STATE OF WISCONSIN
C O U R T O F A P P E A L S
DISTRICT II

Appeal No. 2015AP2162-CR
Circuit Court Case NO. 12CF552

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARCOS ROSAS VILLEGAS,

Defendant-Appellant.

ON APPEAL FROM ORDERS DENYING
POSTCONVICTION MOTIONS AND
FROM JUDGMENT OF CONVICTION
ENTERED IN WALWORTH COUNTY CIRCUIT COURT,
THE HON.DAVID M. REDDY PRESIDING, AND FROM
ORDER WAIVING JUVENILE JURISDICTION IN
WALWORTH COUNTY CASE NO 2012JV110

AMENDED BRIEF
OF DEFENDANT-APPELLANT

URSZULA TEMPSKA
State Bar No. 1041496
Law Office of U. Tempska
P.O. Box 11213
Shorewood, WI 53211
414-640-5542
U_tempska@yahoo.com
Attorney for Defendant-Appellant

TABLE OF CONTENTS

Page

CASES CITED

Wisconsin Statutes

Other authorities cited

ISSUES PRESENTED

I. WAS COUNSEL INEFFECTIVE BEFORE OR DURING THE WAIVER PROCEEDINGS IN JUVENILE COURT?

Postconviction court answered: no.

II. WAS WAIVER OF JUVENILE JURISDICTION INVALID FOR REASONS UNRELATED TO INEFFECTIVENESS?

Postconviction court answered: no.

III. WAS COUNSEL INEFFECTIVE IN CRIMINAL COURT, DURING THE PLEA NEGOTIATIONS OR THE PLEA?

Postconviction court answered: no.

IV. WAS THE PLEA INVALID FOR REASONS UNRELATED TO INEFFECTIVENESS?

Postconviction court answered: no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Rosas Villegas respectfully requests oral argument, if it may helpfully flesh out for this Court any of his arguments on this appeal.

Publication may be warranted, because selected issues in this case concern further clarification of the duties of defense counsel representing undocumented alien clients in

juvenile delinquency proceedings and in criminal proceedings, including duties to investigate the immigration/citizenship status of clients and to inform clients about various "clear" immigration consequences of proceedings, some of which are addressed in *Padilla* and its progeny.

STATEMENT OF THE CASE

Marcos Rosas Villegas ("Marcos") was born in Mexico on April, 25, 1996, and was brought to Wisconsin as a preschooler. He has lived in Wisconsin ever since, his entire family reside in Wisconsin, and he has no connections with Mexico. He is an undocumented alien. As a "childhood arrival" before and during this prosecution, Marcos had an open path to lawful residency in the United States, under a federal statute known as DACA. [1] See R.30:3-4.

This case originated in juvenile court, but jurisdiction was waived to criminal court, where Marcos (then aged 17) ultimately pled guilty to armed robbery. R.25, R.30:3-4. The plea and resulting conviction made Marcos presumptively deportable from the United States; and also made him automatically, irrevocably, and permanently ineligible for DACA and inadmissible. Marcos is now inadmissible, not eligible for DACA, and will be deported immediately upon discharging from the prison term of his sentence. See R:61:40-43 (see also Exhibit 1 admitted at the hearing held on April 14, 2015, R.35, R.61).

Marcos would not have pled guilty to armed robbery in criminal court if he had been advised (or had known) that: (a) the plea would make him presumptively deportable, and also would make him automatically, irrevocably, and permanently

[1] See infra for a more detailed explanation of DACA.

inadmissible to the United States and ineligible for DACA; and/or (b) that the plea would waive his right to challenge waiver to criminal court.

This appeal challenges Marcos' plea and his waiver to criminal court, and also appeals the denial of Marcos' motion for postconviction relief and motion for reconsideration, which sought:

1. plea withdrawal and vacatur of the criminal conviction, on the grounds that the plea was constitutionally invalid as entered based on counsel's ineffective assistance during the plea negotiations and during the plea; and for other reasons also was not made knowingly, intelligently, or freely; and was made pursuant to a defective colloquy of the court, and

2. vacatur of the order waiving juvenile court's jurisdiction (and of all judgements and orders subsequently entered by the criminal court), on the grounds that such waiver stemmed from counsel's ineffective assistance before and during the waiver proceedings; and that the waiver of juvenile jurisdiction was invalid on other grounds as well.

PROCEDURAL FACTS

Postconviction relief was timely sought by postconviction motion filed on January 28, 2015. R.30; see also R.37, R.39. The circuit court held two hearings on the postconvictin motion: on April 14, 2015 (a *Machne*r hearing) and September 4, 2015. R.61, R.62. After the court denied the postconviction motion in oral remarks during a hearing on September 4, 2015, R.62, (App. 25-27), a Motion for Reconsideration was filed on September 9, 2015, R.43, which

was denied by order entered on September 11, 2015, R.44. (App.2-3) The order denying postconviction relief was entered by the circuit court on October 6, 2015. R.46. (App.1) The circuit court's denial of postconviction relief was timely pursuant to this Court's order of December 9, 2015, which extended the time for the court to decide postconviction motions until October 6, 2015. The Notice of Appeal was timely filed on October 22, 2015. R.47.

This Amended Brief of Defendant-Appellant is timely if filed on/before May 20, 2016, pursuant to this Court's order of April 28, 2016.

FACTS RELEVANT TO THIS APPEAL

In November 2012, Marcos (then aged 16), his younger brother Carlos, and another juvenile knocked on the door of Sonja Acevedo in Lake Geneva, WI, where they had previously bought marijuana. Acevedo unlocked the door and the youths burst in, demanding money and pot, and intimidating those inside. They taped the hands of the two women and a teenager behind their backs, placed the children in a bedroom, and after rifling through the apartment left with gaming hardware and some cash. One youth carried a knife and another a piece of plastic piping. See R.30:23-24 ("facts" narrative from Delinquency Petition).[2]

A juvenile delinquency petition was filed in Walworth County, in case number 2012JV110, *In the Interest of Marcos Rosas Villegas*, charging Marcos with Count 1, Armed Robbery, under Section 943.32(2), PTAC; Count 2, Burglary

[2] Although one co-actor claimed that Marcos carried a knife, R.65:72, Marcos has consistently ardently denied that he carried any weapons and asserted that he was unaware during the robbery that any of the actors carried a knife or another weapon.

of a Building/Dwelling, PTAC, Use of a Dangerous Weapon, under Sections 953.10(1m)(a) and 939.63(1)(b); and Counts 3 and 4, False Imprisonment, PTAC, under Section 940.30, and 939.05. R.30:21-24. Attorney Robert J. Kennedy was appointed to represent Marcos.

The State petitioned for waiver of juvenile jurisdiction, R.30:25-26. Attorney Kennedy contested the petition and at a waiver hearing of December 12, 2012, presented evidence and arguments against waiver. R.65:21-32, 38-59, 64-68, 73, 75-81. [3]

The court found clear and convincing evidence that retaining jurisdiction was contrary to Marcos' best interests and those of the public, and waived juvenile jurisdiction. R.65:89-91; R.3.

In criminal court the case became Walworth County Case No. 12-CF-552, with the same charges. R.2. Based on attorney Kennedy's advice Marcos pled guilty to Count 1, Armed Robbery, PTAC, contrary to Wis. Stats Sections 943.32(2) and 939.05. R.25. He was found not guilty on the remaining counts. Id. He was later sentenced to a bifurcated sentence of 10 years initial confinement and 10 years ES. Id.

At the time of this prosecution Marcos was an undocumented alien. A relative had brought Marcos to the U.S. at age 5, to rejoin his parents. He subsequently never left the U.S. He has no ties with Mexico. His entire known

[3] In his postconviction papers and in arguments in postconviction court Marcos discussed extensively counsel's actions and inactions during the waiver hearing held on 12/12/12 in juvenile court, and the juvenile court's reasoning and rulings at such hearing, and also extensively cited to the transcript of that hearing, R.65, in support of his arguments. See e.g. R.30:5 et seq.; R.39.

family reside in the U.S. He discovered his undocumented alien status when he was in middle school. See R.61:27-29 et seq. (testifying about "childhood arrival" experience).

In 2012, as an alien child illegally brought to the U.S. by adults, Marcos was eligible to seek legalization of his status under the federal Deferred Action for Childhood Arrivals ("DACA") law. See R.30:3-4; R.61:38-39. Had juvenile court retained jurisdiction and adjudicated Marcos guilty on all counts, Marcos would not become presumptively deportable, and would also retain DACA eligibility and not become inadmissible to the United States. See id. [4]

Under the Immigration and Nationality Act ("INA") Section 101(a)(43), any charge for which defendant received a sentence of 365 days or more is an "aggravated felony" and is grounds for deportation under INA Section 237(a)(2)(A)(iii)). This the felony conviction on Marcos' record -- resulting from waiver to criminal court and his guilty plea – made Marcos presumptively deportable from the United States. After his criminal conviction Marcos was informed by I.C.E. that he would be deported as soon as he is released from prison. R.61:40-42 (referring to Exhibit 1, admitted at that time, officially notifying Marcos that he was "deportable under Section 237(a)(2)(A)(iii) and would be deported "without a hearing before an immigration judge").

