STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Case No. 2016AP1045-CR
Case No. 2016AP1046-CR
Case No. 2016AP1047-CR
Case No. 2016AP1048-CR
Case No. 2016AP1049-CR

TERRANCE L. EGERSON,

Defendant-Appellant.

ON NOTICE OF APPEAL FROM JUDGMENT OF CONVICTION ENTERED IN CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE MEL FLANAGAN, PRESIDING, AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE MICHELLE A. HAVAS, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUES

I. Whether the defendant-appellant's trial counsel provided ineffective assistance of counsel when counsel did not move dismiss the domestic abuse repeaters that were not supported by the facts in the complaints.

The circuit court found that defendant-appellant's trial counsel was not ineffective.

II. Whether the domestic abuse repeaters applied to defendant-appellant's charges where applied in error and violated Egerson's fundamental right to due process.

The circuit court found that the domestic abuse repeaters were not applied in error.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Counsel does not request oral argument. Publication may be appropriate to reinforce what constitutes the statutory definition of domestic abuse.

STATEMENT OF THE FACTS

On March 22, 2013, Egerson called his wife, A.E., on the phone from the Milwaukee County Jail. (45R2).[1] On that date Egerson was serving an imposed and stayed jail sentence on either case 11CM5728 or

[1] This brief cites to the record contained in 2016AP1045 as "45_", in 2016AP1046 as "46_", in 2016AP1047 as "47_", in 2016AP1048 as "48_" and in 2016AP1049 as "49_". When citing to documents that are contained in all files, this brief will use "45_" as a reference

11CM7406. (45R31:10; 45R34:6) This is based on Egerson's probation being revoked on both cases prior to March 22, 2013 and the sentences were consecutive to each other. (45R31:2; 46R2:4).

The sentences in Milwaukee County cases 11CM5728 and 11CM7406 ordered Egerson to have no contact with A.E. pursuant to Wis. Stat. § 973.055(1), (45R2). On March 15, 2013, A.E. obtained a temporary restraining order against Egerson in Milwaukee County case 13FA1617. (45R2). It is not clear from the record if Egerson was properly served with the temporary restraining order, and therefore, had knowledge of the restraining order.

Based on Egerson's March 22, 2013, phone conversation with his wife the State charged Egerson in case 13CF1401 with three misdemeanor charges: one count of violation of a domestic abuse temporary restraining order, and two counts of intentionally contact victim. (45R2). The complaint did not incorporate the complaints from case 11CM5728 or case 11CM7406. (45R2:3)

The complaint in 13CF1401 stated that "on March 22, the defendant caller her [A.E.] and repeatedly accused her of 'fucking' another man." (45R2:3). On March 22, 2016, Officer Peter Graber was present with A.E. during her phone conversation with Egerson. (45R40:6). Officer Graber testified at the preliminary hearing that, "He [Egerson] asked [A.E.] is it over between us or what do you--what exactly want. At which time she [A.E.] replied I want you to leave me alone and let me get on with my life."

(45R40:7). The criminal complaint does not contain any facts that Egerson's phone conversation with A.E. caused A.E. to be fearful. (45R2).

The State charged the phone conversation as an act of "domestic abuse" as defined by Wis. Stat. § 968.075(1)(a)[2] and invoked Wis. Stat. § 939.621 – "domestic abuse repeater" – which increased the term of imprisonment and changed the status of each charge from a misdemeanor to a felony. (45R2). A condition of Egerson's bond in 13CF1401 was to have no contact with A.E. (45R4). At no point prior to Egerson pleading guilty did trial counsel move to dismiss one of the intentionally contact victim charges as not supported by fact because Egerson was only serving one sentence on March 22, 2013, when Egerson contacted A.E. once.

On April 17, 2013, Egerson, while in the Milwaukee County jail, had another phone conversation with his wife. (46R2). Based on this phone conversation the State charged Egerson in case 13CF1860 with one count of violation of a domestic abuse injunction, one count felony bail jumping and one count of intentionally contact victim and invoked Wis. Stat. § 939.621 - "domestic abuse repeater" on each charge. (46R2).

