STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Appeal No. 2015AP2344 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEREMY L. WAND,

Defendant-Appellant.

ON APPEAL TO REVIEW A JUDGMENT OF CONVICTION AND DENIAL OF A POSTCONVICTION MOTION BY THE CIRCUIT COURT FOR LAFAYETTE COUNTY, THE HONORABLE THOMAS J. VALE, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Did trial counsel ineffectively argue the presentence motion to withdraw plea by not pursuing Wand's claim that he was induced to plead guilty because of pressure from his attorneys and their failure to litigate a suppression motion?

The trial court answered: No, because the court had conducted a sound plea colloquy, Wand waived the suppression hearing, and he only offered conclusory allegations of pressure from his attorneys.

2. Should Wand be allowed to withdraw his plea because his attorney argued the plea withdrawal motion under a conflict of interest?

   The trial court answered: No, because Wand's argument was circular: either he qualified for plea withdrawal because of attorney pressure or, in the absence of pressure, there was no conflict.

3. Was trial counsel ineffective for not using the opinion of an arson expert to cast doubt on the origin of the fire?

   The trial court answered: No, because trial counsel had an expert and was not required to seek a second opinion.

4. Was trial counsel ineffective for not obtaining and using an expert to suppress Wand's confession?

   The trial court answered: No, because trial counsel had an expert and was not required to seek a second opinion.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither is requested. Defendant-appellant believes that the issues presented herein can be adequately addressed by the parties' briefs.

STATEMENT OF THE CASE AND FACTS

In a complaint dated September 11, 2012, Jeremy L. Wand, along with his older brother, Armin, was charged with three counts of First-Degree Intentional Homicide for the deaths of his nephews, two counts of Attempted First-Degree Homicide involving his niece and sister-in-law, and one count of arson (2:1-3; App. 101-03). The probable cause portion of the complaint alleged that, on September 7, Wand and his brother set fire to Armin's house, resulting in the deaths of Armin's three sons and injuries to his wife and daughter (2:4-5; App. 104-05). These allegations were based on the confessions of both Armin and Jeremy Wand.

Armin Wand gave a statement to the police on September 9, 2012, in which he said that he and Jeremy planned to burn down Armin's home late at night to collect life insurance policies on the members of his family. His wife, Sharon Wand, always complained about not having enough money, and he, Armin, wanted a fresh start in life. Sharon woke up after the fire had already started, Armin said, so Jeremy ran out of the house (2:5-6; App. 105-06).

The complaint continued by describing the statement given by Jeremy Wand. He admitted discussing with Armin about starting a fire to collect the renter's insurance, and said that Armin promised to pay him $300 for his help. Wand told the investigators that he went to Armin's house around 11:45 p.m., and although he was reluctant to start a fire with people inside, he set a fire on the electrical cord to the television. Wand said that, after Sharon woke up, Armin pulled him outside (2:7-8; App. 107-08).

Attorney Frank Medina was appointed to represent Jeremy Wand (14:1), and he received help from Attorney

Miguel Michel, as co-counsel, later in the case. Attorney Medina had reason to doubt Wand's competency, and the court ordered a competency exam (42:1-2). Wand's competency report, dated October 25, 2012, found that Wand was capable of understanding the criminal justice system (47:4). In the report, Wand said that the police questioned him over a three-day period and refused to believe his protestations of innocence, so he just lied by telling them something close to what his brother, Armin, reportedly said. Wand also described the complaint as a lie (47:3).

An amended information was filed on November 15, 2012, adding a seventh count of Intentional Homicide of an Unborn Child (58:1-4; Ap. 110-13).

The court hearings relevant to this appeal took place on May 10, June 12, July 19, and August 22, 2013. A motion to suppress statements was due to be heard on May 10, 2013. This motion, saying that "statements made in custody were not voluntary under the totality of the circumstances," had been filed on April 10, 2013. However, on April 25, Attorney Medina sent the court a letter withdrawing the motion. On May 10, the court conducted a colloquy with Wand to determine whether he agreed to forego the motion. After determining that Wand consented to the motion's withdrawal, the court told Wand that the motion could be reconsidered and that he could still attempt to suppress his statements at a later time (118:4-5). If Attorney Medina was going to refile the motion, he would have to do so by May 29 so that it could be heard on June 12.

When June 12 came, Wand ended up pleading guilty. Once defense counsel notified the court of the change of plans, the case was recessed until the afternoon session to give Wand time to ponder his decision (119:10). After court reconvened, the State described a plea agreement, which called for a dismissal/read-in of Count 4 (the first-degree

homicide involving Jessica), the amendment of Count 7 from the first-degree homicide of an unborn child to felony murder, and the promise not to argue for consecutive sentences (119:12-13, 37). The court told Wand that the trial had been set for July 12 and the primary purpose of the June 12 hearing was to consider the suppression of the statements that he had previously made to the investigators (119:13). Wand said that he understood that, by pleading guilty, he was waiving his rights to the suppression hearing and the jury trial (119:14-15). The court continued with the plea colloquy, and Wand pled guilty to the agreed-upon counts (119:23-26). Sentencing was set for July 19, and the court ordered a PSI (119:40-41).

At Wand's first sentencing date on July 19, 2013, his trial counsel produced a motion to withdraw his guilty plea. This written motion alleged two reasons in support of plea withdrawal: an inconsistent statement by Sharon Wand and the fact that she had been recently charged with a crime (120:4). However, referring to the PSI that had been prepared for sentencing, the trial court questioned these grounds for plea withdrawal, noting that Wand had told the PSI writer that he was not thinking clearly at the time he changed his plea to guilty and did so only upon the insistence of his attorneys (*Id.* at 5-6). Wand told the PSI writer that he knew nothing about the fire until being awoken at 5 a.m. by a police officer who informed him of the fire. When the PSI writer asked Wand for his thoughts on sentencing, Wand apathetically responded, "I really feel no sentencing is appropriate because I didn't do anything wrong but if you think I need a sentence it should be 20 years, early parole, and time served" (93:3).

At the July 19, 2013, hearing, Wand spoke at the court's invitation (120:6-7). He told the court that he felt most pressured by Attorney Miguel Michel (defense co-counsel), who, the court noted, was not in court on June 12.

