STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2015AP002611-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICKY C. ANDERSON,

Defendant-Appellant.

On Appeal From the Judgment of Conviction and
Order Denying Postconviction Relief Entered
in the Shawano County Circuit Court, the
Honorable James R. Habeck, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

> From a prison telephone at Fox Lake Correctional Institution, Anderson pled guilty to a Class C felony, while his counsel was located in the courtroom and connected to Anderson through the court's speakerphone system. At the outset of the plea hearing and prior to accepting Anderson's plea, the circuit court told Anderson that he "could be present in person for different things" and asked whether it was "okay that we do this by phone today?" Anderson responded, "Yes."
>
> Is Anderson entitled to plea withdraw based on the violation of his right to be present and the denial of his right to effective assistance of counsel at his plea hearing?

The circuit court denied Anderson's motion to withdraw his plea after concluding that he waived his right to be present with counsel at the plea hearing.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Anderson believes the briefs will adequately address the issue in this case, but welcomes the opportunity for oral argument should this court deem it necessary. Publication is not requested.

STATEMENT OF THE CASE AND FACTS

The state charged Anderson with second degree sexual assault of a child under 16 years of age, contrary to Wis. Stat. § 948.02(2), as a repeater under Wis. Stat. § 939.62(1)(c). (1). The complaint alleged that Anderson performed oral sex on a 15-year old male. (1:4-5). Anderson pled guilty as charged by telephone from Fox Lake Correctional Institution and the court pronounced him guilty of a Class C felony. (18; 37:3-5; 38).

Prior to his plea, Anderson had been revoked from a previous case and had been returned to prison. (38:5; 39:16). On October, 28, 2014, the date he entered a plea in this case, Anderson was scheduled to appear for a final pre-trial conference in this case and to make an initial appearance in a different case, Shawano County Case No. 14-CM-128. (37:3; 39:28). On the date of the scheduled hearings, however, the parties reached an agreement to dispose of both cases. (37:3-5; 39:5-6, 11-12).

Specifically, roughly 20 minutes before what would become a change of plea hearing in both cases, Anderson participated in a conference call from prison in which he spoke by speakerphone with his counsel and the prosecutor together about resolving both cases. (37:4-5; 39:5-7, 11-13, 17-18). By the end of the conference call, the parties reached an agreement. (37:3-5). In exchange for Anderson's guilty plea in this case, the state agreed to dismiss the single count of misdemeanor theft charged in 14-CM-128 and to cap its sentencing recommendation at 15 years initial confinement. (37:3-5).

At the beginning of the plea hearing, the court, the Honorable James R. Habeck presiding, briefly addressed Anderson regarding his telephone appearance:

> The Court: All right. And, Mr. Anderson, you know, you can be present in person for different things. For our procedure today, realizing the fact that we have a jury trial coming scheduled on November 5 to start, is it okay that we do this by phone today?
>
> Mr. Anderson: Yes.
>
> The Court: So you understand, when I spotted this yesterday, we pursued whether we could get you by internet, then that would have given you the ability to see us and vice versa. But they were already filled up and we could not get that, so this was the next best technology.
>
> Mr. Anderson: Okay.
>
> The Court: So you're aware of that. And Attorney Singh is here in the courtroom with me too.

(37:3-4).

Later, after the court conducted a plea colloquy with Anderson, but prior to accepting his plea, the court addressed Anderson as follows:

> The Court: Also I could vacate the courtroom if you wanted to speak with your attorney and ask him any questions or discuss anything else. Do you feel confident on proceeding right now?
>
> Mr. Anderson: Yes.
>
> The Court: So it's okay that we go ahead right now without talking with your attorney anymore?
>
> Mr. Anderson: Yes, sir.

(37:13).

The court then accepted Anderson's guilty plea and pronounced him guilty as charged. (37:17). After pronouncing judgment, the court discussed the impending sentencing hearing with Anderson and his counsel:

> The Court: Now at a future sentencing date, we can plan ahead and we can have you here in the courtroom for that. Would you like that?
>
> Mr. Anderson: Yes.
>
> The Court: All right. So we will make arrangements on that. And then would you get that writ out, Attorney Singh?
>
> Mr. Singh: Yes, sir.