But two other automatic, unavoidable, and irreversible consequences follow from Marcos' criminal conviction. First, he is specifically excluded from receiving immigration benefits under DACA; and, if he returns and is apprehended,

---

[4] See Immigration and Nationality Act ("INA") Section 101(a)(43) (any charge for which defendant received a sentence of 365 days or more is an "aggravated felony" and is grounds for deportation under INA Section 237(a)(2)(A)(iii)).

he will face up to 20 years in federal prison on illegal re-entry charges. Second, pursuant to INA §212(a)(2)(A)(i)(I), 8 U.S. Code §1182, the armed robbery conviction makes Marcos categorically *inadmissible* to the U.S., automatically preventing him from being able to enter or re-enter the country. See R.30:5 (post-conviction argument, uncontroverted and un-objected-to by the State, that waiver and conviction would "forever disqualify [Marcos] from legally re-entering the U.S."); R.37:5-6 (discussing failure to advise about automatic permanent inadmissibility); R.62:22 (unrebutted argument that permanent inadmissibility was a clear, automatic immigration consequence). (App. 19) [5]

It bears repeating that the immigration consequences of inadmissibility and DACA ineligibility are statutory and not subject to discretion of any officials. An alien becomes DACA ineligible and inadmissible when he voluntarily admits all of the facts which constitute the crime. An attempt or conspiracy to commit such a crime is included in this ground for automatic inadmissibility. Unlike deportability, DACA ineligibility and inadmissibility pursuant to this

[5] After the Wisconsin Supreme Court released its decisions in *State v. Shata*, 2015 WI 74, and *Ortiz-Mondragon*, 2015 WI 73, (reporter citations unavailable at the time of this Brief's drafting), undersigned counsel conceded in postconviction court that, in light of those two decisions, Mr. Kennedy did not deficiently advise Marcos about the *deportation* consequences of certain proceedings, by telling Marcos that he very likely would be deported. See R.62:5-6. (App.8-9) But Marcos never conceded that failure to advise him about automatic, irreversible, and permanent *inadmissibility* and *DACA ineligibility* -- two separate clear, automatic, and non-discretionary immigration consequences -- was not deficient. See e.g. R.62:22, 23 (App. 19, 20) (at postconviction hearing arguing that permanent *inadmissibility* was key clear, automatic immigration consequence and counsel failed to advise Marcos and waiver court about it, alleging constitutional ineffectiveness on this ground).

provision are not merely presumptive, but automatic. No positive steps are required on the part of the government to effect exclusion from admission. No action or inaction on the part of the Attorney General can result in admission or restored DACA eligibility. There is no discretion. There is no right to due process. There is no reviewability. Because truly automatic and unavoidable, inadmissibility and DACA ineligibility differ from "presumptive deportability." See *State v. Shata*, 2015 WI 74 at P50 (holding counsel was not ineffective because deportability was not guaranteed or automatic and defendant was advised that he could be deported).

Since Marcos' incarceration for armed robbery, I.C.E. has informed him that he would be deported immediately upon completing the custody portion of his sentence. R.35 (includes Exhibit 1, I.C.E. deportation notice to Marcos); R.61:40-43 (Marcos' testimony about I.C.E. notice that they will deport him once released from prison after 10 years). Pursuant to federal statues, cited supra, once his judgment of conviction became final Marcos also became automatically, irrevocably, and permanently inadmissible; and forever lost DACA eligibility.

ARGUMENT I
COUNSEL WAS INEFFECTIVE BEFORE AND DURING THE WAIVER PROCEEDINGS.

A. Standard of review

This Court will not disturb the circuit court's findings of fact with respect to ineffective assistance of counsel unless they are clearly erroneous; but whether counsel was ineffective is a question of law this Court reviews *de novo*. *State v. Balliette*, 2011 WI 79, ¶18-19, 805 N.W.2d 334.

B. The legal standard: right to counsel during waiver proceedings

A juvenile has a constitutional due process right to counsel during delinquency proceedings. *State ex rel. LaFollette v. Circuit Court of Brown County*, 37 Wis.2d 329, 383, 155 N.W.2d 141 (S. Ct. 1967). Once a waiver petition is filed, the juvenile is entitled to a waiver hearing to the court, at which he "shall be represented by counsel." Wis. Stat. § 938.18(3)(a),(c).

To succeed on a claim of ineffective assistance of counsel, Marcos must show that counsel's performance was deficient and that the deficiencies prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's performance is deficient when it falls below objective standards of reasonableness. *Strickland*, 466 U.S. at 687-88; *State v. McMahon*, 186 Wis. 2d 68, 80, 519 N.W.2d 621, 626 (Ct. App. 1994). The reasonableness of counsel's challenged conduct is judged on the facts of the particular case, viewed as of the time of counsel's conduct and from counsel's perspective. *State v. Pitsch*, 124 Wis. 2d 628, 636, 369 N.W.2d 711 (1985). Prejudice occurs where there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S at 694; *State v. Sanchez*, 201 Wis.2d 219, 548 N.W.2d 69, 76 (1996).

C. Attorney Kennedy was ineffective in failing to investigate and discover Marcos' mental health conditions and immaturity.

Before waiver proceedings attorney Kennedy did not investigate whether Marcos in fact had suffered, or was suffering, from any metal health disorders, disabilities, or related factors which, pursuant to Section 938.18, could

weigh on the juvenile court's waiver decision. He presented no mental health evaluations to the waiver court and did not argue that Marcos' mental health status weighed in favor of retaining jurisdiction. He did not object when the State asserted, or when the court found, that Marcos had no mental health evaluations, disorders, or illnesses, or developmental ones. See R.65, passim. See also e.g. R.30:16; R.43:2-4 (Marcos' arguments post-conviction).

This failure to investigate was unreasonable when red flags indicated likely mental health, psychological, and/or developmental issues which could weigh against waiver.

There was record of Marcos' learning and behavioral issues, having had an IEP, and apparent marijuana abuse. See e.g. R. 65:7, 14, 15-16 (marijuana and paraphernalia found in room), 26 (Marcos admitted to smoking pot), 45-46 (marijuana at school). There had been no prior mental health evaluations or diagnoses.[6] R.65:35. The State asserted, and the waiver court found (as grounds for waiver), that Marcos had no mental health or developmental issues. R.65:73, 82.

Based on the above-listed red flags and because mental health and disability statutorily factor into waiver decisions, reasonable counsel would have investigated Marcos' mental health and developmental status during the crime and waiver.

[6] As argued in the Postconviction Motion, R.30:14-15, the State's own "Waiver Investigation Report," on which the juvenile court relied in waiving to criminal court, showed that Marcos had 'difficulty retaining' material, a learning disability, and an IEP since elementary school; Marcos had never received individual counseling, but wanted treatment and was interested in alternatives to correctional placement. The State in postconviction court did not deny, rebut, or challenge any of these assertions or the record on which they rested.

Attorney Kennedy did not do so, unreasonably. Had he investigated, he would have discovered what was revealed during Marcos' post-conviction mental health evaluation by forensic psychologist Dr. Nathan Glassman, R.42:

1. Marcos has mental health disorders (chronic depression and anxiety) and likely had them since at least 2012;
2. these disorders were significant factors in Marcos' behavioral and adjustment problems, including the offense conduct;
3. Marcos typically craves approval and reluctantly takes on age-appropriate responsibility; and is psychosocially immature and was that way in 2012;
4. Marcos has severe THC dependency and had it in 2012, THC use was self-medication, and it caused Marcos' behavioral problems;
5. his academic functioning was low, in August 2015 (2.5 years after the crime) being at 6th grade level; he has an attention focusing deficiency;
6. he has difficulty with language-based tasks;
7. he needs age-appropriate treatment for his diagnoses, may benefit from psychiatric evaluation and medications, and would improve with treatment. [7]

[7] Marcos raised failure to discover and argue Marcos' mental health issues as ineffectiveness at waiver in the Postconviction Motion and Motion to Reconsider. R.30:16; R.43:2-4. Marcos presented Dr. Glassman's report to the post-conviction court, R.42, and argued its findings to postconviction court, R.62:19-22. (App. 16-19) On Motion to Reconsider, R.43:4, n.2, he also proffered testimony from Dr. Glassman, if it would help address the court's concerns or questions, or the state's objections. The postconviction court did not take Dr. Glassman's testimony, although it previously indicated that clarification from Dr. Glassman could help persuade the court that his findings supported

Failure to discover and present to the waiver court this mental health and psycho-social data prejudiced Marcos, because this was relevant anti-waiver-weighing data which the court *neve*r learned or considered. Marcos was thus waived into criminal court based on, and because of, the court's *false* picture of him: as a kid with no mental illness or disability, mature for his age; who would not benefit from treatment or programming; who had received services and programming but did not respond to them; who lacked motivation to comply with and respond to programming available in juvenile corrections. See R.65:73, 82-89.