The complaint states, "[Egerson] was asking A.E. who was watching the children and was inquiring about paying bills. A.E. reported that the defendant was being extremely condescending and was talking down to her. A.E. informed the defendant that he was not to be calling her and disconnected the call" (46R2:3). A.E. knew Egerson was in custody at the jail at the time of their phone conversation. (46R2:3). The complaint does

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

not contain any facts that Egerson's phone conversation with A.E. caused A.E. to be fearful. (46R2). The complaint incorporated by reference the judgment of convictions from 11CM5728 and 11CM7406. (46R2).

On April 17, 2013, the date that Egerson allegedly committed the bail jumping charge in 13CF1860, Egerson was not released from custody on bond in case 13CF1401. (45R1:1) From January 7, 2013 to June 20, 2013, Egerson was continuously in custody. (45R33:6). At no point prior to Egerson pleading guilty did trial counsel move to dismiss the bail jumping charge. Egerson's bond in case 13CF1860 ordered no contact with A.E. (46R3).

On May 26, 2013, Egerson, while in the Milwaukee County jail, had a phone conversation with his wife and on July 1, 2013, Egerson, while out of custody, had a phone conversation with his wife. (47R2). Based on these two phone conversations the State charged Egerson in case 13CF3152 with two counts of violation of a domestic abuse injunction and two counts felony bail jumping. And invoked Wis. Stat. § 939.621 – "domestic abuse repeater" – on each count. (47R2). On July 1, 2013, Egerson was out custody on bond in cases 13CF1401 and 13CF1860.

The complaint in 13CF3152 contains a portion of the transcript from the May 26, 2013 phone conversation. (47R2:4-5). In the complaint A.E. stated, "that the majority of their conversations revolved around their children and their household matter along with his [Egerson's] subtle attempts to get her to not come to court so the charges would be dropped..." (47R2:4). The complaint does not contain any allegation that Egerson's

May 26, 2013, phone conversation with A.E. caused A.E. to be fearful. (47R2).

The complaint also contains a statement from A.E. that she had a phone conversation with Egerson on July 1, 2013 and she recorded the conversation. (47R2:4). The complaint does not contain the substance of the July 1, 2013 phone conversation. (47R2:4). The complaint does not contain any allegation that Egerson's July 1, 2013, phone conversation with A.E. caused A.E. to be fearful. (47R2).

On July 18, 2013, Egerson had a phone conversation with his mother from the Milwaukee County jail and on July 21, 2013, Egerson had a phone conversation with his wife from the Milwaukee County jail. (48R2). Based on these phone conversations the State charged Egerson in case 13CF3435 with one count of felony intimidation of a victim, one count violation of a domestic abuse injunction and two counts felony bail jumping and the State invoked Wis. Stat. § 939.621 – "domestic abuse repeater" – on each charge. (48R2). The complaint contains partial transcripts of the phone calls. (48R2:4-6). On July 21, 2013, Egerson was out of custody on bond cases 13CF1401 and 13CF1860. (48R2).

Egerson's July 21, 2013, phone conversation with his wife lasted 16 minutes. The complaint contained a transcript of the phone conversation, which contained the following:

> "07/21/13 at 10:19 AM to 414-242-366 from CCFC Unit 6b
>
> E=Terrance Egerson (defendant)
>
> A=Alexandra Egerson (victim)

...

E: what will be the wrong with doing- I'm not going to hurt you, because I know the laws. I know what the laws entail. And I'm in this situation-

A: Guess what, you knew law seven years ago, sir, you sure did. You knew the law seven years ago.

E: Yes, I did.

A: That was it- the law isn't brand knew. You didn't even care about the law. Every time you touched me you didn't care, because you always knew she wasn't going to do anything.

E: But you know what?

A: But, now I'm doing something. Now, it's not that you know the law, it's now you know you can't punk me.