(37:18).

Finally, just before the hearing ended, the prosecutor interjected:

> Ms. White: Your Honor, if I may simply inquire of Mr. Anderson. Is it okay, Mr. Anderson, with you that we do this hearing over the telephone?
>
> Mr. Anderson: Yes.

(37:19).

On January 14, 2015, Anderson appeared in court with his trial counsel for sentencing. (38:3-5). At the beginning of the sentencing hearing counsel for Anderson submitted the following documents to the court: the plea questionnaire and waiver of rights form, an addendum to the plea questionnaire and waiver of rights form, a recitation of the state's plea offer, a document entitled 'Defendant's Notifications', and copies

of Wisconsin Jury Instructions Criminal 2104 and 2010B. (38:3-5; 15). Anderson's counsel explained this rather unusual sequence of events as follows:

> Mr. Singh: And if I may interrupt, I completed - - I intended to complete the normal paperwork for a plea entry back when the Court took the plea, but I was surprised to find out that my client was not actually here. He would be appearing by phone. Today I completed the paperwork. If you believe it would be acceptable, I would like to turn it in now for the record.
>
> The Court: Certainly.
>
> Mr. Singh: So this was completed today.

(38:3).

Subsequently, the court imposed a sentence of 21 years imprisonment consisting of 15 years initial confinement followed by 6 years extended supervision. (38:39).

On October 6, 2015, Anderson filed a postconviction motion for plea withdrawal. (26). Specifically, Anderson moved the court to vacate his conviction and allow him to withdraw his plea because he was deprived of his right to be physically present at his plea hearing. (26). The court held a postconviction hearing at which Anderson and his trial counsel testified. (39).

Anderson testified that at the time of his plea he did not know he had a right to be physically present in court for his plea hearing. (39:7, 13-14). He also testified that prior to sentencing he reached out to his trial counsel about withdrawing his plea. However, he was not informed of any legal basis to withdraw his plea prior to sentencing. (39:7-8).

On cross examination, Anderson acknowledged that the court informed him that he could be present in the courtroom for "different things." (39:8-9). Anderson also acknowledged that he agreed to go forward with the plea by telephone. (39:11).

On redirect, Anderson explained that to him, the right to be present for "different things" meant "[s]entencing, anything, different thing [sic]." (39:13).

The state called Anderson's trial counsel to testify. (39:14). Trial counsel's testimony did not address the issue of Anderson's telephone appearance at his plea hearing. (39:15-21). Rather, the state's questions focused on trial counsel's knowledge and recollection of Anderson's decision to plead guilty and the strength of the state's case. (39:15-21). At no point in trial counsel's testimony did he state that he informed Anderson that he had a right to be present in court for his plea hearing. (39:15-21).

Based on the record and the testimony at the motion hearing, Anderson argued that his constitutional and statutory right to be present at his plea hearing were violated when he appeared by phone from prison. (39:21-23). Anderson also argued that his telephone appearance violated his right to counsel, which amounts to structural error. (39:23-24).

The court denied Anderson's postconviction motion based on its conclusion that Anderson waived his right to be present at his plea hearing. (29; 39:32-33).

This appeal follows.

ARGUMENT

Anderson Is Entitled to Plea Withdrawal Based on the Violation of His Right to Be Present and the Denial of His Right to Effective Assistance of Counsel at His Plea Hearing.

A. The standard of review and general principles of law.

To withdraw a plea post-sentencing a defendant must prove by clear and convincing evidence that refusal to allow withdrawal would result in a manifest injustice. ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. A manifest injustice requires the defendant to show a serious flaw in the fundamental integrity of the plea. ***Id.***; *see also* ***State v. Soto***, 2012 WI 93, ¶14, 343 Wis. 2d 43, 817 N.W.2d 848 (discussing the manifest injustice standard as applied to the right to be physically present at a plea hearing). A manifest injustice results when a defendant is denied the effective assistance of counsel. ***State v. Cain***, 2012 WI 68, ¶26, 342 Wis. 2d 1, 816 N.W.2d 177. And where a defendant establishes the denial of a relevant constitutional right, he may withdraw the plea as a matter of right. ***Id.***

A circuit court's denial of a defendant's motion for plea withdrawal is reviewed under the erroneous exercise of discretion standard of review. ***Id.***, ¶13. An erroneous application of law amounts to an erroneous exercise of discretion. ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997).