When asked by the court when he got "on board" with changing his plea, Wand said that he was never on board with the idea and just did what he thought was best for the situation, just to make people happy (*Id.* at 9-10). Attorney Michel kept talking about it over and over, so Wand just did what Michel thought was best (*Id.* at 10). The court asked Wand if Attorney Medina indicated on June 12 that he thought Wand should take a plea, to which Wand ambiguously responded, "He was just doing what he thought was best for what – what I told him" (*Id*. at 11). Then, the court also asked Wand if Mr. Medina pushed him into taking a plea that he did not want to make, and Wand responded, "Not all the way, but he kind of sided with Miguel..." (*Id.* at 13-14). Wand denied ever saying, back on June 12, words to the effect that "I want to enter a plea today" (*Id.* at 11).

The court asked Mr. Medina how he knew client wanted to enter plea. Without saying that Wand told him that he wanted to change his plea, Mr. Medina responded, "We filled out a plea questionnaire. I explained the plea questionnaire to him. I explained his options, again explained his constitutional rights, and he signed it, and he also signed the appeal rights form, and that was his information to me, that he was going to enter a plea of guilty that day" (*Id.* at 12). Although Mr. Medina told the court that he had previously talked about entering a guilty plea, he did not describe any prior discussion in which a decision to plead guilty was made. Seemingly, the decision occurred at the moment that Mr. Medina presented the plea questionnaire to Wand.

Mr. Medina stayed on as Wand's attorney. The court asked Wand if he would feel comfortable with Medina continuing as his attorney. In a textbook example of putting the ox before the cart, Wand told the court: "I think he's one of the best attorneys for the situation since I hear that he's a

better trial lawyer ... I just hear he has a great trial record, I should say, so I think he would be best for the situation as my attorney ... As long as I can talk to him and figure out what signs were misunderstood and the straightening it up, then I would be comfortable with him" (*Id.* at 14). From these comments, Wand was already looking beyond the plea withdrawal to an eventual trial, apparently forgetting that he would first need to convince the court to let him withdraw his plea.

Despite Wand's statements to the PSI writer that he pled guilty at the insistence of his attorneys, his trial counsel stuck by the original motion when it was formally heard by the court on August 22, 2013. Attorney Medina explained that the basis for the plea withdrawal was contained in the motion, adding that Wand had the "same rights as anybody else in terms of making the State prove its burden ..." (121:3). Then counsel stated that Wand "... in view of new evidence and circumstances ... wishes to pursue a trial" (*Id.* at 3-4).

The court reviewed the motion and found that it set forth two grounds for plea withdrawal: (1) Sharon Wand gave a statement to Agent McDermott (the PSI writer) that Wand was present at the crime scene, whereas her prior statement was that she did not see him there; and (2) since the date of the plea, Sharon Wand had been charged (but not convicted) of offenses in another county (*Id.* at 4). The State clarified that Sharon Wand's earlier statement was that Wand had been there earlier in the evening of the fire, until 7:30, 8 p.m., but she didn't know if he was there later. In her most recent statement, she claimed Wand was there, so the "new evidence" was hardly to Wand's benefit (*Id.* at 6). Wand's attorney responded that the vagueness of Sharon's statement to the PSI writer was "something in the province of the jury" (*Id.* at 9). The State quickly underscored the weakness of this reason for plea withdrawal: How could a change from an

exculpatory statement to an inculpatory one benefit Wand and offer credible grounds for a plea withdrawal? (*Id.* at 11)

When, at the hearing on the motion to withdraw the guilty plea on August 22, 2013, Attorney Medina asked Wand why he wanted to withdraw his plea, Wand replied that "we have false statements by me ... recanted statements by the defendant" (*Id*. at 16). By "defendant," Wand was referring to himself—and "there was really no way to ... get this to go through except for the suppression." (*Id.* at 17).

Upon cross-examination from the State at the August 22 hearing, Wand again blamed pressure from trial counsel as a reason for pleading guilty (*Id*. at 19). Significantly, this response was elicited by the State, not by defense counsel whose motion and entire argument remained silent on the issue of attorney coercion.

Unsurprisingly, the court denied the motion on the basis of the plea colloquy and the feeble reasons put forth by trial counsel (*Id.* at 29). The fact that Sharon had been charged with a crime did not matter because she had not been convicted (*Id.* at 31). And because the "motion to withdraw was based on fairly limited grounds here on the statement concerning Sharon Wand from an exculpatory to an inculpatory statement resulting in an inconsistent statement" did not bear on an issue in the case, the trial court rejected the motion (*Id.* at 32).

Sentencing followed the court's denial of the motion on August 22, 2013. The court imposed concurrent sentences of life imprisonment on Counts 1 through 3, making Wand eligible for parole after 35 years. Wand received 35 years of initial incarceration and 20 years of extended supervision on Count 5, and 25 years of initial confinement and 15 years extended supervision on Counts 6 and 7 each, to be run concurrent with the other sentences (111:1-3; App. 114-16).

A postconviction motion was filed on July 16, 2015. The motion set forth various claims of ineffective assistance of counsel as grounds for a plea withdrawal: not arguing attorney pressure or coercion as the real reason for seeking the presentence withdrawal of Wand's plea, arguing the plea withdrawal motion under a conflict of interest, not seeking to suppress Wand's statements and retaining an expert for that purpose, and not retaining an expert to dispute the origin of the fire. Attached to the motion were *curriculum vitae* of Dr. Lawrence White, an expert on false confessions, and the report of R. Paul Bieber, an arson expert (150:1-36; App. 117-171). Supplemental exhibits, consisting of a summary of the expert testimony on Wand's confession from Dr. White and Mr. Bieber's *curriculum vitae* were filed on July 29 (156:1-11; App. 172-182).

The circuit court issued an oral decision denying the postconviction motion on October 9, 2015 (165:1-22; App. 183-203), and signed an order to that effect on October 22, 2015 (164:1: App. 204). In starting off its decision, the court made some factual findings. First, the court noted that Wand filed a motion to suppress statements made to the police officer back in the spring of 2013, and a hearing date on the motion was set for May 10, 2013. When that date arrived, the court engaged in a colloquy with Wand and determined the motion to suppress would be withdrawn (165:5-6; App. 187-88). In the event of a change of heart, the court asked for a refiling of the motion by May 29 in anticipation of the hearing scheduled for June 12 (165:6; App. 188).

