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.

REPLY BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT-PETITIONER

Respectfully submitted,

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I. 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.

A. Judge Bohren knew the standard for ineffective assistance of counsel cases and made factual findings entitled to deference by this Court.

The State faults Judge Bohren, Judge Reilly of the Court of Appeals, and Pico for ostensibly not knowing the correct standard of review for ineffective assistance of counsel claims. Pico established to a reasonable probability that, but for trial counsel's errors, the result would have been different. Judge Bohren recited the correct standards under ***Strickland v. Washington***, 466 U.S. 668, 694 (1984), and ***State v. Carter***, 2010 WI 40, ¶37, 324 Wis. 2d 640, 782 N.W.3d 695 (2010). Judge Bohren, Judge Reilly, and Pico understand the standard; the State simply disagrees that LaVoy was ineffective.

Judge Bohren made factual findings related to individual errors, each of which is discussed in depth in Pico's brief-in-chief. (Brief of Defendant-Respondent-Petitioner,29–60). These errors include LaVoy's failure to obtain medical records or consult with an expert witness regarding Pico's medical condition; his failure to consult with an expert witness regarding the Reid Interrogation

Technique; his failure to consult with an expert witness regarding the CARE Center interview; his failure to object to improper testimony by Detective Rich at trial; his failure to review "good touch/bad touch" materials; his failure to call Michelle Pico at trial; and LaVoy's failure to object to requiring Pico admit conduct in order to get leniency at sentencing.

None of the factual findings relating to these errors were clearly erroneous. Judge Bohren explained those findings, and Pico's brief discussed them, but a couple of examples incorrectly cited by the State[1] include that while LaVoy did ask Pico why he wears an eye patch due to a severe accident, there was zero investigation of any resultant brain damage because Pico said he recovered. LaVoy was asked if he inquired of Pico "or" the family about deficiencies, and his testimony showed he asked Pico, but the family just did not bring up anything to LaVoy other than Pico being a great man and dad. (96:1–12,17). Judge Bohren's factual finding that this was not discussed with the family was correct. LaVoy also did not discuss his decision not to consult the records or a doctor with the family.

Similarly, the argument that Pico withstood the police interrogation is incorrect. Because of his brain damage, Pico

[1] (Br.18,24,29,38)

acquiesced, admitted to feeling bad, admitted to knowing what he did was illegal, and said he "shouldn't have done it." (91:87;31:12;83H10–21). Judge Bohren made a factual finding that Pico did not withstand police pressure and made equivocal statements at best. (98:16–17). Furthermore, Yuille did not testify that the CARE Center interview was done well—he said the interview critically failed the spirit of Stepwise, which is to determine what happened or did not happen to D.T. (96:130–35). Judge Bohren also correctly noted that LaVoy confirmed the interview did not clarify what D.T. was alleging by the "down the pants" statement, as Yuille testified. (96:94,98:18).

As to improper vouching by Rich, Judge Bohren noted that redactions are commonly permitted in tapes prior to parties playing them at trial. LaVoy failed to realize he could have requested redaction of the tape to prevent the jury from hearing Rich vouch for D.T.'s credibility. Judge Bohren noted LaVoy could have filed a motion to prevent witnesses from commenting on the credibility of other witnesses or objected to Rich calling Pico a liar and Flayter the

best interviewer in the state at trial.[2] (98:19,21).

The State claims because there is no "settled" case law establishing statements induced by the Reid Technique are automatically involuntary, LaVoy properly withdrew his statements motion. (Br.29). The defense is not arguing Reid-induced statements are always involuntary, but that here, given Pico's brain damage, they were. Yuille also testified this interview did not follow Reid protocols, making suppression more likely. (96:140). Judge Bohren faulted LaVoy for not contacting an expert to help him deal with this technique. (98:13–14). LaVoy both said he withdrew the motion because he lost the character evidence motion in limine and then contradicted himself, saying he withdrew it so Pico did not have to testify in order to get a denial in front of the jury. (96:19,20). Again, he still did not get the records or talk to a doctor, despite the fact his client could not answer questions from his own lawyer without getting extremely flustered and nervous. (96:92–93).