B. Anderson was deprived of his constitutional and statutory right to be present in the same courtroom as the presiding judge when he entered a guilty plea and the court pronounced judgment.

1. The right to be present.

"Due process guarantees a defendant "the right to be present at any stage of a criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure."" ***State v. Alexander***, 2013 WI 70, ¶20, 349 Wis. 2d 327, 833 N.W.2d 126 (quoting ***Kentucky v. Stincer***, 482 U.S. 730, 745 (1987)).

The plea hearing and the validity of guilty pleas are critically important to our system of criminal justice. *See* ***State v. Brown***, 2006 WI 100, ¶23, 293 Wis. 2d 594, 716 N.W.2d 906. Under Wis. Stat. § 971.08 and ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), the circuit court must "address the defendant personally" and "assess the defendant's capacity to understand the issues at the hearing." ***Brown***, 293 Wis. 2d 594, ¶35.

Recognizing the critical importance of pleas in our system of justice, our supreme court has established mandatory procedures to ensure defendants enter "knowing, intelligent, and voluntary" pleas. ***Id.***, ¶23. The purpose being, to emphasize "the importance of the trial court's taking great care in ascertaining the defendant's understanding of the nature of the charges and the constitutional rights being waived." ***Id.***, ¶32 (internal quotations omitted). The duty to ensure the plea hearing meets constitutional standards "demands the trial court's utmost solicitude." ***Id.***, ¶33

(internal citations and quotations omitted) (citing ***State v. Bangert***, 131 Wis. 2d at 278-79 and in turn, quoting ***Boykin v. Alabama***, 395 U.S. 238, 243-44 (1969).

A defendant's physical presence in court at his plea hearing surely contributes to the fairness of the procedure by which the defendant waives numerous and significant constitutional rights. In our criminal justice system, which is so dependent on the use of guilty pleas, it cannot be said that the "defendant's presence would be useless or the benefit but a shadow." *See* ***Snyder v. Com. of Mass.***, 291 U.S. 97, 106-07 (1934) (noting that presence is not required by due process when presence would be useless).[1]

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[1] In ***State v. Peters***, 2000 WI App 154, ¶¶10-11, 237 Wis. 2d 741, 615 N.W.2d 655, *rev'd on other grounds*, 2001 WI 74, 244 Wis. 2d 470, 628 N.W.2d 797, the court of appeals held, in the context of a collateral challenge to a prior conviction, that Peters' due process rights were not violated when he pled no contest and was sentenced by closed-circuit television. The court also noted, however, that while Peters' no contest plea from jail by closed-circuit television was not violative of due process, "[t]his is not to say that every form of communication can be satisfactorily conducted by closed-circuit television. For example, where a defendant was forced to communicate with his attorney over closed-circuit television, a reviewing Florida court found the procedure unfair." ***State v. Peters***, 237 Wis. 2d 741, ¶13, n.11.

In reversing the court of appeals, the Wisconsin Supreme Court did not reach the issue of Peters' closed-circuit television appearance because the court held that Peters was denied, completely, the right to counsel. ***Peters***, 244 Wis.2d at 480. Of note, Peters, like Anderson and Van Patten, described below in § D.2., was convicted in Shawano County Circuit Court.