The motion was refiled on June 7, 2013, only to be withdrawn by defense counsel again prior to the June 12 hearing when Wand pled guilty (*Id.*). Then came the July 19 hearing, originally set for sentencing, except that Wand filed a motion for plea withdrawal immediately prior to the hearing

(Id. at 7; App. 189). At this hearing, the court recalled asking Wand about whether he was satisfied with counsel and giving a chance to have a new attorney appointed (*Id.*).

On August 22, 2013, the date set for a hearing on the plea withdrawal motion, the court reviewed the reasons for plea withdrawal set forth in the motion: Sharon Wand's change of statement that Wand was present at the fire (when previously she did not know whether he was there) and her pending charge (*Id.* at 8; App. 190). These reasons did not constitute fair and just reasons under the more liberal standard for plea withdrawal before sentencing (*Id.*).

The court then turned its attention to the postconviction motion and its claim of ineffective assistance of counsel. Many "pieces of evidence" may have motivated Wand to plead guilty, the court suggested. The court cited the confession of his brother Armin, Sharon Wand's new statement, a neighbor's possible identification of Wand at the scene of the fire, and Wand's own confession (*Id.* at 9; App. 191).

Turning to the claim that defense counsel failed to retain and use experts, the trial court noted that an arson expert, named Agnosti, was hired by the defense to provide an opinion. Wand's postconviction motion presented the opinion of another expert, which was not new evidence because it involved "a different interpretation of old evidence," nor was it ineffective assistance of counsel to not retain a second expert (*Id.* at 11; App. 193). The postconviction motion also presented the opinion of Dr. White, an expert on false confessions, and alleged that trial counsel was ineffective for not obtaining and using an expert on this issue.

But the trial court noted that defense counsel had retained an expert, Dr. Merrick, who did a competency

examination on Wand and found that he could understand the Miranda warnings (*Id*. at 13; App. 195). The court pointed out that Wand made a voluntary decision to waive the suppression hearing (*Id*.).

Next, the trial court considered the issue of whether the plea had been coerced by Wand's attorneys. In responding to this issue, the trial court said that "there must be sufficient pleadings to receive an evidentiary hearing, and the statements cannot be conclusory, merely saying [Wand] was under pressure. Well, who pressured [Wand]? How? What? What were the threats, if there were threats? What was done to force his plea? ... The only response [from Wand] if you look through the transcripts is 'I felt like I was being pressured.'" (*Id*. at 14; App. 196). The trial court took note of *State v. Basley* for the point that a sufficient plea colloquy "goes a long way to deflect" a postconviction motion of this type (*Id*. at 15; App. 197).[1]

The court recounted the plea colloquy: Wand responded "no" when asked if anyone had made threats or promises to get him to enter into a plea, and the court took a recess of several hours so that Wand could think about whether he wanted to go ahead with the plea or have a trial (*Id*. at 15-16; App. 197-98).

Sufficient precautions were taken during the plea colloquy and Wand was given considerable time to mull over the decision, the court reasoned, so that when the case was recalled that afternoon Wand told the court that he had made the decision to plead guilty independently and with assistance

[1] *State v. Basley*, 2006 WI App 253, ¶18, 298 Wis. 2d 232, 726 N.W.2d 671, *rev. denied*, 2007 WI 120, 304 Wis. 2d 610, 741 N.W.2d 240: "Thus, although a circuit court's compliance with *Bangert* cannot immunize a guilty or a no contest plea against all possible postconviction challenges, a proper plea colloquy not only ensures, to the greatest extent possible, that a guilty or a no contest plea complies with constitutional requirements, but it goes a long way toward deflecting many potential postconviction challenges to a plea."

of counsel, no one had made threats or promises outside the plea agreement, and that he was pleading guilty because it could mean less time in prison and as a way of remembering his nephews (*Id*. at 17; App. 199).

The court also referred to the questions it posed to Wand at the hearing held on July 19. When asked whether Attorney Medina thought that he should enter a plea, Wand answered: He was just doing what he thought was best for what – what I told him." (*Id*.).

As for Wand's claim that trial counsel had a conflict of interest in arguing the plea withdrawal motion, the court saw this argument as circular: If his attorneys coerced him into pleading guilty, then they had a conflict, but if they did not do so, then they had no conflict (*Id*. at 18-19; App. 200-01). In short, Wand did not describe undue pressure from trial counsel, only that he may have had a strong recommendation, which is permissible, and he was given the opportunity to obtain new counsel, but declined to do so (*Id*. at 19; App. 201).

The trial court denied the postconviction motion in its entirety. Trial counsel was not ineffective for failing to retain experts because he had done so, and "expert shopping" was not necessary to avoid ineffectiveness. Wand waived his suppression hearing, and the plea colloquy was sound.

ARGUMENT

TRIAL COUNSEL WAS INEFFECTIVE IN ARGUING THE PLEA WITHDRAWAL MOTION, FOR ARGUING THE MOTION UNDER A CONFLICT OF INTEREST, AND FOR FAILING TO RETAIN AND USE ARSON AND FALSE CONFESSION EXPERTS.

After sentencing, a defendant who seeks to withdraw a guilty plea must show by clear and convincing evidence that a withdrawal is necessary to correct a "manifest injustice." *State v. Washington*, 176 Wis. 2d 205, 213, 500 N.W.2d 331 (Ct. App. 1993). Wisconsin adopted the manifest justice test in *State v. Reppin*, 35 Wis. 2d 377, 385-86, 151 N.W.2d 9 (1967), based on the American Bar Association's tentative draft of plea withdrawal standards and application to four factual situations. The four factual situations adopted in *Reppin* were (1) the defendant was denied the effective assistance of counsel as guaranteed by the constitution, statute, or rule; (2) the plea was not entered or ratified by the defendant or a person authorized to act on his or her behalf; (3) the plea was involuntary in that it was entered without knowledge of the charge or the sentence that could be imposed; and (4) the defendant did not receive the concessions contemplated by the plea agreement. *Id.* at 386, fn.2. If any of these four factual situations are present, then the trial court must grant the defendant's postsentence request for plea withdrawal. *Id.* at 386.