E: But- but you know what? You know what? I'm in here for not touching you. I'm not in here for harming you.

A: That has nothing! Ok, you know what? That's your problem. You feel like domestic violence isn't only touching. No, you're still- you harass, and that falls under abuse, sir!

E: So what you're saying is that- what you're saying is-

A: Just because you haven't done a physical thing to me since last year does not mean that you still aren't abusive.

E: But what have I done abusive to you? I haven't abused you, man! I haven't abused you! I haven't.

A: Ok."

(R48R2:5).

The complaint does not contain any allegation that Egerson's phone conversation with A.E. caused A.E. to be fearful. (47R2).

On October 9, 2013, Egerson while in the Milwaukee County jail had a phone conversation with his wife. (49R2). Based on this phone conversation the State charged Egerson in case 14CF189 with one count violation of a domestic abuse injunction and one count felony bail jumping and the State invoked Wis. Stat. § 939.621 – "domestic abuse repeater" – on the violation of a domestic abuse injunction count. (49R2). On October 9, 2013, Egerson was released from custody on bond in case 13CF3152 with the condition of having no contact with his wife. (49R2). The complaint states "A.E. reported that the defendant had been calling her through other inmates having them call her and he would he would yell in the background to the inmate on the phone who would relay the message to A.E." (49R2:2). The criminal complaint does not contain the substance of the phone conversation. (49R2). The complaint does not contain any allegation that Egerson's conversation with A.E. caused A.E. to be fearful. (49R2).

On February 10, 2014, the circuit court consolidated the above captioned cases and scheduled the cases for a final pretrial conference and a jury trial. On April 21, 2014, Egerson's trial counsel filed a motion to dismiss the penalty enhancers. Trial counsel argued that because Egerson's two predicate domestic abuse assessments occurred before the legislature enacted Wis. Stat. § 939.621 that the repeater was not applicable to Egerson. (45R17). The Court denied the motion. (45R46:13). At no point

did Egerson's trial counsel object to the domestic abuse repeaters as not being supported by the facts alleged in the complaints.

On the day of trial Egerson resolved all the cases with a change of plea. As part of the plea negotiation Egerson agreed to plea guilty to four misdemeanor charges and two felony bail jumping charges; the State agreed to dismiss and read-in the remaining charges, dismiss the domestic abuse repeaters and recommend a sentence of 5-7 years initial confinement and 5-7 years extended supervision. (45R:47:8).

After the guilty pleas the Court adjourned the cases for sentencing. Prior to sentencing Egerson moved the Court to withdraw his guilty pleas. (45R22). Egerson's trial attorney withdrew and Egerson was appointed a new attorney. The circuit court denied Egerson's motion to withdraw his pleas. (45R48:11).

On November 25, 2014, the Court sentenced Egerson. On the two-felony bail jumping charges the court sentenced Egerson to a total of ten years in the Wisconsin State prison system broken down to five years initial confinement and five years extended supervision. (48R33:49) On the misdemeanor charges the court sentenced Egerson to 22 months and one day jail consecutive to the bail jumping sentences. (48R33:47-48). At the sentencing the court noted, "everyone does agree that these are not offenses of physical violence." (48R33:42-43).

On February 2, 2016, Egerson filed a postconviction motion and requested an evidentiary hearing. (R45:31). The circuit court denied

Egerson's postconviction claims without holding an evidentiary hearing. (R45:36)

ARGUMENT

I. TRIAL COUNSEL WAS INEFFECTIVE WHEN COUNSEL DID NOT OBJECT TO THE INAPPROPRIATE DOMESTIC ABUSE REPEATERS AS CHARGED IN THE CRIMINAL COMPLAINTS.

A. INTRODUCTION AND STANDARD OF REVIEW.

A defendant is entitled to withdraw a guilty plea after sentencing only upon a showing of "manifest injustice" by clear and convincing evidence. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). A defendant meets the "manifest injustice" test if the defendant was denied the effective assistance of counsel. *Bentley*, 201 Wis. 2d at 311.