A criminal defendant also has a statutory right to be present in the same courtroom as the presiding judge when he pleads guilty and the judge accepts his plea and pronounces judgment. ***State v. Soto***, 343 Wis. 2d 43, ¶34; Wis. Stat. § 971.04(1)(g). Wisconsin Stat. § 971.04 provides, in relevant part:

> (1) Except as provided in subs. (2) and (3), the defendant shall be present:
>
> (a) At the arraignment;
>
> (b) At trial;
>
> (c) During voir dire of the trial jury;
>
> (d) At any evidentiary hearing;
>
> (e) At any view by the jury;
>
> (f) When the jury returns its verdict;
>
> (g) At the pronouncement of judgment and the imposition of sentence;
>
> (h) At any other proceedings when ordered by the court.

While plea hearings are not explicitly mentioned in Wis. Stat. § 971.04, in ***State v. Soto***, the Wisconsin Supreme Court held that subsection (1)(g) applies to a plea hearing in which a defendant enters a plea and the court pronounces judgment. 343 Wis. 2d 43, ¶34.

In ***Soto***, the court analyzed a case in which the defendant was physically present in a Trempealeau County courtroom with his attorney for his plea hearing, but the presiding judge appeared from a Jackson County courtroom via videoconferencing. ***Id.***, ¶6. The day before his plea hearing, Soto entered into a plea agreement with the prosecutor. ***Id.***, ¶5. That same day, Soto completed a

plea questionnaire and waiver of rights form. ***Id.*** At the scheduled plea hearing, the judge asked a series of questions related to the acceptability of videoconferencing. ***Id.*** Specifically, the judge asked whether the parties in the Trempealeau County courtroom could *see* and hear him to their satisfaction. ***Id.***, ¶7. Soto's attorney and the prosecutor answered "Yes." ***Id.*** The judge also asked Soto and his attorney whether the use of videoconferencing was acceptable for the plea hearing and both answered affirmatively. ***Id.***

As noted above, the ***Soto*** court held that a defendant has a statutory right under Wis. Stat. § 971.04(1)(g) to be in the same courtroom as the presiding judge when a defendant pleads guilty and when the court pronounces judgment. ***Id.***, ¶34.

Accordingly, Anderson had a constitutional and statutory right to be present in the same courtroom as the presiding judge when he pled guilty and the court pronounced judgment.

2. The right of a defendant to be present must be waived rather than forfeited.

Under ***Soto***, the right at issue in this case cannot be forfeited; rather, the right must be waived. ***Id.***, ¶40. Waiver is the intentional relinquishment or abandonment of a known right. ***Id.***, ¶35. In contrast, forfeiture is the failure to timely assert a right. ***Id.*** As described by the ***Soto*** court, "waiver typically applies to those rights so important to the administration of a fair trial that mere inaction on the part of a litigant is not sufficient to demonstrate that the party intended to forgo the right." ***Id.***, ¶37. Rights subject to waiver include constitutional protections such as the right to trial by jury, the right to counsel, and the right to refrain from self-incrimination. In addition, "certain statutory rights have

been deemed so sufficiently important as to require the affirmative relinquishment demanded by the doctrine of waiver." ***Id***.

The ***Soto*** court concluded that the statutory right to be present in the same courtroom as the presiding judge under Wis. Stat. § 971.04(1)(g) is "particularly important to the actual or perceived fairness of the criminal proceedings." ***Id***., ¶40. As such, if this right is to be relinquished, the defendant must do so by waiver – "the intentional relinquishment of a known right." ***Id***.

While the showing necessary to demonstrate waiver varies depending on the right at issue, ***id***., ¶44, the focus of the inquiry is always the same: "whether a defendant is knowingly, intelligently, and voluntarily" waiving the right at issue, ***id***., ¶45 (*see also* ¶58, (Abrahamson, C.J., dissenting)). Thus, to establish a valid waiver the party relying on waiver must prove that the waiving party knew of the right being waived. ***Brunton v. Nuvell Credit Corp.***, 2010 WI 50, ¶36, 325 Wis. 2d 135, 785 N.W.2d 302. In other words, "a valid waiver that intentionally relinquishes a right must be done with actual knowledge of the right being waived." ***Id***. For example, in a case involving the right to a jury trial, our supreme court explained that in order to qualify as a valid waiver, the defendant "must waive the right knowingly, intelligently, and voluntarily, with "sufficient awareness of the relevant circumstances and likely consequences."" ***State v. Smith***, 2012 WI 91, ¶54, 342 Wis. 2d 710, 817 N.W.2d 410 (quoting ***Brady v. United States***, 397 U.S. 742, 748 (1970)).