Wand's lawyers were ineffective for not arguing Wand's real reasons for plea withdrawal, for arguing that motion under a conflict of interest, and for not retaining and using experts on the origins of the fire and Wand's false confession. To establish ineffective assistance of counsel, Wand must show that his attorney's performance was deficient and this deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). *Strickland* requires success on both prongs: if the defendant fails to make a sufficient showing on one prong, the court need not address the other prong. *State v. Pitsch*, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). Strategic decisions that are rationally based on facts and law will not support a claim of ineffective assistance of counsel. *State v. Elm*, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996). Therefore,

trial counsel must be afforded the opportunity to explain whether the allegedly deficient performance was motivated by strategic considerations. *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). *Strickland's* prejudice prong is satisfied by a showing that trial counsel's error undermined confidence in the outcome of the proceeding. *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

To gain a hearing on a postconviction motion, Wand was required to assert facts that, if true, would qualify him for relief. *State v. Howell*, 2007 WI 75, ¶75, 301 Wis. 2d 350, 734 N.W.2d 48.

A. Trial counsel argued the presentence motion to withdraw plea ineffectively; Wand made sufficient evidentiary allegations to be entitled to a hearing on the postconviction motion.

A defendant should be allowed to withdraw a guilty plea before sentencing for any fair and just reason, unless the prosecution is substantially prejudiced. *State v. Canedy*, 161 Wis. 2d 565, 582, 469 N.W.2d 163 (1991). While this "fair and just" reason must be more than the mere desire to have a trial, *Id.* at 583, the court's exercise of discretion must take a liberal, rather than a rigid, view of the reason given for plea withdrawal. *State v. Bollig*, 2000 WI 6, ¶29, 232 Wis. 2d 561, 605 N.W.2d 199. The defendant also has the burden of showing by the preponderance of evidence that the proferred reason is fair and just. *State v. Garcia*, 192 Wis. 2d 845, 862, 532 N.W.2d 111 (1995). Some of the reasons for which the court may grant a plea withdrawal include the defendant's assertion of innocence and lack of post-plea incriminating statements, haste or confusion in entering the plea, coercion on the part of trial counsel, and whether the motion was

promptly made. *State v. Shanks*, 152 Wis. 2d 284, 291, 448 N.W.2d 264 (Ct. App. 1989).

Here, counsel's performance was deficient for not arguing the real reasons for plea withdrawal, and this failure was prejudicial because these reasons were likely to have resulted in a successful plea withdrawal. Trial counsel should have argued that Wand sought to withdraw his plea because he wanted to retract his confession, he wanted and expected to have a motion to suppress his confession, he was innocent, his attorneys (both Medina and Michel) were ineffective, and he felt pressured by his attorneys to plead guilty.

Wand's claim of attorney coercion was evident from the statements he made to the PSI writer. He told the PSI writer that he was not thinking clearly at the time of his plea and pled guilty only upon the insistence of his attorneys. He denied involvement in the crime. He displayed an apathetic attitude toward sentencing, saying that he was willing to take whatever sentence despite no culpability for the crime (93:3, 10).

At the July 19, 2013, hearing, Wand spoke at the court's invitation (120:6-7). He told the court that he felt most pressured by Attorney Miguel Michel (defense co-counsel), who, the court noted, was not in court on June 12. When asked by the court when he got "on board" with changing his plea, Wand said that he was never on board with the idea and just did what he thought was best for the situation, just to make people happy (*Id.* at 9-10). Attorney Michel kept talking about it over and over, so Wand just did what Michel thought was best (*Id.* at 10). The court asked Wand if Mr. Medina pushed him into taking a plea that he did not want to make, and Wand responded, "Not all the way, but he kind of sided with Miguel..." (*Id.* at 13-14). Wand denied

ever saying, back on June 12, words to the effect that "I want to enter a plea today" (*Id.* at 11).

The court asked Mr. Medina how he knew client wanted to enter plea. Without saying that Wand told him that he wanted to change his plea, Mr. Medina responded, "We filled out a plea questionnaire. I explained the plea questionnaire to him. I explained his options, again explained his constitutional rights, and he signed it, and he also signed the appeal rights form, and that was his information to me, that he was going to enter a plea of guilty that day" (*Id.* at 12). Although Mr. Medina told the court that he had previously talked about entering a guilty plea, he did not describe any prior discussion in which a decision to plead guilty was made. This supports Wand's contention that Attorney Medina presented the plea questionnaire as *fait accompli*.

Mr. Medina stayed on as Wand's attorney. The court asked Wand if he would feel comfortable with Medina continuing as his attorney. In a textbook example of putting the ox before the cart, Wand told the court: "I think he's one of the best attorneys for the situation since I hear that he's a better trial lawyer ... I just hear he has a great trial record, I should say, so I think he would be best for the situation as my attorney ... As long as I can talk to him and figure out what signs were misunderstood and the straightening it up, then I would be comfortable with him" (*Id.* at 14). From these comments, Wand was already looking beyond the plea withdrawal to an eventual trial, apparently forgetting that he would first need to convince the court to let him withdraw his plea.

As already noted, the plea withdrawal motion put forth two specious reasons for plea withdrawal, which the trial court rejected. In addition to pressure or coercion from his attorneys, Mr. Medina failed to argue, as a reason for plea

withdrawal, Wand's desire to suppress the statements he made to the police. This reason should have been clear to Mr. Medina. When, at the hearing on the motion to withdraw the guilty plea on August 22, 2013, Mr. Medina asked Wand why he wanted to withdraw his plea, Wand replied that "we have false statements by me ... recanted statements by the defendant" (121:16). By "defendant," Wand was referring to himself—and "there was really no way to ... get this to go through except for the suppression." (*Id.* at 17). Many months earlier, when Wand was examined for competency, he described his questioning by the investigators: "They didn't believe me at first, so I told them a lie that was close to what Armin said. Every time I said something at first, they told me it wasn't true. Now the entire criminal complaint is a lie" (as quoted in the Competency Assessment, 47:3). The examiner added, "[Wand] reported having told his attorney about this sequence of events ..." (*Id.*). As argued below, trial counsel provided ineffective assistance by not pursuing the motion to suppress statements. Also, the plea withdrawal motion that trial counsel actually filed never addressed Wand's statement that his confession was false and he wanted to recant.