[2] Interestingly, the State relied on ***State v. Miller***, 2012 WI App 68, 341 Wis.2d 737, 816 N.W.2d 331, in the Court of Appeals but did not raise that case in circuit court. The Court of Appeals did not address the waiver argument and proceeded to determine this issue against Pico based upon ***Miller***. Now, the State cites the case of ***State v. Smith***, 207 Wis.2d 258, 558 N.W.2d 379 (1997) in this Court as a new way for the State to win. That case does not help the State because there is no question that Rich's comments were opinion testimony, and the questioned evidence in ***Smith*** was not. The theories of the State have changed on this and other issues throughout these proceedings. In fairness to the circuit court and to Pico, such changing of theories should not be permitted in this Court.

The State argues that the evidence about Pico touching D.T.'s leg in the same manner he touches his daughter's leg shows neither impulsivity nor an inability to conform behavior to societal norms. (Br.19). However, it is the fact that Pico did not realize it is inappropriate to touch another child's leg in the same way as he touches his daughter's until the police questioning that shows the exact impulsiveness Michelle discussed. (96:214,11). Realizing it was inappropriate after Michelle and Rich explained it does not mean it was not done impulsively. Nor does it mean an NGI plea was not possible. It is precisely because Pico could not conform his behavior to societal expectations that he was prosecuted. At the very least, a doctor could have explained the brain injury made Pico unlikely to realize that what is a sweet and helpful behavior with his daughter is inappropriate with another child. It should be noted the family did not agree with LaVoy's presentation of the case, as they were upset Michelle was not called to explain how they were trained to rub their daughter's leg to explain why he would do such a thing. (96:30).

Judge Reilly noted this Court observed in ***Thiel***[3] "that an appellate court must be 'sensitive' to the trial judge's assessments of credibility and demeanor and not exclude those assessments, 'either

[3] ***State v. Thiel***, 2003 WI 111, 264 Wis.2d 571, 665 N.W.2d 305.

expressly or impliedly, from an analysis of deficiency and prejudice, unless they are clearly erroneous.'" ***State v. Pico***, 2017 WI App 41, ¶123, 376 Wis. 2d 524, 900 N.W.2d 343 (unpublished but citable under Wis. Stat.(Rule)809.23(3)) (Reilly, J., dissenting) (citing ***Thiel***, 2003 WI 111, ¶23).

Like the attorney in ***Thiel***, LaVoy determined that getting Pico's medical records and consulting with a neurologist was not necessary. It is impossible to determine whether they are necessary without knowing the details of the records or what the neurologist would say. This was not an informed decision. LaVoy decided his defense was reasonable doubt during the very first meeting with Pico. (96:61). Investigating anything was dismissed because it did not fit with LaVoy's decision in that first meeting–even after he saw signs that Pico's brain did not simply heal itself and signs that the brain injury would have explained his admissions and strange behavior.

Judge Bohren found that LaVoy chose not to undertake a reasonable investigation even though LaVoy knew Pico had an eye patch and vision issues. (98:12–13). Judge Bohren found LaVoy "passively looked at" the injury's impact on the case and further found the issue was "not evaluated with the seriousness" it merited based on the witness's testimony. (98:28). Judge Bohren's findings were not

erroneous. These findings are, therefore, entitled to deference by this Court.

B. The cumulative effect of trial counsel's many errors resulted in overwhelming prejudice to Pico.

Each of the errors raised by Pico is individually sufficient to find ineffectiveness, but the cumulative prejudice is overwhelming. The State attempts to nullify Judge Bohren's rulings by picking apart each separate finding, saying either the court did not specifically say that finding established prejudice, or by arguing the individual errors were not enough to establish prejudice. However, in a sexual assault case with no physical evidence and where the complainant made numerous inconsistent statements, the individual errors make a prejudice finding more likely. In Judge Bohren's over 30 pages of transcript with factual findings and conclusions of deficiency and prejudice, it is clear he knew the standard for determining whether Pico's attorney was ineffective and correctly determined there was cumulative prejudice.