3. Anderson's acquiescence to plead guilty to a Class C felony by telephone from prison did not amount to a knowing, voluntary, and intelligent waiver of his right to be physically present in the same courtroom as the presiding judge.

Under ***Soto***, the question to be answered in any waiver analysis is whether the holder of the right at issue intentionally relinquished a known right. ***Soto***, 343 Wis. 2d 43, ¶35. In other words, the party asserting waiver against the holder of the right must demonstrate that the waiver is knowing, intelligent, and voluntary. ***Id.***, ¶45.

When videoconferencing is proposed to be used for a plea hearing at which judgment will be pronounced, the judge must enter into a colloquy that explores the effectiveness of the technology being employed. ***Id.***, ¶46. In so doing, the presiding judge must ascertain whether the defendant and his attorney are able to see, speak to, and hear the judge and that the judge can see, speak to, and hear the defendant and his attorney. ***Id***. The judge must also determine whether the defendant knowingly, intelligently, and voluntarily consents to the use of videoconferencing by asking questions that suggest that the defendant may refuse to enter his plea by videoconference. ***Id.***

Based on its review and analysis of the record presented, the ***Soto*** court concluded that Soto waived his right to be present in the same courtroom as the presiding judge at his plea hearing. ***Id.***, ¶¶2, 47-50. The court based its conclusion on the following facts: (1) Soto appeared in a courtroom in the Trempealeau County courthouse; (2) both his attorney and the prosecuting attorney also appeared in the same courtroom; (3) the judge was able to *see*, speak and hear

Soto and his attorney and Soto and his attorney could *see*, speak to and hear the circuit court judge; and (4) Soto expressly consented, presumably with the assistance of counsel, to the use of videoconferencing for the plea hearing. ***Id***. (Emphasis added).

Two key factors distinguish Anderson's case from ***Soto***. First, Anderson's telephone appearance from prison is significantly more problematic than Soto's presiding judge's videoconference appearance. Second, when viewed in proper context, the court's colloquy with Anderson is insufficient to demonstrate a knowing, intelligent, and voluntary waiver of his right to be present.

At Anderson's plea hearing, he could not see the presiding judge and the presiding judge could not see Anderson or view the location within the prison from which he made his telephone call. Even more problematic, Anderson could not see, be seen, or effectively communicate with his attorney. Foundationally, Anderson's plea hearing cannot be said to have reflected the trial court's "utmost solicitude" and the "critical importance of pleas in our system of justice" ***Brown***, 293 Wis. 2d 594, ¶¶23, 33.

As recognized by the United States Supreme Court, "the courtroom in Anglo-American jurisprudence is more than a location with seats for a judge, jury, witnesses, defendant, prosecutor, defense counsel and public observers; the setting that the courtroom provides is itself an important element in the constitutional conception of a trial." ***Estes v. State of Tex.***, 381 U.S. 532, 561 (1965). The ***Soto*** court recognized as much when it explained:

> Requiring that the defendant be present in the courtroom is guided also by the belief that a courtroom is a setting

> epitomizing and guaranteeing "calmness and solemnity," … so that a defendant may recognize that he has had access to the judicial process in a criminal proceeding. Finally, requiring the defendant to make his appearance in a courtroom avoids the potential or perceived problems that can occur when the defendant is located in another facility such as a jail, while the judge, prosecutor, and perhaps even defense counsel are in the courtroom.