Had the waiver court perceived an accurate, fine-grain picture of Marcos' mental health, psycho-social functioning, linguistic limitations, the impact of his disorders on Marcos conduct (and its seriousness), and Marcos' responsiveness to appropriate treatments, it would have differently assessed the seriousness of Marcos' conduct and the ability of the juvenile system to rehabilitate and punish Marcos. See R.62:19-22. (App.16-19) Hence the waiver determination would very likely have been different. *Strickland*, 466 U.S. at 695–96.

D. Attorney Kennedy was ineffective in failing to discover Marcos' undocumented alien status and DACA eligibility, and failing to advise Marcos about two clear, automatic, irreversible, and permanent immigration consequences of waiver to criminal court and conviction: inadmissibility and DACA ineligibility.

Attorney Kennedy unreasonably – when representing a minority Hispanic juvenile in delinquency proceedings -- failed to investigate Marcos' citizenship/immigration status;

Marcos' postconviction arguments. See R.62:20-21, 27-28. (App. 17-18, 24-25).

to discover the importance of retaining juvenile jurisdiction for Marcos's eligibility for DACA, admissibility, and deportability; and to advise Marcos about the automatic, irreversible and permanent immigration consequences (inadmissibility and DACA ineligibility) of waiver into, and felony conviction in, criminal court.

Attorney Kennedy knew early on that Marcos' father spoke little English, Marcos spoke Spanish, and that Marcos' goals were to stay in juvenile court, stay in the U.S. with his family, avoid prison. R.61:9, 13, 22. Nevertheless, *before waiver* he did not investigate, or discover, that Marcos was brought from Mexico at age 5, was undocumented, but was eligible for immigration benefits under DACA, which makes available legal residency in the US to "childhood arrivals". Id. at 6 et seq., 11-13, 18.[8] He did not discover that Marcos would become presumptively deportable if convicted of a felony after waiver; or that he would become automatically, irrevocably, and permanently inadmissible; or that he would similarly lose DACA eligibility; or that retaining Marcos in juvenile court and securing juvenile dispositions would preserve Marcos' DACA eligibility and spare him presumptive deportability and immediate, irrevocable and permanent inadmissibility. Id. at 12, 14, 16, 19, 24-25. Attorney Kennedy did not advise Marcos at all about two clear, automatically statute-triggered immigration consequences of waiver (and felony conviction): irrevocable and permanent inadmissibility and DACA ineligibility. Id. at 9, 13-15, 18-19. Attorney Kennedy presented no immigration-status-related facts to the waiver court, or arguments. R.65, passim.

[8] Attorney Kennedy testified that he did not discover all these facts until *after the plea*. Id.

Juvenile clients in waiver proceedings must be advised about the consequences of waiver. See *In Interest of T.R.B.*, 325 N.W.2d 329, 109 Wis.2d 179 (1984) (juvenile court at waiver hearings should address juvenile personally, and counsel, to ensure on record that counsel advised juvenile fully about consequences of waiver of jurisdiction).

But here the court did *not* personally address Marcos or attorney Kennedy to ensure on the record that Kennedy "fully" advised Marcos of the waiver's consequences.

The record shows that before the waiver attorney Kennedy did not advise Marcos *at all* about two clear immigration consequences of waiver and felony conviction: automatic, irrevocable, and permanent inadmissibility, based on statutory mandate; and identical loss of DACA eligibility. R.61:9, 13-15, 18-19. Failures to advise Marcos about these two clear automatic immigration consequences of waiver (and felony conviction) were unreasonable and deficient, in light of controlling law. See *In Interest of T.R.B.*, 325 N.W.2d 329, 109 Wis.2d 179 (1984); *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010).

Each of these two deficiencies prejudiced Marcos, because it prevented a *strategic* approach to the waiver proceedings, full informed of their implications; and they prevented presentation to the juvenile court of additional strong arguments weighing against waiver: that retention of juvenile jurisdiction *was* in Marcos' best interests *and* the community's, because it ensured Marcos' successful rehabilitation and preserved his DACA eligibility and ability to stay lawfully in the United States with his family -- whereas waiver to criminal court would ruin those things.[9]

[9] Such a ruling on "best interests" is a prerequisite to waiver under Wis. Stat. § 938.18.

Just as with failure to argue that mental health disorders and psycho-social limitations weighed against waiver, prejudice resulted also when attorney Kennedy failed to argue to the waiver court that clear, automatic, irreversible immigration consequences (inadmissibility and DACA ineligibility and) weighed heavily against transfer of jurisdiction under Wis. Stat. § 938.18.[10]

Two of the 5 statutory factors courts must consider in waiver determinations implicated Marcos' eligibility for lawful U.S. residency under DACA: sub (a), "t*he juvenile's pattern of living* . . . and apparent *potential for responding to future treatment*;" and sub (am): "[t]he prior record of the juvenile, including . . . *the juvenile's prior offenses"* (emphasis added). [11] But the juvenile court never heard of Marcos' undocumented "childhood arrival" status, his history of living in the U.S. illegally, eligibility for DACA's benefits

---

[10] Wis. Stat. § 938.18 states in relevant part:

(6) After considering the criteria under sub. (5), the court shall state its finding with respect to the criteria on the record, and, if the court determines on the record that it is established by clear and convincing evidence that it would be contrary to the best interests of the juvenile or of the public to hear the case, the court shall enter an order waiving jurisdiction and referring the matter to the district attorney for appropriate proceedings in the court of criminal jurisdiction . . . . (emphasis added).

[11] As argued infra, proper exercise of discretion in waiver proceedings involving undocumented juveniles requires the court to know of and consider the immigration consequences if waived to, and convicted in, criminal court (vs. *no* such consequences if juvenile disposition entered). Such consequences *immediately and directly* concern the courts' duty of "determine on the record" through proper discretion whether retention is "contrary to" the juvenile's OR the community's "best interests." Wis. Stat. § 938.18.

and desire to avail himself of those benefits (i.e. motivation to rehabilitate and avoid felony convictions), although these implicated statutorily-required factors for waiver.

Marcos was waived by a court which had no idea that he was a "childhood arrival" eligible for DACA and very motivated to rehabilitate and benefit from DACA; or that he would be deported and would become automatically forever inadmissible if convicted of a felony after waiver, and ineligible for DACA. [12]

Had the juvenile court understood Marcos' immigration status, DACA eligibility, and the automatic irreversible and permanent immigration consequences of waiver-cum-conviction (inadmissibility and DACA *in*eligibility), a reasonable probability exists that it would have found that retention of juvenile jurisdiction was in the best interests of Marcos and of the community. Indeed, no reasonable court could find otherwise. *State v. Jones,* 2010 WI 72, ¶ 23, 326 Wis.2d 380, 797 N.W.2d 378.

---

[12] Wisconsin courts do consider information about undocumented immigration status and deportation consequences of felony conviction in making waiver decisions. See e.g. *In re Vairin M.*, 2002 WI 96, P17, 255 Wis.2d 137647 N.W.2d 208 (Supreme Court noting in dicta: "The juvenile court also noted that the issue of potential deportation would have been relevant to its waiver decision."). Moreover, Wis. Stats. Section 48.299 permits use of any relevant, probative, and trustworthy evidence for the limited purpose of determining what type of court can act most appropriately in the circumstances, from the viewpoint of society and juvenile. Even inadmissible evidence, if informative and helpful in exercise of juvenile judge's discretion, can be used on petition for waiver of juvenile jurisdiction. *In Interest of J.G.*, 350 N.W.2d 668, 119 Wis.2d 748 (1984). Nothing bars juveniles from presenting immigration status and consequences in waiver proceedings.

Had attorney Kennedy informed the court about the clear, automatic, irreversible, permanent (and tragic) immigration consequences -- for Marcos and the community -- of Marcos' waiver and felony conviction, "the decision reached [regarding waiver] would reasonably likely have been different." *Strickland*, 466 U.S. at 695–96. The juvenile court would on such record conclude that no "clear and convincing evidence" supported waiver, meeting the standard for prejudice. *State v. Sanchez*, 201 Wis.2d 219, 548 N.W.2d 69, 76 (1996). When absence of this knowledge contributed to the waiver and counsel unreasonably caused this absence, Marcos was prejudiced. Id.

E. The postconviction court erroneously ruled, invoking *Kraemer*, that Marcos had waived his right to challenge errors in the waiver by pleading.