Wand thought that the suppression hearing would take place on June 12. He entered court on that day believing that the motion would be heard. But Attorney Medina never filed the motion by May 29, as ordered by the court.[2] Wand's belief is supported by a letter from Attorney Miguel Michel, attached to the postconviction motion (150:18-19; App. 134-35). This letter confirms that Attorney Michel met with Wand on June 6 about the upcoming motion to suppress on June 12. The letter notes that the incriminating statements

[2] Attorney Medina prepared a motion dated June 7, 2013, but the docket entries do not reflect its filing with the court, nor was it part of the court file sent to appellate counsel upon his appointment. Rather, the motion was attached to the State's brief in opposition to the postconviction motion, and now appears (probably) as Document 161 of the record on appeal.

that Wand made at the jail might get suppressed (even though no motion had been filed by the deadline), and that Wand was "leaning" toward going to trial. This letter supports Wand's belief that his suppression motion was still on the table for June 12 and that he did not enter court on June 12 intending to plead guilty.

Attorney Michel's letter also contained the dubious proposition that, although Wand's statement might be suppressed, it could still be used for impeachment if Wand chose to testify differently at trial. This advice applies to *Miranda* violations, not to involuntary statements, and may have had a discouraging effect on Wand. *See Mincey v. Arizona*, 437 U.S. 385, 401 (1978); *State v. Mendoza*, 96 Wis. 2d 106, 118-19, 291 N.W.2d 478 (1980).

The postconviction motion stated that, at any hearing on the issue, Wand would testify that, although the most pressure came from attorney Michel, he also felt pressure from Attorney Medina who persistently talked about pleading guilty at every meeting with Wand from the first meeting. The fact that Wand had two attorneys, both pressuring him to plead guilty, caused him to plead guilty on June 12, 2013. Wand would further testify that he thought the suppression motion would take place on June 12, and he felt hopeless when it did not occur. Attorney Medina also never believed Wand's claim of innocence, thinking instead that Wand was confused and suffering from posttraumatic stress disorder. No defense was ever discussed. Wand will testify that, on June 12, Attorney Medina showed up with the guilty plea questionnaire filled out in advance and told Wand that he knew what was best and to trust him. Wand stayed with Attorney Medina because he expected that the court would grant the plea withdrawal motion. He did not know that the court could appoint new counsel for him (150:7; App. 123).

Wand fares well on the *Shanks* factors. If Attorney Medina had effectively argued the plea withdrawal motion, he would have alleged, among other things, that Wand felt pressured or coerced by both of his attorneys, that he wanted and expected a hearing on his suppression motion, and that he asserted his innocence.[3] An assertion of innocence is an important factor in a motion to withdraw a plea before sentencing; its absence militates against granting the motion. *Dudrey v. State*, 74 Wis. 2d 480, 247 N.W.2d 105 (1976). In the motion filed by Attorney Medina, Wand's innocence was not asserted, even though it could have been plainly deduced from his statements to the PSI writer. Nor did Attorney Medina argue any of the other reasons listed above.

As described above, Attorney Medina demonstrated deficient performance by raising specious reasons for the plea withdrawal. Counsel's performance was also prejudicial because there was a reasonable probability that, but for his errors, Wand would not have pled guilty or the trial court would have granted the plea withdrawal motion.

In denying the postconviction motion, the trial court suggested that many "pieces of evidence" may have motivated Wand to plead guilty, Wand only offered conclusory allegations of pressure from his attorneys, the court conducted a sound plea colloquy, and Wand endorsed Attorney Medina's representation in response to questions from the court (165:6-7, 9, 14-16; App. 188-89, 191, 196-98).

First of all, the trial court's reliance on facts that presumptively motivated Wand to plead guilty is misplaced. These "pieces of evidence" were Armin Wand's confession, Sharon Wand's latest statement, a neighbor's possible

[3] Wand also repudiated the plea at his earliest opportunity: when he was interviewed by the PSI writer. Wand will testify that when he expressed his displeasure to Attorney Medina after court on June 12, counsel told Wand to tell the PSI writer.

identification of Wand at the scene, and Wand's own confession. None of this evidence would have caused Wand to plead guilty. The veracity of Armin's statement is suspect; it, too, is being challenged in a case currently pending before this court. *State v. Armin Wand*, 2015AP1366-CR. Sharon Wand's later statement is contradicted by her earlier statement, so it would have been impeached at trial. By the State's own admission, the neighbor's identification was uncertain (121:14). Finally, Wand is challenging the reliability of his confession as part of this appeal.

The trial court also relied on the plea colloquy and *State v. Basley*, 298 Wis. 2d 232, ¶18, for the proposition that a sound plea colloquy "goes a long way to deflecting these sorts of claims" (165:15-17; App. 197-99). Wand responded "no" to the trial court's question during the colloquy about whether anyone had threatened him or made promises to get him to plead guilty, and the court took a recess to give Wand time to mull over his decision. Later, when the plea withdrawal surfaced on July 19, Wand's first sentencing date, Wand told said that his attorney was "just doing what he thought was best ... what I told him" (165:15-16, 17; App. 197-98, 199).

An excessive focus on plea colloquy, however, undermines the liberal, before-sentencing test for plea withdrawal, which only requires a fair and just reason. In contrast, plea withdrawal after sentencing takes a constitutional perspective, requiring the showing of a serious flaw in the integrity of the plea. *See State v. Krieger*, 163 Wis. 2d 241, 252, 471 N.W.2d 599 (Ct. App. 1991). If Attorney Medina had raised attorney pressure as grounds for the plea withdrawal before sentencing, Wand would have satisfied the more lenient fair-and-just standard.

A sound plea colloquy, moreover, does not settle the matter if the plea withdrawal motion depends on facts outside

the record. *State v. Basley*, 298 Wis. 2d 232, ¶15. The plea colloquy should not determine this Court's decision, for Wand, by the time of the colloquy, had succumbed to pressure from his attorneys and apathetically complied with the plea-taking procedure.