Soto, 343 Wis. 2d 43, ¶23 (internal citation omitted) (citing generally Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 Tul. L. Rev. 1089 (2004).[2]

Anderson's only connection with the judge or his attorney was by telephone. While the judge did inform Anderson that "I could vacate the courtroom if you wanted to speak with your attorney and ask him any questions or discuss anything else" (37:13), this attempt by the judge to make the best out of the situation only highlights the hearing's inherent flaws. Anderson was required to ask the

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[2] While Poulin's article focuses on videoconferencing technology, it has interesting observations to make regarding flaws related to remote appearances in general: "Some read the absence of complaints by defendants as satisfaction with the use of videoconferencing. A Philadelphia judge remarked, "I sentenced someone to five years in jail for arson by telephone. Never heard anything more, so I guess it worked!" The silence may not signify satisfaction. Defendants may not be in a position to criticize the use of videoconferencing or even to differentiate between a videoconferenced proceeding and an in-court proceeding. Defendants as a group are dissatisfied with the criminal justice process and with the representation they receive, yet they rarely find an ear for their complaints. Proponents of video use will interpret defendants' consent as an endorsement of the system. To the contrary, consent may result from systemic pressure or from counsel's ill-advised guidance." 78 Tul. L. Rev. at 1160.

presiding judge to vacate the courtroom during his plea hearing in order to communicate at all, much less confidentially, with his attorney. Compared to Soto, who was seated next to his attorney in a courtroom and could see the presiding judge by live videoconferencing technology, Anderson's telephone appearance from a state prison is significantly less solemn and calm or remotely close to an environment that would have demonstrated to Anderson that he had real "access to the judicial process." *See* ***Soto***, 343 Wis. 2d 43, ¶23.

Interestingly, the state appears to have considered these principles when it made the following observations in ***Soto***:

> Significantly, Soto was not in a prison or a jail, he was in a courtroom, which is not potentially coercive, noisy, or otherwise distracting as a prison or jail might be. *Cf. Peters*, 237 Wis. 2d 741, ¶4. Furthermore, Soto was not separated from his attorney; they were in the same courtroom with no impediments to their communication. *Cf. Wright v. Van Patten*, 552 U.S. 120 (2008) (per curiam) (defendant was present in courtroom at guilty plea hearing, but defense counsel appeared by telephone; habeas corpus relief denied because no clearly established federal law violated).

Brief of Plaintiff-Respondent at 24, ***Soto***, 343 Wis. 2d 4 (No. 2010AP2273-CR).[3]

When viewed in context, the court's colloquy with Anderson was insufficient to demonstrate a valid waiver. The right at issue in this case is the same right that was at issue in

[3] Available at: https://acefiling.wicourts.gov/documents/ show_any_doc?appId=wscca&docSource=EFile&p%5bcaseNo%5d=2010AP002273&p%5bdocId%5d=68688&p%5beventSeqNo%5d=32&p%5bsectionNo%5d=1 .

Soto. Nevertheless, the context in which Soto's waiver was analyzed was significantly different than the context in which Anderson's acquiescence must be reviewed.

To begin with, the record in this case provides no evidence that Anderson knew he had a constitutional or statutory right to be in the courtroom with the presiding judge for his plea hearing. Next, the presiding judge's colloquy failed to unambiguously inform Anderson that he had such a right. (37:3-4). Rather, Anderson was told that "you can be present for different things" and asked whether, "[f]or our procedure today, realizing that we have a trial coming scheduled on November 5, (eight days later) to start, is it okay that we do this by phone today?" (37:3). When Anderson responded, "Yes," the judge proceeded to explain that an attempt was made to "get you by internet, then that would have given you the ability to see us and vice versa. But they were already filled up and we could not get that, so this was the next best technology." (37:3-4).

At most, the record demonstrates that Anderson was told that he could be present for "different things" and that an attempt was made to arrange for Anderson's appearance by internet. Instead, appearing by telephone, Anderson had the ability only to hear what was taking place in the courtroom and the presiding judge could only speak to Anderson, but Anderson could not see the people in the courtroom nor could the people in the courtroom see Anderson. Further, in order to effectively speak with his attorney, Anderson was required to ask the court to vacate the courtroom. Under these circumstances and based on the record in this case, it cannot be said that Anderson knowingly, intelligently, and voluntarily waived his constitutional and statutory right to be present in the same courtroom as the presiding judge when he entered his plea and the court pronounced judgment.