The postconviction court relied on *State v. Kraemer*, 156 Wis. 2d 761, 457 N.W.2d 562 (Ct. App. 1990), in denying Marcos relief, apparently concluding that his plea was valid and thus waived all errors in the waiver, under *Kraemer*. R.62:10-11, 18 (App. 13-14, 15) ("from my review of *Kraemer*, I believe it does apply"), 27 (App. 24) ("So relying upon … *Kraemer*, the Court will deny the defense motion."). [13]

The postconviction court "adopted" the prosecution's argument that waiver was proper and valid. R.62:26 (App. 23); see also R.62:23-24 (App. 20-21) (prosecutor's analysis of waiver as proper; stating "*Kraemer* does apply").

[13] Validly pleading to an adult charge waives a juvenile's right to challenge the waiver of juvenile court's jurisdiction. *State v. Kraemer*, 156 Wis. 2d 761, 457 N.W.2d 562 (Ct. App. 1990). Hereafter Marcos may sometimes refer to this rule as "the *Kraeme*r waiver rule."

The postconviction court *no-where* stated what factual findings supported its rulings on *every* raised claim for relief. R.62, R.46, R.44. Insofar as the denial of postconviction relief relies on any factual findings of the postconviction court which are inconsistent with the factual summaries stated in Marcos' postconviction filing papers, Marcos asserts that those factual findings are clearly erroneous. *Balliette,* 2011 WI ¶18-19.

The postconviction court's relatively unclear and unspecific rulings, cited supra, prevent undersigned counsel from specifically addressing the court's positions, findings, reasonings, and rulings, and require undersigned counsel to infer or guess at the court's reasonings. Nevertheless throughout this Brief counsel attempts as specifically as possible to address the postconviction court's findings, reasonings, and rulings in the context of her 4 arguments.

ARGUMENT II
WAIVER OF JUVENILE JURISDICTION WAS INVALID FOR REASONS UNRELATED TO COUNSEL'S INEFFECTIVENESS.

A. Standard of review

The decision to waive jurisdiction under Wis. Stat. § 938.18 is within the sound discretion of the juvenile court. *State v. Tyler T.*, 2012 WI 52, ¶24, 341 Wis.2d 1, 814 N.W.2d 192. The juvenile court's waiver decision will be reversed if the court erroneously exercised its discretion. Id.

In reviewing the juvenile court's discretionary decision to waive jurisdiction over a juvenile, the court of appeals first looks to the record to see whether discretion was exercised; if discretion was exercised, the reviewing court then looks for

reason(s) to sustain the court's discretionary decision. *In re Tyler T.*, 2012 WI 52, P24, 341 Wis.2d 1, 814 N.W.2d 192.

B. The juvenile court did not exercise discretion in waiving Marcos to criminal court

Discretion is "a process of reasoning based on the facts of record and reasonable inferences from those facts, and a conclusion supported by a logical rationale founded upon proper legal standards." *McCleary v. State*, 49 Wis.2d 263, 277, 182 N.W.2d 512 (1971). Exercise of discretion requires reliance on facts of record and the applicable law, and on a demonstrable rational process. *Martindale v. Ripp*, 2001 WI 113, P28; 629 N.W. 2d 698. A court which makes determinations inconsistent with the record or the law does not properly exercise discretion. *Ocanas v. State*, 70 Wis.2d 179, 187, 233 N.W.2d 457 (1975).

The juvenile court's waiver determinations were inconsistent with the record or the law, doubly contrary to exercise to discretion. Contrary to discretion, the court waived Marcos based on determinations unsupported even by the State's evidence presented at the waiver hearing, and on unreasonable inferences from the facts of record. *Ocanas*, 70 Wis.2d at 187; *McCleary*, 49 Wis.2d at 277.

The State's witnesses at the waiver hearing testified that:

1. the Department never recommends the Serious Offender Program, but only waiver to adult court, R.65:52-53 (juvenile intake worker testifying she had "never not recommended waiver");
2. Marcos had been on supervision just 8 months (for low-level shoplifting) and "did well," was "successful on" it, though he had no "counseling programs" and no mental health "diagnoses," R.65:35, 55-56, 74;

3. "at times" Marcos' "parents had "difficulty with some of his behaviors, and were concerned on what they could do," R.65:36;
4. Marcos' prior police contacts involved benign conduct: two disorderly conduct and one "first degree sexual conduct" referrals stemmed from Marcos' youthful "boyfriend-girlfriend relationship" (*both* 13 y.o., *both* referred to juvenile intake), R.65:39-41; battery referral and municipal citation stemmed from Marcos and another boy "horsing around" when a third interfered by hitting Marcos' peer, R.65:41-42; "referral for retail theft . . . in excess of $2,500" was for an item valued at "*way under* $2,500," R.65:42-43; a "trespassing warning" stemmed from Marcos' being on an abandoned golf course, R.65:44; taking his dad's car without permission or a license, R.65:37.
5. a school suspension for having "brass knuckles" (dubbed a "weapon") involved a *plastic belt buckle* resembling brass knuckles, which Marcos took off and put away at school, after realizing the buckle looked like knuckles, R.65:48-51, 65, 73, 86;
6. Marcos lacked gang affiliation, R.65:22-23;
7. Marcos non-cooperativeness with supervision services consisted of missing "a couple sessions" of "family functional therapy" to treat his *brothers'* issues, until informed he was "invited" to participate, R.65:57-58, 60:12-13;
8. the young robbers -- in sweatshirts and bandana-covered faces, armed with a "small kitchen knife" and a plastic pipe, R.65:6, 13, 72 -- restrained the adults and gathered the kids on a bed in a room apart and told them to "be quiet," but no physical violence occurred. R.65:6; R.30: 23-24 (no mention of violence in factual summary).

The State ultimately argued for waiver based on the "extreme seriousness" of Marcos' conduct, his "history with the police department, he's known to them, there have been issues," R.65:72-73; and because Marcos:

1. had "no mental illness or disability," no "mental or physical issues;"
2. adopted an "adult pattern of living," including sneaking out," "sexual relations" (with 13 y.o. girlfriend), shoplifting condoms;
3. had a "bad," "poor attitude," (e.g. cursed at an officer and passively resisted him) "not suitable for the juvenile court;"
4. had been uncooperative (but not combative) and had "issues complying with the department" (missing therapy sessions). R.65:73-75.

Contrary to the facts of record and to reason (thus to discretion), the juvenile court found that Marcos would *not* respond to services and sanctions in the juvenile system and that the "juvenile system just is not equipped to handle" Marcos. R.65:87-89.

No discretion was exercised in making these determinations, which contradict the record:

1. that Marcos had not responded to treatment or services in juvenile system and would not respond in the future, so the adult system's longer rehabilitation opportunities and protections were needed. R.65:83-89. . R.65:83 et seq, 88 ("I have nothing now that indicates that anything would get through to him").

> Marcos had received no individual mental health or psych evaluation, treatment, or services, and had responded well to the scant *family* services received on juvenile supervision. R.65:88 (court

stating "He's been on supervision before. It went okay at the time . . ."); 35 (juvenile intake worker testified: "I believe he was successful on his term of supervision. . . . And I do not believe that at that time he was involved in any counseling programs."); R.65:55-56.

The record indicated that Marcos benefited from the few services he received, was very motivated to benefit in the future, and juvenile services were not yet exhausted and could rehabilitate Marcos.

3. that the seriousness of Marcos' conduct disqualified him from the Serious Juvenile Offender Program, because it was "beyond the average Class C felony," well above the middle-level of felonies. R.65:90.

Marcos was charged precisely with a "middle-level" felony, a Class C. Per statute, juveniles charged with felonies in classes from A through E are eligible for the SJO. R. 30:28-32 (Exhibit D: DJC's Serious Juvenile Offender Program Questions and Answers). Class C felony is precisely smack in the middle of the 5 classes of felonies, from A through E.

4. that Marcos had no mental health illness or developmental disabilities. R.65:82.

The record showed that Marcos was *never evaluated* for mental health and that he had a learning disability, and had used marijuana, so to make the above findings was failure of discretion.

The juvenile court's determinations, on which waiver rested, were unsupported by, and contrary to, the record, and

stemmed from unreasonable inferences from facts of record, contrary to discretion. [14]

C. No valid reasons support the waiver determination

No valid reasons exist for sustaining the juvenile court's waiver determination. *In Re Tyler T.*, 2012 WI at P24.

Key facts and governing laws (discovered only post-waiver, due to counsel's ineffectiveness) weigh heavily against waiver, including: Marcos' mental health issues, treatability, juvenile treatment needs, delayed maturity, and the relatively lesser seriousness of his acts, when seen in this context; his undocumented alien status prior to waiver and eligibility for DACA, if retained in juvenile court and adjudicated as a juvenile (strong motives to rehabilitate); his presumptive deportation and his automatic, unavoidable, and irreversible permanent inadmissibility and loss of DACA eligibility (once waived, then convicted of a felony).

