***State v. LaCount***, 2008 WI 59, 310 Wis. 2d 85, 750 N.W.2d 780 and held such testimony is permissible. ***Id.*** at ¶ 21.

Furthermore, there is no case holding expert testimony is prohibited at a hearing relating to whether an attorney provided adequate counsel. It may be unnecessary, but it is not prohibited.

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, ¶ 31, 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). The rule in Wisconsin on such experts is that an expert is not required but

is permitted. *See* ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 382, 541 N.W.2d 753 (1995). In addition, Judge Crabb in the Western District of Wisconsin has held an attorney versed in insurance law meets the ***Daubert*** test for such testimony. *See* ***Talmage v. Harris***, 354 F. Supp. 2d 860, 866 (W.D. Wis. 2005).

Even in ***Provenzano v. Singletary***, 148 F.3d 1327 (11th Cir. 1998), cited by the State in the Court of Appeals, there was no finding testimony by an attorney expert would be inadmissible; the Court merely held the question of law is to be decided by the court. ***Id.*** at 1332. The affidavit from the attorney expert was not found inadmissible there but was found to be insufficient to establish ineffectiveness. ***Id.***

Our courts have consistently entrusted our judges with broad discretion. Any decision that would create an absolute bar to a court exercising its discretion to hear from an attorney expert as to factual matters would lead to an evisceration of that gatekeeping function with which we have historically entrusted our courts. The court is the factfinder in an ineffectiveness claim, and the court should be able to determine whether it can be aided by expert testimony on a case by case basis. The testimony here is of the type commonly used by both prosecutors to defeat such claims and by defense attorneys to support them. Some judges may want this type of testimony if they feel they

do not have the expertise to decide the claim. The circuit court is entrusted with gatekeeping under Wis. Stat. § 907.02(1). Judge Bohren did exercise his gatekeeping function and determined what would be permissible and what would not be. He exercised his discretion just as he was supposed to do. *See* ***Seifert v. Balink***, 2017 WI 2, ¶ 87, 372 Wis. 2d 525, 888 N.W.2d 816.

B. Judge Bohren Would Have Found the Same Whether or Not Fincke Testified.

Judge Bohren 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 Drs. Capote, Yuille, and Schoenecker in finding LaVoy deficient. (98:14–15, 17; 19;20,21,28). It would be absurd to assert those findings he noted with approval as mentioned by Fincke were also not his own findings. He made factual findings, and many of them were the exact ones alleged by the defense in the postconviction motion and agreed with by Fincke (except the court disagreed with both Pico and Fincke that the mischaracterization of the prior offense hurt Pico at sentencing, showing the court made its own findings). 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 somehow finds an error in the admission of Fincke's testimony, that error was harmless. It is hard to imagine a scenario where Judge Bohren says the findings he recited were not his own and only adopted from Fincke, but this Court could remand this case for a clarification of Judge Bohren's findings if the Court determines such expert testimony is never admissible or that it needs to review the exercise of discretion.

CONCLUSION

For the reasons stated in this Brief, Pico respectfully requests the Court of Appeals' decision be reversed and this case be remanded with an Order reinstating the trial court's postconviction order granting Pico a new trial and vacating the sentence.

Dated at Madison, Wisconsin, _____, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 14,963 words.

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

Dated this 8th day of November, 2017.

Signed,

_____

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APPENDIX 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(2)(a) and that contains, at a minimum:

(1) a table of contents;
(2) the findings or opinion of the circuit court;
(3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and
(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I 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 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.

I further certify that this appendix conforms to the rules contained in s. 809.19(13) for an appendix, and the content of the electronic copy of the appendix is identical to the content of the paper copy of the appendix.

Dated this 8th day of November, 2017.

Signed,

_____

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APPENDIX TABLE OF CONTENTS