C. Anderson was deprived of the constitutional right to effective assistance of counsel.

1. The right to effective assistance of counsel under ***Cronic.***

The Sixth Amendment to the United States Constitution guarantees the right to the effective assistance of counsel. ***United States v. Cronic***, 466 U.S. 648, 654 (1984). Under ***Strickland v. Washington***, a defendant must demonstrate both that his counsel's performance was deficient and that the deficient performance prejudiced the defense. 466 U.S. 668, 687 (1984). However, in certain Sixth Amendment contexts, prejudice is presumed. ***Id.*** at 692. The actual or constructive denial of the assistance of counsel is legally presumed to result in prejudice because in such a circumstance prejudice "is so likely that case-by-case inquiry into prejudice is not worth the cost." ***Id.***; *see also* ***U.S. v. Cronic***, 466 U.S. at 659.

The denial of counsel at a critical stage of a trial results in an unfair trial. ***Cronic***, 466 U.S. at 659. The entry of a guilty plea is a critical stage of a criminal proceeding such that the right to effective assistance of counsel applies. ***Missouri v. Frye***, 132 S.Ct. 1399, 1405 (2012); *see also* ***State v. Myrick***, 2014 WI 55, ¶15, 354 Wis. 2d 828, 848 N.W.2d 743.

Accordingly, ***Cronic***, not ***Strickland***, applies where there has a been a complete denial of counsel; where counsel has been prevented from assisting the accused during a critical stage of the prosecution; or under circumstances where the likelihood that any lawyer could provide effective assistance of counsel is so small that a presumption of

prejudice is appropriate without inquiry into the actual conduct of the proceeding. *See* ***Cronic***, 466 U.S. at 659-60 and 659 n.25.

2. Anderson was denied the right to effective assistance of counsel under ***Cronic*** when he entered a guilty plea to a Class C felony from prison by telephone while his attorney was located in the courtroom and connected to Anderson only through a non-confidential speakerphone.

This case is strikingly similar to a Seventh Circuit case that originated in Wisconsin and presented the same fundamental issue. *See* ***Van Patten v. Deppisch***, 434 F.3d 1038, 1041 (7th Cir. 2006) and ***Van Patten v. Endicott***, 489 F.3d 827 (both reversed by ***Wright v. Van Patten***, 552 U.S. 120, 126 (2008) (per curiam).[4]

Roughly 20 years prior to Anderson's plea hearing in this case, Joseph Van Patten pled no contest to first degree reckless homicide in the Shawano County Circuit Court. *See* ***Van Patten v. Deppisch***, 434 F.3d at 1040. On the day of his plea, Van Patten's attorney called to inform him that he would be transported to the courtroom for a change of plea hearing, at which time Van Patten was to enter a no contest plea pursuant to a plea agreement. ***Id***. While Van Patten was brought to the courtroom for his plea, his

[4] The Seventh Circuit's order granting Van Patten's writ of habeas corpus was reversed "[b]ecause our cases give no clear answer to the question presented…it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law." ***Wright v. Van Patten***, 552 U.S. at 126 (internal quotations omitted).

attorney "appeared" by speakerphone from a remote location. ***Id***. After the court "quizzed" Van Patten to ensure that his plea was knowing, intelligent, and voluntary, the court accepted his plea and two months later, sentenced him to 25 years imprisonment. ***Id***.

The eventual legal outcome of Van Patten's case is noted above, but what matters more are the significant substantive similarities between these two cases. In reversing the Seventh Circuit's order granting Van Patten's writ of habeas corpus under 28 U.S.C. § 2254, the Court took time to note that:

> Petitioner tells us that "[i]n urging review, [the State] does not condone, recommend, or encourage the practice of defense counsel assisting clients by telephone rather than in person at court proceedings, even in non-adversarial hearings such as the plea hearing in this case," Pet. For Cert. 5, and he acknowledges that "[p]erhaps, under similar facts in a direct federal appeal, the Seventh Circuit could have properly reached the same result it reached here," *ibid*. Our own consideration of the merits of telephone practice, however, is for another day, and this case turns on the recognition that no clearly established law contrary to the state court's conclusion justifies collateral relief.