The postconviction motion stated that Wand felt pressured by both attorneys who only talked about pleading guilty, and that he realized the importance of the suppression motion due to be heard on June 12, and felt helpless when it was not heard. Instead of the suppression motion, Attorney Medina presented a guilty plea questionnaire, telling Wand that he knew what was best and to trust him. Wand also will testify that because no defense strategy had ever been discussed, save the abandoned suppression motion, that he descended into a state of hopelessness on June 12, the date of the plea. (150:7; App. 123).

Given the foregoing, Wand made sufficient factual allegations to merit a hearing on the issue of attorney ineffectiveness in arguing the plea withdrawal motion.

B. Trial counsel argued the plea withdrawal motion under a conflict of interest, which presumes prejudice and calls for a plea withdrawal.

As an independent ground for ineffective assistance of counsel, Wand argued in the postconviction motion that, at the time of his motion to withdraw his guilty plea, his attorney's representation was a conflict of interest and ineffective assistance of counsel under the Sixth Amendment. A claim of conflict of interest involving an attorney is a "subspecies of ineffective assistance of counsel." *State v. Love*, 227 Wis. 2d 60, 69, 594 N.W.2d 806 (1999). The Sixth Amendment right to counsel includes the right to conflict-free

counsel, and the presence of a conflict of interest in arguing a plea withdrawal motion is ineffective assistance of counsel. *U.S. v. Ellison*, 798 F.2d 1102, 1108 (7th Cir. 1986). When ineffective assistance of counsel is based upon a conflict of interest, the defendant "must establish by clear and convincing evidence that an actual conflict of interest existed." *State v. Kaye*, 106 Wis. 2d 1, 8, 315 N.W.2d 337, 340 (1982) (citation omitted) (*overruled on other grounds*, *State v. Miller*, 160 Wis. 2d 646, 660-61, 467 N.W.2d 118, 123 (1991). An actual conflict of interest exists "when the lawyer's advocacy is somehow affected by ... competing loyalties." *State v. Foster*, 152 Wis. 2d 386, 393, 448 N.W.2d 298, 301 (Ct. App. 1989). The attorney must have done something or failed to do something that a reasonably competent attorney unburdened by a conflict of interest would have done or not failed to do. *State v. Thiel*, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305; *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

S.C.R. 20:1:7 recognizes that a conflict of interest exists where "[t]here is a significant risk that the representation ... will be materially limited by the personal interest of the lawyer." The case notes to the Supreme Court Rule bear this out:

> Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's ... interests.
>
> For example, if the probity of a lawyer's own conduct in a transaction is a serious question, it may be difficult or impossible for the lawyer to give a client detached advice.

An attorney in this situation may be more interested in protecting his professional reputation than advocating for his client. Moreover, unlike the usual ineffective assistance

claim in which the defendant has a dual burden of proving both that his attorney's performance was deficient and that the deficient performance was prejudicial, a defendant who claims his attorney was ineffective because of a conflict of interest only needs to satisfy the performance part of the ineffective-assistance-of-counsel test. *State v. Love*, 227 Wis. 2d 60, at 68.

One reason that a conflict of interest is created whenever there is an arguable claim of ineffective assistance of counsel is that the attorney cannot evaluate his or her own effectiveness. This principle is highlighted in the Wis. Admin. Code, sec. SPD 2.11, which provides in relevant part:

> (2) The state public defender shall assign to independent private counsel any case in which a staff attorney of the state public defender's office provided trial representation and it is arguable that the client was not afforded effective representation.[4]

Love requires an actual conflict of interest, which is more than a potential conflict, for a finding of prejudice. *State v. Love*, 227 Wis. 2d 60, 69. An actual conflict is defined by the facts of the case and arises when a "defendant's attorney was actively representing a conflicting interest, so that the attorney's performance was adversely affected." *Id*. at 71. Here, there was actual conflict. Despite Wand's statements to the PSI writer, the motion to withdraw his plea did not allege attorney pressure or ineffective assistance of counsel as a basis for plea withdrawal. This failure on the part of trial counsel was significant. The most reasonable explanation for this omission is that trial counsel's ability to zealously advocate for his client was impaired by his own self-interest in avoiding a finding of ineffective assistance of counsel. Wand's allegations concerning attorney coercion and the failure to argue the motion to

[4] Attorney Medina was appointed by the State Public Defender (14:1).

suppress put his attorney in a difficult situation. It is unreasonable to expect the attorney in this case to establish his own ineffectiveness. Attorney Medina, who handled the plea withdrawal motion, had to choose between arguing for his client or himself. Once the trial court asked Attorney Medina about how he knew Wand wanted to plead guilty, he stopped acting as an advocate for his client.

This conflict is exemplified by the fact that Attorney Medina did not pursue Wand's statements to the PSI writer and the court about attorney pressure or argue Wand's desire in having a hearing on his suppression motion. When asked by the court how he knew Wand wanted to plead guilty, Attorney Medina merely described filling out the guilty plea questionnaire, which Wand says was supplied to him already filled out (120:11-12). Also, Attorney Medina never followed up on Wand's comment to the court about misunderstandings between him and Attorney Medina: Wand told the court that he was willing to continue with Attorney Medina, "...as long as I can talk to him and figure out what signs were misunderstood" (120:14). Moreover, at the motion hearing, after Wand said that felt pressured by his attorneys to enter a plea of guilty, Attorney Medina asked only one additional question about this pressure before switching the subject to the colloquy conducted by the court (121:16).

Wand also believed that the motion to suppress statements was still on the table, as reflected in the June 6 letter in which Attorney Michel discussed the upcoming motion (150:18-19).

In ruling against Wand on this issue, the trial court had it wrong. The trial court thought that Wand's argument was circular because there could be no conflict due to ineffectiveness unless Wand proved that his attorneys pressured him, but this pressure would have provided grounds

for relief on its own accord (165:18-19). But, more accurately, it is the allegation of ineffectiveness, not proof of ineffectiveness, that created the conflict, since Wand's attorneys were placed in the position of representing conflicting interests, as described above.

Because trial counsel did not move to withdraw, Wand was forced to rely upon conflicted counsel in arguing in plea withdrawal motion. New counsel should have been appointed to represent Wand on his motion to withdraw his plea. Attorney Medina's failure to withdraw amounts to *per se* prejudice, entitling Wand to a plea withdrawal.