The State cites ***Thiel*** and notes cumulative prejudice is less likely if the evidence against the defendant is compelling. Here it was not, as D.T. denied vaginal touching at trial. She did not tell Ms. Jens or even her mom that there was vaginal touching. (96:36). The only time D.T. said vaginal touching occurred was during the questionable

CARE Center interview. Had the attorney done the bare minimum investigation, given all the inconsistent statements on the part of D.T., Pico would have been acquitted. The ***Thiel*** Court noted the level of inaction on the part of the attorney there. A similar level of inaction and inattention occurred in Pico's case.

In a case such as this, either the defendant needs to testify, or a strong denial needs to be put before the jury. LaVoy withdrew the motion to suppress statements because he determined Pico could not testify due to his nervousness and how flustered he gets. He was not able to answer questions properly. (96:15,40). An explanation of the brain damage would have explained that response. LaVoy dismissed all suggestions of a review of the medical records or talking to a neurologist and kept saying at the motion hearing he did not want to make the case about neurologists and experts. (96:40,92). Neurology and expert evidence were the only ways to reconcile the evidence, however. Moreover, Pico's statements significantly hurt the defense case, so much so that the prosecutor heavily relied on them in her closing arguments. (91:139–41,174). There is no room for such errors in a case such as this. (98:19–20). The failure to do any investigation or to consult any experts for testimony or help in the case was fatal to the defense, as noted by Judge Bohren.

In the case of ***Thomas v. Clements***, 789 F.3d 760 (7th Cir. 2015), the Seventh Circuit Court of Appeals reversed a conviction due to ineffective assistance of counsel due to a failure to consult a pathologist. The Court explained the standard of review as follows:

> Thomas has to show a "reasonable probability" that, but for counsel's unprofessional errors, the result would have been different...He does not, as the appellate court said, have to show that counsel's performance *would* have led to a different result.

Thomas, 789 F.3d at 767.

Judge Bohren had many years of experience as a circuit court judge. He knew the proper standard for reviewing ineffectiveness claims. If there is any question which of his conclusions are factual findings, credibility findings, or what standard his conclusions are based upon, the appropriate remedy is a remand for further factual findings. However, Judge Bohren made detailed findings and conclusions establishing LaVoy's deficient representation. Cumulatively, Pico was not given effective assistance of counsel.

II. THE SENTENCING COURT ERRED; THAT CLAIM IS PROPERLY BEFORE THIS COURT, AND THE REMEDY IS REMAND FOR FURTHER FINDINGS IF THE COURT OF APPEALS' DECISION IS AFFIRMED.

The State asks this Court to follow the lead of the Court of Appeals' decision, which did not address this issue because no cross-appeal was filed. Because Pico was the Respondent in the Court of Appeals, he had no reply brief to address the argument that a cross-

appeal should have been filed. Pico's original brief in this Court, however, addressed the procedural issues.

Pico's initial brief addressed the reasons this issue is properly before this Court. Pico won a new trial, so there was nothing to cross-appeal. Only a clear written order may be appealed, and Judge Bohren did not expressly indicate whether there was a sentencing problem. It was not a final order as to his decision in this matter, and there was no obligation to file a cross-appeal from his ruling. Pico raised this issue in the Court of Appeals to clarify the record and avoid waiver once the State failed to brief this issue.

Pico raised this issue both as part of his ineffectiveness claim and as a separate plain error claim in the trial court. Judge Bohren found LaVoy ineffective. The court did not make a finding that LaVoy provided effective assistance of counsel at sentencing when he failed to object to the court's requirement that Pico admit guilt in exchange for leniency. If this Court affirms the Court of Appeals' decision reversing Judge Bohren's grant of a new trial, then a remand is necessary to determine if the State is correct that Judge Bohren meant to deny this claim. Given that the statements regarding this issue were made immediately before Judge Bohren found LaVoy to be ineffective, it seems from the context that he intended to find for Pico on this issue, at least as far as the ineffectiveness argument. (98:28).