Wright v. Van Patten, 552 U.S. at 126. Concurring in the Court's opinion, Justice Stevens had this to say:

> An unfortunate drafting error in the Court's opinion in *United States v. Cronic*…makes it necessary to join the Court's judgment in this case.
>
> …

> Regrettably, *Cronic* did not "clearly establis[h]" the full scope of the defendant's right to the presence of an attorney. See 28 U.S.C. § 2254(d)(1).
>
> …
>
> The Court of Appeals apparently read "the presence of counsel" in *Cronic* to mean "the presence of counsel *in open court*." Initially, all three judges on the panel assumed that the constitutional right at stake was the right to have counsel by one's side at all critical stages of the proceeding. …In my view, this interpretation is correct. The fact that in 1984, when *Cronic* was decided, neither the parties not the Court contemplated representation by attorneys who were not present in the flesh explains the author's [Justice Stevens] failure to add the words "in open court" after the word "present."
>
> …
>
> I acquiesce in this Court's conclusion that the state-court decision was not an unreasonable application of clearly established federal law. In doing so, however, I emphasize that today's opinion does not say that the state court's interpretation of *Cronic* was correct, or that we would have accepted that reading if the case had not come to us on direct review rather than by way of 28 U.S.C. § 2254.

Id. at 126-29 (Stevens, J., concurring).

While both Anderson and Van Patten were physically separated from their attorneys, Van Patten was at least in the Shawano County courtroom when he entered his plea.

Under ***Cronic***, Anderson was denied the assistance of counsel at a critical stage in his case. A ***Cronic*** violation can occur even if the trial judge "did his best to conduct the plea colloquy with care" if the "arrangements made it

impossible for [the defendant] to have the "assistance of counsel" in anything but the most perfunctory sense." ***Deppisch***, 434 F.3d at 1043.

Anderson, like Van Patten, stood alone[5] before the judge and prosecutor and could not "turn to his lawyer for private legal advice, to clear up misunderstandings, to seek reassurance, or to discuss any last-minute misgivings." *See* ***Id***. Further, with his client listening through a telephone connection from prison, Anderson's attorney "could not detect and respond to cues from his client's demeanor that might have indicated he did not understand certain aspects of the proceeding or that he was changing his mind." *See* ***Id***. Even though Anderson was given the option by the court to vacate the courtroom if he wanted to speak with his attorney, such a "special request" is insufficient to overcome the "auspicious setting for someone about to waive very valuable constitutional rights." *See* ***Id***.

Accordingly, under ***Cronic***, Anderson's telephone appearance represents a "structural defect in the proceedings against him." *See* ***Id***. The circumstances of Anderson's plea amounted to the denial of the "assistance of counsel at a stage where he must assert or lose certain rights and defenses" and is an error that "pervade[s] the entire proceeding." *See* ***Id***. (quoting ***Satterwhite v. Texas***, 486 U.S. 249, 256 (1998). As such, harmless error analysis does not apply to Anderson's ***Cronic*** claim. *See* ***Id***.; *see also* ***State v. Nelson***, 2014 WI 70, ¶34, 355 Wis. 2d 722, 849 N.W.2d 317.

Accordingly, the record demonstrates that Anderson was denied the assistance of counsel when he appeared at his plea hearing alone from prison by telephone while his

[5] Anderson "stood alone" from a state prison while Van Patten "stood alone" in a courtroom with the judge and prosecutor.

attorney appeared in the courtroom with the judge and prosecutor. This error is structural in nature and requires that Anderson be allowed to withdraw his guilty plea. ***State v. Nelson***, 355 Wis. 2d 722, ¶34.

CONCLUSION

For the reasons set forth above, Anderson respectfully requests that the court reverse the circuit court's order denying his motion to withdraw his guilty plea and vacate his judgment of conviction.

Dated this 7th day of March, 2016.

Respectfully submitted,

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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 5,698 words.

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 7th day of March, 2016.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including 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.

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