There is no valid reason to uphold a waiver made by an un-informed court, which knew *nothing* about key relevant laws and facts weighing against waiver: Marcos' mental

[14] In postconviction court Marcos argued that even the Waiver Investigation Report, which the State filed to *support* the waiver petition, reflected facts weighing *against* waiver, with which the waiver decision and the waiver court's factual findings were inconsistent: Marcos had "difficulty retaining" material, a learning disability, and an IEP since elementary school; was never subject to psychological or mental health evaluation; had never received individual counseling; Marcos wanted treatment and was interested in alternatives to correctional placement. See R.30:14-15 (postconviction motion citing to the Waiver Investigation Report and to transcript of waiver hearing of 12/12/2012, R.65). The State neither objected to, nor rebutted, these facts and arguments.

health disorders (and their impact on the seriousness of his conduct), immaturity, pattern of living as an undocumented "childhood arrival" eligible for DACA; Marcos' treatability and strong motivation to rehabilitate and attain lawful U.S. residency under DACA; and the automatic, unavoidable, permanent immigration consequences of waiver and felony conviction (inadmissibility and DACA ineligibility).

Without all this information, the juvenile court could not in an informed, rational way determine whether waiver was warranted. The waiver determination lacks reliability and legitimacy when the waiving court was blind to these key laws and facts bearing on the statutory factors for waiver. No valid reasons exist for sustaining this blindly-made waiver determination. *In Re Tyler T.*, 2012 WI at P24.

No reason exists to uphold the waiver also because doing so will *not* accomplish the waiver's objectives: of providing "a longer term of supervision that may include incarceration, parole, probation, treatment and educational opportunities and community protection." R.65:9. With immediate deportation after prison, and with automatic permanent inadmissibility and loss of DACA eligibility, Marcos will be on supervision much *shorter* than the waiver court expected: only 10 years (while imprisoned), not 20. In adult prison, he will *not* have longer or better access to treatment or educational opportunities: adult corrections are notoriously poor in those. Longer community protection will also not happen, because, after his deportation, the community will face Marcos' illegal return to the only family and home he knows, with all the attendant risks of illegal residency in the U.S. None of the court's rationales and purposes for waiver will materialize by upholding the waiver.

Because the juvenile court did not exercise discretion in waiving Marcos, and because no valid reasons exist for sustaining waiver, this Court should reverse or vacate Marcos' waiver to criminal court, or otherwise relieve Marcos of the invalid waiver. *In Re Tyler T.*, 2012 WI at P24.

ARGUMENT III
COUNSEL WAS INEFFECTIVE DURING THE PLEA NEGOTIATIONS AND DURING THE PLEA

A. The legal standard: defendant's right to counsel during plea negotiations and the plea

A criminal defendant has a Sixth Amendment right to effective assistance of counsel during plea negotiations. *Missouri v. Frye*, 132 S.Ct. 1399 (2012); *Lafler v. Cooper*, 132 S.Ct. 1376, 1384 (2012). Counsel's ineffectiveness during the plea proceedings makes a plea not knowing, intelligent, and voluntary: "[T]he *sine qua non* to a voluntary plea of guilty" is effective assistance of counsel during the plea. *State v. Dillard*, 2014 WI 123, P68, 358 Wis.2d 543, 859 N.W.2d 44. Validly, strategically pleading to an adult charge waives a juvenile's right to challenge the waiver. *Kraemer*, 156 Wis. 2d at 765.

B. Attorney Kennedy was ineffective in not advising Marcos that pleading would foreclose him from appealing his waiver to criminal court.

Attorney Kennedy was ineffective during the plea negotiations and while preparing Marcos for the plea when he never advised Marcos that a guilty plea would waive Marcos' right to appeal the waiver to criminal court. See R.62:11 (App. 14). Attorney Kennedy testified he had been ignorant of the *Kraemer* waiver rule. R.61:16. He and Marcos

both testified that Kennedy had not advised Marcos about this result of the plea. R.61:16, 37.

Attorney Kennedy's ignorance of the *Kraemer* waiver rule and failure to advise Marcos accordingly were deficient. See *State v. Silva*, 2003 WI App 191, P11, 266 Wis.2d 906, 670 N.W.2d 385 (ruling counsel's ignorance of law deficient).

To prove prejudice from attorney Kennedy's deficient performance during the plea Marcos must show that "but for counsel's deficient performance he would not have pleaded guilty and would have insisted on going to trial," *Hill v. Lockhart,* 474 U.S. 52, 59, 106, S. Ct 366, 370 (1985).

Attorney Kennedy's and Marcos' testimonies in postconviction court do make this showing. Marcos' primary goal was to stay in juvenile court. R.61:9, 13 (Kennedy: Marcos "absolutely" wanted to stay in children's court; in U.S.), 32, 33 (Marcos said he wanted to "continue in children's court"). Marcos would have rational reasons to go to trial, despite low chances of success, if had known of the clear, automatic, tragic immigration consequences of pleading. R.61:54 (Marcos: "It there was a possibility that I'd win [at trial], of course I did [want to go to trial]"), 62 (Marcos didn't know he could win at trial). See also R.37 (arguing that "rationality" of decision to try case properly proved prejudice from plea mis-advice, under *Padilla*, 559 U.S. at 372; *State v. Mende*z 2014 WI App 57, P.12, 16-17, 354 Wis.2d 88, 847 N.W.2d 895).

Marcos would have gone to trial if he had known he would be deported after the conviction, and would be automatically, irrevocably, permanently inadmissible and ineligible for DACA. See e.g. R.61:61 (Marcos testifies that

one reason he pled was he believed he would still be eligible for DACA after plea).

Finally, Kennedy's failure to inform Marcos that his guilty plea would waive his right to challenge the waiver denied Marcos his right to appeal. Where defense counsel's deficient performance deprives a defendant of his right to appeal, the State is no longer entitled to a presumption in the reliability of the proceedings. *Roe v. Flores-Ortega*, 528 U.S. at 470, 120 S. Ct. at 1038-39. So Marcos' plea proceedings cannot be considered reliable. Id. Marcos pled without understanding that the plea would extinguish his right to appeal waiver of juvenile jurisdiction -- when his primary goal was to stay in juvenile court and risks of appealing waiver were nil. Marcos pled non-intelligently due to counsel's self-admitted ignorance of the law and failure to educate Marcos. He thus lost his appellate rights due to attorney Kennedy's deficiencies. Allowing such plea to stand would work multiple manifest injustices.

C. Attorney Kennedy was ineffective in failing to advise Marcos about two clear and automatic immigration consequences of the plea: automatic and irreversible inadmissibility, and loss of DACA eligibility.

Only after the plea did attorney Kennedy and Marcos understand that the waiver and plea made Marcos presumptively deportable, and also made him automatically, irreversibly, permanently inadmissible and ineligible for DACA. R.61:12-14 (after plea Kennedy discovered that plea would get Marcos deported; at plea believed it would "badly damage" his "possibilities of citizenship"), 18, 23 (Kennedy thought after plea Marcos would "*almost certainly* have to live outside the country," indicating ignorance of automatic

inadmissibility). Kennedy never advised Marcos about these latter two clear, automatic, and irreversible immigration consequences of the plea. R.61:23-25 (no advice on inadmissibility consequence), 34 (Marcos unaware plea would automatically cause inadmissibility and DACA eligibility); 61 (unaware plea would trigger DACA ineligibility).

The record shows that attorney Kennedy only advised Marcos, by reference to the plea questionnaire form, that he would likely be deported after pleading. R.61:14 (testifying he advised Marcos "it was very likely" he would be deported; also advised him "not necessarily 100%" he would be deported), 15 (advised Marcos it was "almost certain" he would be deported), 18 (told Marcos that deportation "was almost certain to happen"). The record shows that attorney Kennedy encouraged Marcos to plead and Marcos complied out of fear, insecurity, ignorance, mistaken belief that he would avoid deportation, preserve DACA eligibility and that avenues for lawful residence would remain. R.61:31-40. At that time neither he nor Kennedy understood that presumptive deportation would surely follow, or that clear, automatic, irreversible, and permanent inadmissibility and DACA ineligibility would occur; or that pleading would waive Marcos' right to appeal waiver to criminal court. See supra.

The record shows that Marcos signed the plea form because he was asked to sign, fearing to cross his counsel and/or the court. R.61:54. While considering pleading, Marcos did *not* know that his conviction would make him deportable, or automatically ineligible for DACA, or automatically, irreversibly, and permanently inadmissible to the U.S. Marcos received *no advice* regarding automatic inadmissibility or DACA ineligibility, but was advised that

possibly he could avoid deportation and stay in the U.S. legally. Id. at 33-34, 37-40, 51-52, 53, 59-60.