Judge Bohren later vacillated in whether this was court error, but his decision as to LaVoy's ineffectiveness overall was clear.

The State argues that if the sentencing issue is properly before this Court, the sentencing court was correct in considering the lack of remorse in the sentence. The sentencing court, however, by requiring a confession at sentencing, impermissibly burdened Pico's Fifth Amendment privilege against self-incrimination. LaVoy was ineffective for failing to object.

As noted in Judge Bohren's ruling, Judge Domina's statements at sentencing were extremely close to those in ***Scales v. State***, 64 Wis. 2d 485, 495, 219 N.W.2d 286 (1974), where the Court ordered imprisonment due to lack of remorse. Judge Bohren 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).

Had Judge Domina said he was taking the lack of remorse into consideration without requiring Pico to give up his right to silence at sentencing, there would not be the same challenge. Pico was treated just as ***Scales*** was; thus, if the Court of Appeals' decision is affirmed in other respects, he is entitled to a new sentencing.

III. EXPERT ATTORNEY TESTIMONY WAS PROPER, BUT REMAND FOR FACTUAL FINDINGS IS THE APPROPRIATE REMEDY IF THIS COURT DETERMINES OTHERWISE.

The State's brief fails to address the waiver argument raised in Pico's original brief. Specifically, because the State did not object once Judge Bohren exercised his discretion and determined what testimony from attorney expert Fincke was permitted, and further, because the State was the party who elicited an opinion on the ultimate issue of ineffectiveness, any complaint about the manner of permitting that testimony on appeal was waived. The failure to respond to that argument means it is conceded. ***Charolais Breeding Ranches, Ltd. V. FPC Securities Corp.***, 90 Wis. 2d 97, 297 N.W.2d 493 (Ct.App.1979).

Furthermore, the State did not respond to the point that this Court cannot *sua sponte* determine whether Judge Bohren would have made the same findings without the attorney's testimony. Should this Court find the testimony was impermissible, the only remedy would be a remand to the circuit court for factual findings without the assistance of expert testimony. Again, by not responding that Pico's suggested remedy was incorrect, the State has conceded a remand to be appropriate. ***Id***.

The State's citation to ***Racine County v. Oracular Milwaukee, Inc***., 2010 WI 25, 323 Wis. 2d 682, 791 N.W.2d 88, is not helpful to the State, as the issue was whether Racine County was required to name an expert when the testimony was not helpful to the fact-finder. That case supports Pico's argument—expert testimony is admissible if it is helpful to the fact-finder, as it was here. It is the judge's job to determine whether the testimony is helpful, and Judge Bohren wanted to hear this testimony. No case holds that is improper.

The State dismisses without analysis ***State v. LaCount***, 2008 WI 59, 310 Wis. 2d 85, 750 N.W.2d 780 by saying it is not analogous. The holding by this Court in ***LaCount*** was that a court can receive expert attorney evidence in its discretion if helpful. The State dismisses the other cited cases permitting such testimony on the basis that there is a different standard in jury fact-finding cases than when a judge does so. It is reasonable to assume that a seasoned circuit court judge can parse through what expert opinion evidence should be relied upon and what should not. There is even less of a danger of misuse of evidence when the court is making the decision instead of a jury.

The State is seeking a brand-new rule that would tie the hands of judges, when courts historically have invested a great deal of discretion in our judges. Bright-line rules are almost never advisable, and one should not be created here.

CONCLUSION

For the reasons stated in this and Pico's original 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, January 16, 2018.

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 2998 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 16th day of January, 2018.

Signed,

_____

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CERTIFICATION

I 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: January 16, 2018.

Signed,

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