C. Trial counsel was ineffective for failing to challenge the cause of the fire, not seeking to suppress Wand's confession, and not using experts for these purposes.

1. The failure to use an arson investigator to dispute the origin of the fire.

As part of the State's investigation of this case, Special Agent William Boswell filed a fire scene report, concluding that the fire had two points of origin—in the living room and in the northwest bedroom—and that the fire resulted from an intentional human act.

A defense expert would have testified differently at trial and would have cast doubt on the State's theory of the fire's origin. The report of R. Paul Bieber, certified as an investigator by the National Association of Fire and Explosion Investigators, was attached to the postconviction motion (150:18; App. 136). Mr. Bieber's report stated:[5]

[5] Mr. Bieber's report was also filed in support of Armin Wand's postconviction motion in Case No. 2012CF74.

1. NFPA 921, *Guide for Fire and Explosion Investigation* (2011 and 2014 editions), serve as a de facto Standard of Care on how to conduct a thorough and objective fire or explosion investigation.

2. The purpose of Fire Investigator Boswell's fire investigation was to determine the origin, cause and development of the fire through the application of scientific principles in his examination of the fire scene.

3. Due to flashover and full room-involvement conditions, Fire Investigator Boswell was unable to determine the origin of the fire in the living room.

4. Boswell's conclusion that the irregular burn patterns to the floor and bedding in the bedroom constitute a separate and distinct area or origin does not withstand careful scrutiny. The burn patterns he referred to are more likely to have been the result of radiant heat from a hot gas layer of smoke generated from a fully involved fire in the adjacent living room, typical burn damage from the melting and burning of common items found in the bedroom, or some combination of the two.

5. The presence of a nearly identical burn pattern on the floor of the dining room – a burn pattern not found to be suspicious by Fire Investigator Boswell – provides further support that burn patterns of this type [are common occurrences] in building fires where the hot smoke and gases of combustion migrate to adjacent rooms.

6. Fire Investigator Boswell's conclusions were made several weeks prior to the interviews of Sharon Wand, the first eyewitness to the fire and the only person to have seen the fire from the inside of the house at its earliest stages. During those interviews she said that the fire had only one area of origin (in the living room) and that the door between the living room and the bedroom was open. Fire Investigator Boswell

> was also unaware that the small burn pattern on the floor east of the plastic bed frame may have predated the fire in question and was possibly created during an earlier fire incident involving a child relative playing with a lighter.
>
> 7. As a result, Fire [Investigator] Boswell's conclusion that the fire had multiple areas of origin was not based on an objective application of the scientific method; was not in compliance with NFPA 921; was not in keeping with generally accepted techniques and methodologies within the field of fire investigation; and is not supported by the evidence currently known.
>
> 8. Fire Investigator Boswell's final report fails to identify an ignition source or a first fuel ignited. His elimination of accidental ignition sources fails to consider or analyze several common ignition sources known to have been present at this fire scene, specifically discarded smoking materials or children playing with matches or a lighter. The circumstances bringing the unknown ignition source in contact with the unidentified first fuel ignited are similarly absent.
>
> 9. Fire Investigator Boswell's ultimate conclusion that "this fire was the result of an intentional human act" was directly based on these two previous determinations – that the fire had multiple sources of origin and that all accidental ignition sources in the living room had been examined and eliminated."

As shown in Mr. Bieber's report, the State's conclusions were premature, inaccurate, and insufficient. The only conclusion that can be drawn, consistent with the NFPA 921, is that the cause of the fire is undetermined.

The trial court rejected Wand's argument on this issue because defense counsel had retained an arson expert named John Agosti and therefore could not be ineffective for failing to secure a second opinion (165:10-11; App. 192-93). Nor

would Mr. Bieber's report have qualified as "new evidence," for it merely offered a "different interpretation of the old evidence" (165:11; App. 193).

However, the content of Agosti's report – or even his background and qualifications – remain unknown. If his opinion was favorable to the defense, why did the defense not use it to Wand's advantage? Moreover, if defense counsel wanted to avoid trying the case, he may have disregarded a favorable report from Agosti. The report prepared by Bieber and attached to Wand's postconviction motion casts doubt on the State's version of the origin and cause of the fire. From Bieber's report, we know with certainty that the State's conclusion about the cause and origin of the fire could have been disputed at trial. In addition, Agosti may not have been suitably qualified, whereas Bieber is a certified by the National Association of Fire and Explosion Investigators and relied on NFPA 921, *Guide for Fire and Explosion Investigations*.

A hearing on the postconviction motion should have been held to find the answers to these questions.

2. Wand's confession was coerced, contaminated, and unreliable; and it could have been suppressed with expert opinion.

Wand's attorneys should have also recognized that Wand's confession was contaminated and false. The use of such a confession violates the defendant's due process rights under both Fourteenth Amendment of the U.S. Constitution and Article I, Section 8 of the Wisconsin Constitution. *State v. Jerell C.J.*, 2005 WI 105, ¶ 17, 283 Wis. 2d 145, 699 N.W.2d 110. Moreover, back in 2009, the U.S. Supreme Court, in *Corley v. U.S.*, 556 U.S. 303, 321 (2009), acknowledged the reality of false confessions and the

"mounting empirical evidence" showing that a "frighteningly high percentage of people" falsely confess. The primary cause of most false confessions is the use of psychologically coercive interrogation techniques. *See* Saul M. Kassin et al., *Police-Induced False Confessions: Risk Factors and Recommendations*, Law and Human Behavior (2010), 34 (1): 3-38; DOI 10.1007/s10979-009-9188-6.