Marcos pled with the hope of avoiding deportation, maintaining his DACA eligibility, and via DACA arranging for lawful residence in the United States. In fact and in law, summarized supra, the plea automatically, de jure, extinguished such possibilities. Marcos' *false* hopes rested entirely on attorney Kennedy's inadequate advice.

Padilla held that a defendant seeking plea withdrawal shows prejudice by "convinc[ing] the court that a decision to reject the plea bargain would have been rational under the circumstances." Id. at 559 U.S. at 372. Decision not to plead, but to try the case, would have been rational for Marcos to make, under his circumstances: because the immediate, automatic and tragic consequences of inadmissibility, DACA ineligibility, presumptive deportation, and loss of the right to appeal waiver so vastly outweighed the (considerable) risks of losing at trial. See R.37:1-5 (discussing the rationality of the choice to try the case).

Marcos would not have pled if he had understood that he would unavoidably be deported, or that the plea would make him automatically and permanently inadmissible and ineligible for DACA. Id. at 44, 61; R.61:34, 38-40, 43-44, 60-61. [15]

The specter of *inadmissibility* pursuant to INA §212(a)(2)(A)(i)(I), 8 U.S. Code §1182 -- an automatic, irreversible and permanent tragic consequence of pleading --

[15] Marcos also testified that he "absolutely" would have asked Kennedy to seek reverse waiver and/or to withdraw the plea, if he had known of those options. Id. at 50, 60-61.

would make supremely rational Marcos' decision to try the case -- even more so than the prospect of deportation. [16]

Under *Padilla*, when the deportation consequence is truly clear, "the duty to give correct advice is equally clear." *Padilla*, 559 U.S. at p. 369. When applied to the two clearly automatic immigration consequences of a felony conviction like Marcos' -- of inadmissibility and DACA ineligibility -- *Padilla* requires counsel to give "correct advice" stating that the alien client will become automatically and categorically inadmissible once convicted of a qualifying crime, and will lose DACA eligibility. Advising vaguely that the client "may become inadmissible" or not advising *at all* is deficient, pursuant to *Padilla*.

When the record clearly shows that attorney Kennedy did not advise Marcos *at all* about the clear, automatic, irreversible, and permanent inadmissibility consequence of his plea-cum-conviction of armed robbery, or of the fact that such plea-cum-conviction would make Marcos automatically ineligible for DACA, each of these failures to advise Marcos was not "correct advice," in light of *Padilla*, thus deficient.

Prejudice ensued when the record shows that these failures caused Marcos to plead unknowingly and unintelligently because:

1. with no knowledge or understanding of two automatic, irreversible, permanent "clear"

---

[16] As explained supra, unlike deportation, inadmissibility pursuant to INA §212(a)(2)(A)(i)(I), 8 U.S. Code §1182, is *de jure* automatic. No positive steps are required on the part of the government to effect exclusion from admission. No action or inaction on the part of the Attorney General can result in admission. There is no discretion; there is no right to due process; there is no reviewability.

immigration consequences of his plea: inadmissibility and DACA ineligibility;
2. with no knowledge or understanding that the plea would waive his right to seek reversal of the waiver to criminal court;
3. under false hopes about future possibilities of lawfully staying in or reentering the United States.

The record shows that Marcos would not have pled if he had known and considered -- pursuant his counsel's proper advice -- the legal consequences of his plea: both the clear automatic and irreversible immigration consequences (e.g. of inadmissibility) and the waiver consequences.

In this case *both* counsel was ineffective during plea negotiations and the plea, *and also* Marcos' plea was not knowing, intelligent, or free (due to counsel's ineffectiveness and other factors). Thus *dual* manifest injustice occurred and plea withdrawal is warranted on *two* separate grounds. *State v. Washington,* 176 Wis.2d 205, 213-214 (Ct.App.1993), *State v. Hoppe*, 2009 WI 41, ¶44 (2009).

Moreover, all individual deficiencies of counsel described above, at any step in the case, prejudiced Marcos when considered cumulatively. *State v. Thiel*, 2003 WI 111, ¶ 59, 665 N.W.2d 305 (2003).

D. The postconviction court erroneously decided that counsel was not ineffective at plea

Marcos argued that attorney Kennedy's failure to know about the *Kraemer* waiver rule and to advise Marcos about it prior to the plea was ineffective. See e.g. R.62:11 (App. 14).

The postconviction court denied Marcos' plea ineffectiveness claim, apparently upon finding that no prejudice resulted from counsel's deficient failure to advise Marcos that pleading would waive his right to challenge the waiver under *Kraemer*. R.62:8 (App.11) (court remarking: "Kennedy explained to the defendant that they were asked and could try and appeal the waiver but that their . . . chances of success were minimal. The defendant did not want to take that path. So that . . . reinforces the fact that he wasn't ineffective at the waiver stage or after the waiver stage."), 10 (App.13) ("the fact that he didn't take any action to . . . undo the waiver… [Kennedy] did have a discussion with the defendant about trying and appealing the waiver and the client decided not to do that…"), 11 (App. 14) (D.A. arguing: "I think attorney Kennedy's failure to know [the Kramer waiver rule] is irrelevant based on his discussion with the defendant prior to the plea about whether or not they should try to appeal or undo the waiver.. . . [Kennedy] was attempting to ask the defendant if he wanted to challenge the waiver. He decided not to. So they moved forward with the plea…."); 26-27 (App. 23-24) (court ruling Kennedy was not ineffective, adopting DA's arguments about the waiver, relying on *Kraemer* in denying relief).

The court apparently reasoned that there could be no prejudice post-plea (from losing the right to appeal waiver) when Marcos had not challenged his waiver into criminal court *prior to* the plea. From Marcos' failure to challenge jurisdictional waiver prior to the plea the postconviction court apparently *inferred* -- without stating any rationale or citing any supporting authority -- that Marcos would *not wish to* challenge such waiver *after the* plea. In effect, the postconviction court treated that *pre-plea* failure to challenge waiver into criminal court as waiver of Marcos' right to challenge the waiver into criminal court post-plea.

Such rationale and ruling were clearly erroneous and not based on any controlling law. That Marcos *right after* the waiver to criminal court (but prior to pleading) did not challenge the waiver does not prove that he would not challenge the waiver later, e.g. after the plea. Marcos' failure, at an earlier stage, to challenge the waiver, did not effectuate waiver of that right in the future or evidence a binding decision not to challenge the waiver later. Such failure could not reasonably be used by postconviction court as evidence that Marcos would never elect to challenge the waiver to criminal court. The law and reason did not support the postconviction court's inferential leap or conclusion that Marcos' failure to exercise a right at an early stage of a prosecution effected waiver of that right or communicated a binding decision not to exercise the right at a later stage.

In making this finding of "no prejudice" and ruling of "no ineffectiveness," the postconviction court relied on in an invalid or inapplicable legal standard, and made factual findings unsupported by the record, by reason, or by logic. The finding and ruling may not stand.

ARGUMENT IV
MARCOS' PLEA WAS INVALID, AS NOT MADE KNOWINGLY, INTELLIGENTLY, AND FREELY, FOR REASONS UNRELATED TO COUNSEL'S INEFFECTIVENESS

A. Standard of review

When reviewing a decision on a motion to withdraw a plea, this Court accepts the trial court's findings of evidentiary or historical fact unless they are clearly erroneous. *See State v. Brown*, 2006 WI 100, ¶ 19, 293 Wis.2d 594, 716 N.W.2d 906. However, whether a plea was knowingly, intelligently,

and voluntarily entered is a question of constitutional fact that this court reviews independently. *Id.*

B. The legal standard: grounds for plea withdrawal

A guilty plea which is not knowingly, voluntarily and intelligently entered violates a defendant's state and federal due process rights. *State v. Bangert,* 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). When a guilty plea is not knowing, intelligent, and voluntary, a defendant is entitled to withdraw the plea as a matter of right. *State v. Van Camp,* 213 Wis.2d 131, 139, 569 N.W.2d 577 (1997). To withdraw a guilty plea after sentencing, a defendant must show by clear and convincing evidence that a upholding the plea would result in manifest injustice, that is, that there are *serious questions affecting the fundamental integrity of the plea*. The defendant has the burden to establish manifest injustice. *State v. Taylor*, 2013 WI 34, ¶48, 347 Wis. 2d 30, 61–62, 829 N.W.2d 482, 497 (2013). The "manifest injustice" test is "rooted in concepts of constitutional dimension," which "involve serious questions affecting the fundamental integrity of the plea. *Libke v. State*, 60 Wis. 2d 121, 128, 208 N.W.2d 331, 334 (1973).

In a motion for plea withdrawal after sentencing, a defendant must make a *prima facie* showing that his plea was accepted without the court's conformance with Wis. Stat. § 971.08, and allege that he in fact did not know or understand the information which should have been provided at the plea hearing, and would not have pleaded guilty if he had been so informed. *Bangert,* 131 Wis.2d at 274. If he meets this burden in the moving papers, the defendant must receive a hearing, where the burden shifts to the state: to demonstrate by clear and convincing evidence that the plea was voluntarily, knowingly, and intelligently made, despite the inadequacy of the record at the plea hearing. *Id.; Van Camp,* 213 Wis. 2d at 140-41. In meeting its burden, the state may rely "on the totality of the evidence," including the testimony from the postconviction hearing, the plea questionnaire/waiver of

rights form, documentary evidence, recorded statements, and transcripts of pretrial hearings. *Brown*, 2006 WI 100 at ¶ 40,. But the state can only meet its burden "by providing affirmative evidence that the defendant's plea was voluntarily, knowingly, and intelligently entered." *State v. Nichelson*, 220 Wis. 2d 214, 223, 582 N.W.2d 460, 464 (Ct App 1998).

C. The postconviction court's denial of plea withdrawal was error

The postconviction court erroneously denied the post-sentencing motion to withdraw Marcos' plea because the motion (and hearings) raised serious questions affecting the fundamental integrity of the plea, *State v. Dillard*, 2014 WI 123, P36 (manifest injustice exists when there are "serious questions affecting the fundamental integrity of the plea."); and also, independently, because the state failed to meet its burden of proving -- by clear and convincing *affirmative* evidence -- Marcos' knowledge that by pleading he would waive his right to challenge waiver into criminal court, *Nichelson*, 220 Wis. 2d at 223.

Uncontroverted evidence of record, cited supra, establishes that Marcos did not know (while pleading) that the plea would waive his right to challenge waiver into criminal court. No evidence (from trial or postconviction court) indicates that Marcos knew that his plea would have this waiver effect (stated in *Kraemer*). The state presented nothing "affirmative" which would constitute clear and convincing evidence that Marcos understood this waiver effect of his plea when he entered his plea. Because the state clearly failed to meet its burden, id., the postconviction court's decision denying plea withdrawal was error.

The record supplied uncontroverted evidence that Marcos did not plead knowingly and intelligently and freely, because it shows that he never knew that pleading would waive his right to challenge waiver to criminal court. Marcos also presented evidence indicating that his counsel's

ineffectiveness caused the plea to be not knowing, intelligent, and free. Marcos thus posed serious questions affecting the fundamental integrity of his plea. *Dillard*, 2014 WI 123, P36. Under both *Nichelson* and *Dillard*, plea withdrawal was warranted; thus its denial was error of law.

Moreover, the postconviction court upheld the plea by relying on incorrect legal standards and irrelevant factors, contrary to the controlling precedent, cited supra, and to due process.

When a guilty plea is not knowing, intelligent, and voluntary, a defendant is entitled to withdraw the plea as a matter of right. *Van Camp,* 213 Wis.2d at 139. But here, contrary to *Van Camp* and *Nichelson*, the postconviction court upheld the plea solely upon finding that Marcos was *not prejudiced* by the not-knowing, not-intelligent, and not-free plea *or* by forfeiting his right to challenge the waiver to criminal court.[17] The postconviction court determined that Marcos certainly *would not have challenged* his waiver to criminal court *after* the plea, when he had not challenged it pre-plea; and thus he was not prejudiced by forfeiting that right with a not-knowing and not-intelligent plea. R.62:26 (App. 23) (finding counsel not ineffective at plea for not advising Marcos about *Kraemer* rule when Marcos "chose not to appeal his waiver into adult court" pre-plea).[18] Reliance on

[17] The postconviction court did not expressly rule that the plea was not intelligent, knowing and free, but neither did it state otherwise. Uncontroverted evidence (cited supra) showed that Marcos did not know, while pleading, that the plea would waive his right to challenge waiver to criminal court post-plea.

[18] As shown elsewhere in this Brief, Marcos was not informed by attorney Kennedy -- defficiently -- that the plea would waive his right to challenge waiver into criminal court, because attorney Kennedy himself was ignorant of this legal consequence of the plea, and of the *Kramer* case which announced it.

such determinations -- unsupported by the law or by logic -- in denying plea withdrawal was error.

Especially so that these determinations were contradicted by the evidence of record. Marcos testified that he "absolutely" would have asked Kennedy to try and undo the waiver -- if only he had known that such action was possible, but he did not know it. R. 61:50, 60-61. Marcos did not hear Kennedy saying that the waiver could be appealed or undone. R.61:33, 60.[19] The record indicates that Marcos' youth, fearfulness, special needs, and language limitations impacted his ability to communicate with his attorney and the court, understand things, express doubts before and during the plea. R.61:44, 46, 54-61. The record shows that Marcos only partially understood the plea colloquy and process, feared to voice his doubts and questions, and signed the plea questionnaire under the pressure of time and fear that the judge would get angry otherwise. R.61:35. This record would explain Marcos' failure to understand, register, and act on Mr. Kennedy's news (that avenues existed to try and undo the waiver) prior to the plea or soon after it.

For the above reasons, the postconviction court's denial of plea withdrawal was error which violated Marcos' due process and his right to withdraw the plea "as of right."

[19] Attorney Kennedy testified that he had informed Marcos that he could try and undo the waiver, but Marcos never asked him to take action in this direction. R.61:13-16.

D. The plea was not made knowingly, intelligently, and freely for several reasons *independent of counsel's ineffectiveness*, and manifold manifest injustice will result if the plea stands.

Manifest injustice exists and plea withdrawal is "as of right" when the defendant received ineffective assistance of counsel, *State v. Washington*, 176 Wis.2d 205, 213-214, 500 N.W.2d 331, 335 (Ct.App.1993) (withdrawal of a guilty plea after sentencing may be based on the ineffective assistance of counsel); and also when the plea was not knowing and voluntary, *State v. Hoppe*, 2009 WI 41, ¶44, 317 Wis. 2d 161, 185, 765 N.W.2d 794, 806 (2009) (defendant entitled to withdraw a plea that was not knowingly, voluntarily, and intelligently entered).

Here, both of these forms of "manifest injustice" warrant plea withdrawal after the sentencing.

The plea was not knowing, intelligent and free for several reasons independent of counsel's ineffectiveness: (1) due to the court's inadequate colloquy; (2) due to Marcos's actual failure to understand the court's language and the import of the proceedings, likely due to his youth, immaturity, anxiety, and language and learning limitations; and (3) due to the fact that Marcos was rushed and intimidated into pleading. Records from juvenile court, criminal court, and postconviction court (cited supra) show that Marcos had had a learning disability, an individual education plan at school, had not received any mental health treatment or services, but was timid and was in fact suffering from language limitations, immaturity, and multiple chronic yet treatable mental health disorders which he self-mediated with THC.

The plea court did not ensure, through personally engaging Marcos, that he was capable of understanding the court and the proceedings, contrary to law. *In Interest of T.R.B.*, 325 N.W.2d 329, 109 Wis.2d 179 (1984).

In fact, Marcos did not understand the court during the plea: attorney Kennedy repeatedly advised the court during the plea that Marcos was not understanding the court and he responded in Marcos' stead. R.52:8-9.

Post-conviction Marcos and attorney Kennedy testified consistently that Kennedy discussed the plea with Marcos one time, immediately prior to the plea hearing, and prepared him by going over the plea questionnaire form, reading from the form about the "possibility" of deportation, and saying there was a "good chance" of deportation. R.61:13-14, 19 (Kennedy's testimony) 37, 52 (Marcos' testimony). Kennedy testified that he had never advised Marcos about the automatic inadmissibility consequence of the plea and conviction or automatic loss of DACA eligibility. R.61:24.

Marcos testified post-conviction that Kennedy had indicated that the judge would get angry if Marcos did not plead that day; that was scared to verbalize questions and concerns, fearing to displease Kennedy and the judge; and that he felt rushed, scared, and pressured to just sign the plea form and go ahead with the plea, although he did not understand everything and wanted more explanations from Kennedy. R.61:32, 35, 39, 49, 55-56, 58-59. Kennedy's testimony (or other evidence) did not contradict this testimony from Marcos.

Records from waiver and postconviction court show objective reasons for Marcos' failure to understand the court and the proceedings: Marcos' limitations in English language and intellectual functioning, immaturity, persistent depression

and anxiety (which he had self-medicated by using THC), and his timid personality. R.42. These records explain also why Marcos did not voice his fears, ask questions, or maturely exercise his rational judgment and free will, when they might collide with the wishes of his attorney and/or the court.

Under these uncontroverted facts of record (summarized supra) Marcos' plea was not knowing, intelligent, and free, due to the fault of: (1) the plea court (which did not ensure Marcos' ability to understand), (2) attorney Kennedy (who failed to advise, explain, ensure Marcos had the opportunity to understand and make free decisions), and (3) Marcos' own psycho-physical limitations (learning and language limitations, young age, immaturity, a soft-spoken and insecure personality, mental health conditions). In this context, it would work manifest injustice of Marcos' plea were to stand.