Dr. Lawrence White, Professor of Psychology and Legal Studies at Beloit College in Beloit, Wisconsin, whose *curriculum vitae* was attached to the postconviction motion and who has previously testified in Wisconsin courts as an expert in police-induced confessions, reviewed Wand's confession. The postconviction motion asserted that Dr. White would have testified to the following opinion:

> 1. Researchers and legal scholars agree that innocent suspects sometime confess to crimes they did not commit, these false confessions happen more often than most people realize, and the interrogation techniques used by the police can induce an innocent suspect to falsely confess. False confessions are especially likely to be given by suspects under the age of 25 who have been interrogated for many hours and presented with false evidence.
>
> 2. During the first interview, Wand related information about the fire that he already had from a secondary source—Sharon Wand's sister. This interview began at 9:35 p.m. and ended 10:30 p.m. on September 7, 2012.
>
> 3. The second interview began after Wand had been awake for nearly 23 hours. This interview lasted 2 hours and 40 minutes, beginning at 12:50 a.m., and continuing to 3:30 a.m. on September 8, 2012. During this interview, the special agents refused to accept Wand's protestations of innocence and repeatedly accused him of lying. The special agents told him,

unfoundedly, that witnesses saw him at Armin's house the night of the fire and that Wand was lying about his activities that night for failing to recall the details of what he watched on television that night. In this interview, "a handful of interrogators put Jeremy through the emotional wringer, intimidated him, pressured him, and refused to accept his account (from which he does not stray until he seems to accept the possibility that he did something but did not remember it)." Wand was interrogated intensely and coercively by the special agents who showed signs of tunnel vision and seemed determined to force a confession of guilt out of him.

4. The third interview occurred later the same day, starting at 5:20 p.m. and lasting slightly over three hours. This interview started with Wand saying, once again, that he was not at his brother's house the night of the fire, but the special agents persisted by telling him that maybe his memory is poor or he walks in his sleep. After all, the neighbors saw him, and his brother, Armin, also placed Jeremy at the scene. The special agents engaged in black-or-white thinking: Armin and the neighbors were lying or Wand was. They did not consider the possibility that the neighbors were mistaken or that Armin himself had been pressured into making false statement. The special agents kept trying to develop themes for Wand to accept: finances were tight so extra money would be helpful, maybe the fire was accidental or meant to be limited. Through all this, Jeremy Wand maintained his innocence even as he tried to offer some explanation for why the witnesses said he was at his brother's house the night of the fire.

5. The fourth interview began at 11:18 a.m. and ended at 1:38 p.m. on September 9, 2012. In questioning Wand, the special agents continued their efforts to coerce an admission from Wand through confabulation and interrogative techniques, while rejecting Wand's questions about why Armin would implicate him. The agents told Wand, falsely, that several neighbors had seen him, further elevating the

risk of a false confession. The agents also engaged in theme development and minimization, seemingly to get Wand to accept that the fire was an accident or that his traumatic experience kept him from remembering the event. These tactics also enhanced the risk of a false confession by offering a way out to a confused suspect. The special agents pursued a shaping-and-leading line of questioning, compelling Wand to construct a conjectural story to satisfy his interrogators. During this interview, the special agents prodded Wand with a high-end inducement: things would go better for him if he admitted his involvement. Such inducements increase the risk of a false confession. The special agents steered Wand toward an account that matched their belief of what happened. Whenever Wand said something that did not fit the agents' account, they ignored or challenged it; when he said something the agents wanted to hear, they reinforced it. In trying to satisfy the agents, Wand would make statements of the guessing type: "That's what I'm guessing." When Wand did this, the agents reinforced and steered him in that direction. Wand presented the image of someone worn and beaten down, tired, emotionally exhausted, and powerless—all of which are risk factors for a false confession.

6. In the fifth and final interview, on September 10, 2012, Wand retracted his confession, but the special agent called him a liar.

7. A police-induced false confession is the product of three sequential errors. First, a misclassification error, in which the police mistakenly classify an innocent person as guilty. Second, a coercion error, in which the police subject the innocent suspect to an accusatory interrogation that often involves lies about evidence and the use of implicit or explicit promises or threats. Third, a contamination error, in which the police pressure the suspect to provide a comprehensive account of the crime and actively shape the suspect's account by supplying him with factual details of the crime. In Dr. White's opinion, Jeremy Wand's self-

> incriminating statements may have been the product of these three errors.
>
> 8. Throughout these interviews, the special agents used interrogation techniques—isolation, confrontation, minimization, and inducements—associated with the Reid School. These powerful techniques can persuade an innocent suspect to confess.

Dr. White's full report was submitted as a supplemental exhibit in support of the postconviction motion (156:2; App. 173).

In denying the postconviction motion, the trial court emphasized that the defense had retained an expert who assessed Wand's competency and opined that he understood the *Miranda* warnings (161:16; 165:13; App. 195). Defense counsel was not required to secure a second opinion, the trial court said (165:12-13; App. 194-95).

But the motion to suppress statements, prepared by Attorney Medina and dated June 7, 2013, focused only on whether the police interrogators continued questioning Wand after his invocation of right to counsel and their refusal to let Attorney Medina see his client. The report from Dr. Merrick accompanying the motion pertained only to Wand's ability to understand the *Miranda* warnings. Dr. Merrick did not address – and was probably unqualified to address – the issue of a false confession induced by coercive interrogative tactics. Because Attorney Medina retained an expert on the wrong issue, the trial court's denial of the motion based on a supposedly duplicative opinion and a charge of "expert-shopping" is erroneous.

Defense counsel performed deficiently by failing to make use of a police interrogation expert to explain the ways in which the investigators' tactics contributed to the

unreliability of Wand's confession. Profession competence demanded that Wand's attorneys raise the issue of an unreliable confession, and the failure to do so was objectively unreasonable and prejudicial to Wand.

CONCLUSION

For the reasons set forth, Mr. Wand respectfully urges this court to vacate the judgment of conviction and order a new trial or remand the case for a *Machner* hearing.

Dated: February 17, 2016

Respectfully submitted,

_____

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CERTIFICATION OF LENGTH AND FORM

I certify that this brief conforms to the rules for a brief produced using a proportional serif font. The length of this brief is 10,196 words.

Dated: February 17, 2016

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CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at minimum:

(1) A table of contents;
(2) The findings or opinion of the trial court; and
(3) Portions of the record essential to an understanding of the issues raised, including oral and written rulings or decisions showing the trial court's reasoning regarding those issues.

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

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

Dated: February 17, 2016

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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that pursuant to Wisconsin Statutes (Rule) 809.19(12), I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of s. 809.19(12). I further certify that this

electronic brief is identical in content and form to the printed form of the brief filed as of 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: February 17, 2016

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George M. Tauscheck

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