E. <u>The plea was not valid, and manifest injustice occurred, also because Marcos' counsel was ineffective prior to and at the time of the plea when he provided to Marcos "incorrect advice" regarding the clear immigration consequences of inadmissibility and loss of DACA eligibility.</u>

A conviction of armed robbery (a "crime of moral turpitude") makes a person categorically inadmissible to the United States, so that the person cannot later enter or re-enter the country lawfully, ever. INA §212(a)(2)(A)(i)(I); 8 U.S. Code § 1182. Such inadmissibility is statutorily-mandated by the plain terms of INA §212(a)(2)(A)(i)(I). Pursuant to this statute, an alien who admits -- e.g. while pleading guilty -- all of the facts which constitute the crime becomes *de jure* and de facto inadmissible, and loses DACA Eligibility. inadmissibility pursuant to this statute is not merely

presumptive, but is automatic. It takes effect by operation of the law. No positive steps are required on the part of the government to effect exclusion from admission. No action or inaction on the part of the Attorney General can result in admission. There is no discretion, right to due process, or reviewability.

The U. S. Supreme Court held that when deportation consequences are clear, "the duty to give correct advice is equally clear." *Padilla,* 559 U.S. at p. 369. Applied to inadmissibility and DACA ineligibility, this mandate requires counsel to give "correct advice," i.e. to state unambiguously that the alien client will become automatically, categorically, irreversibly, and permanently inadmissible once convicted of a qualifying crime; and ineligible for DACA. Advising vaguely that the client "may become inadmissible" or not advising *at all* about these crystal-clear consequences (of inadmissibility and DACA ineligibility) is *not* "correct advice" under this law, thus would be deficient.

Here the record, cited supra, shows that attorney Kennedy did not advise Marcos *at all* about either of these two automatic, crystal-clear, irreversible, and permanent consequences of is plea (inadmissibility and loss of DACA eligibility). These two failures clearly to advise Marcos about these two clear-as-day, certain, automatic, direct consequences of Marcos' plea was not "correct advice," in light of *Padilla* and its progeny, thus deficient. The resulting plea was consequently not knowing, intelligent, and free, thus invalid and worked manifest injustice.

It would be manifest injustice to allow a plea to stand when it flowed from counsel's failure to advise Marcos about the clear, automatic, unavoidable, non-reviewable and permanent immigration consequences of the plea.

F. Marcos' plea was not knowing, intelligent, or free because it followed from a defective colloquy by the court and Marcos clearly did not understand the court or the proceedings

To ensure that pleas are knowing, intelligent, and voluntary, trial courts must engage defendants in adequate plea colloquies that comply with Wis. Stat. § 971.08 and case law. *See State v. Bangert*, 131 Wis.2d 246, 266–72, 389 N.W.2d 12 (1986). The court's references to the plea questionnaire are not substitute for a personal, in-court colloquy. *State v. Hoppe*, 2009 WI 41, ¶¶ 30–32, 317 Wis.2d 161, 765 N.W.2d 794. If a defendant shows deficiencies in the plea colloquy, then the burden shifts to the State to show by clear and convincing evidence that the plea was knowing, intelligent, and voluntary despite the deficiencies. *Bangert*, 131 Wis.2d at 274–75. To meet this burden, the state may use the entire record "to shed light on the defendant's understanding and knowledge." *State v. Plank*, 2005 WI App 109, ¶ 7, 282 Wis.2d 522, 699 N.W.2d 235 (citation omitted). But the state can only meet its burden "by providing affirmative evidence that the defendant's plea was voluntarily, knowingly, and intelligently entered." *Nichelson*, 220 Wis. 2d at 223.

The court's defective plea colloquy caused Marcos' plea to be not knowing, intelligent, or free. First, the plea court did not personally determine Marcos' level of understanding of the proceedings or capacity to make informed decisions, contrary to *State v. Brown*, 2006 WI 100, P.30, 293 Wis.2d 594716 N.W.2d 906 ("To ensure a knowing, intelligent, and voluntary plea, *Bangert* also required that a trial judge explore the defendant's capacity to make informed decisions"). Second, the plea court did not determine Marcos' understanding of the consequences of the

plea, specifically that pleading would waive Marcos' right to appeal waiver into criminal court, as held in *Kraemer*, 156 Wis. 2d 761 (stating that a valid plead to an adult charge waives a juvenile's right to challenge such waiver).

The record shows that Marcos in fact at least twice did not understand the court during the plea colloquy. R.52:8 (defense counsel twice stating that Marcos probably was not understanding the court). On other occasions Marcos' lack of understanding is inferable from his failure to answer the court's questions. See e.g. id. at 9 (court asking Marcos if he signed the plea questionnaire on May 8, Marcos not responding, Kennedy responding for Marcos).

The record does *not* show that the court reliably verified Marcos' ability to understand the plea proceedings or capacity to make informed decisions; or assessed Marcos' general intellectual functioning or capability to make informed decisions; or ensured that Marcos knew the consequences of the proceedings.

The record shows that for objective psycho-physical reasons, R.42, Marcos might not understand or make informed decisions.

The plea transcript shows that the colloquy did *not* verify Marcos' understanding that the plea would forfeit his right to challenge his waiver to criminal court. The court only confirmed Marcos' understanding that he was giving up the rights listed in the plea questionnaire, R.52:9, but the questionnaire did *not* address the right to challenge a waiver determination. Post-conviction record (cited supra), shows that Marcos did not have that understanding.

Due also to the above defects in the court's plea colloquy, Marcos's plea was not knowing, intelligent, and free.

G. The record supports an independent conclusion that, as a matter of constitutional fact, Marcos' plea was not made knowingly, intelligently, and freely, so he can withdraw it "as of right."

The record supports an independently conclusion that, as a matter of constitutional fact, Marcos' plea was not made knowingly, intelligently, or freely, and he may withdraw it as of right, *Van Camp*, 213 Wis.2d at 139; *Brown*, 2006 WI at ¶19, because, as argued supra: (1) Marcos did not plead knowingly, intelligently, and voluntarily for several reasons, including the court's inadequate plea colloquy; and also, independently, and (2) Marcos's counsel was ineffective before and during the plea proceedings.

The record cited supra shows that Marcos' plea was not knowing, intelligent, and free, because at the time of the plea:

1. neither Marcos nor his counsel knew that pleading would waive Marcos' right to appeal waiver to criminal court;
2. neither knew that pleading would automatically, irreversibly, and permanently make Marcos DACA ineligible,
3. neither knew that pleading would automatically, irreversibly, and permanently make Marcos inadmissible to the United States, and
4. neither knew that pleading would subject Marcos to federal felony charges and potential decades in federal prison, if reenters the U.S.A. illegally.

Evidence from the entire record (including the postconviction hearings) does not provide "clear and convincing evidence" rebutting the abundant proof in the record (summarized above) of Marcos' lack of knowledge and understanding of several unavoidable, clear, automatic, and irreversible consequences of the plea; Marcos' lack of intellectual and linguistic capacity to understand the court's language and the proceedings; or his actual failure to understand the court's colloquy and the proceedings' key consequences.

CONCLUSION

Based on the above-cited arguments and facts of record, Marcos asks this Court independently to conclude that, as a matter of constitutional fact, Marcos' counsel was ineffective during the waiver proceedings in juvenile court, and also during plea proceedings in criminal court; and to rule that for several independent reasons his plea was not made knowingly, intelligently, an freely, so Marcos as of right may withdraw it, and to vacate his judgment of conviction accordingly, consistent with *Van Camp*, 213 Wis.2d at 139, and *Brown*, 2006 WI at ¶19; and to reverse or vacate the order waiving juvenile jurisdiction, so Marcos may return to juvenile court where his juvenile adjudication would proceed according to law and due process.

Dated this 17th day of May, 2016.

Respectfully submitted,

URSZULA TEMPSKA
Counsel for Defendant-Appellant
State Bar No. 1041496
Law Office of U. Tempska

P.O. Box 11213
Shorewood, WI 53211
(414)640-5542
U_tempska@yahoo.com

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 10,428 words.

Dated this 17th day of May, 2016.

Signed:

URSZULA TEMPSKA
Counsel for Defendant-Appellant
State Bar No. 1041496
Law Office of U. Tempska
P.O. Box 11213
Shorewood, WI 53211
(414)640-5542
U_tempska@yahoo.com

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

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

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

Dated this 17th day of May, 2016.

Signed:

URSZULA TEMPSKA
Counsel for Defendant-Appellant
State Bar No. 1041496
Law Office of U. Tempska
P.O. Box 11213
Shorewood, WI 53211
(414)640-5542
U_tempska@yahoo.com