Egerson must satisfy a two-prong test for an ineffective assistance of counsel claim. *Strickland v. Washington*, 466 U.S. 668 (1984). First, Egerson must show that counsel's performance was deficient. *Id*. Second, Egerson must show that his attorneys' deficiency was prejudicial. *Id*. at 687.

A postconviction *Machner*[3] hearing is necessary to sustain a claim of ineffective assistance. A trial court may deny a postconviction motion without a hearing "if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record

[3] *State v. Machner*, 92 Wis. 2d 797, 804; 285 N.W.2d 905 (Ct. App. 1979).

conclusively demonstrates that the defendant is not entitled to relief." *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, the reviewing court determines de novo whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. *Bentley*, 201 Wis. 2d at 309-10. If the motion raises such facts, the circuit court must hold an evidentiary hearing. *Id*. at 310; *Nelson v. State*, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972). However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing. *Bentley*, 201 Wis. 2d at 310-11; *Nelson*, 54 Wis. 2d at 497-98. This Court reviews a circuit court's discretionary decisions under the deferential erroneous exercise of discretion standard. *Bentley*, 201 Wis. 2d at 311.

B. TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT BECAUSE COUNSEL DID NOT MOVE TO DISMISS THE INAPPROPRIATE DOMESTIC ABUSE REPEATERS.

Egerson's trial counsel was deficient when counsel did not move to dismiss the domestic abuse repeaters because the facts alleged in the criminal complaints were not sufficient to support the repeaters.

The reviewing court examines the complaint to determine whether the complaint contains facts or reasonable inferences from the facts that are

sufficient to allow a reasonable person to conclude that a crime was probably committed and that the defendant probably committed it." *State v. Reed*, 2005 WI 53, ¶12, 280 Wis. 2d 68, 695 N.W.2d 315. Based on the facts alleged in the complaints in this case and the reasonable inferences from those facts Egerson is left wondering why he was charged as a domestic abuse repeater. The answer to this question can be found in the facts that tend to prove the elements of the offense. *State v. Gaudesi*, 112 Wis.2d 213, 220. This requires an analysis of the facts alleged in the complaints applied to the elements of domestic abuse repeater.

The domestic abuse repeater statute, Wis Stat. § 939.621(2) reads as follows:

> "(2) If a person commits an act of domestic abuse, as defined in Wis. Stat. § 968.075 (1) (a) and the act constitutes the commission of a crime, the maximum term of imprisonment for that crime may be increased by not more than 2 years if the person is a domestic abuse repeater. The victim of the domestic abuse crime does not have to be the same as the victim of the domestic abuse incident that resulted in the prior arrest or conviction. The penalty increase under this section changes the status of a misdemeanor to a felony."

Next, the court must determine what constitutes "domestic abuse." Relevant to these cases Wis. Stat. § 968.075(1)(a) defines "domestic abuse," as follows:

> "(1) DEFINITIONS. In this section:

> (a) Domestic abuse means any of the following engaged in by an adult person against his or her spouse or former spouse...:
>
> 1. Intentional infliction of physical pain, physical injury or illness.
> 2. Intentional impairment of physical condition.
> 3. A violation of Wis. Stat. § 940.225 (1), (2) or (3).
> 4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1., 2. or 3."

Wis. Stat. § 968.075(1)(a).

A review of the statutory definition of domestic abuse shows that the underlying crimes in the complaints are not acts of domestic abuse. For the underlying crimes to be acts of domestic abuse the complaint must contain facts and related inferences that fit the crimes stated in subparts 1. through 4. Comparing the facts in the complaints with the crimes listed in Wis. Stat. § 968.075(1)(a)1.-4. reveals that: (1) there is no allegation that Egerson intentionally inflicted physical pain, physical injury or illness; (2) there is no allegation that Egerson intentionally impaired A.E.'s physical condition; (3) no sexual assault is alleged; and (4) there is no physical act by Egerson and it would not have been reasonable for A.E. to fear imminent engagement in any of the conduct described in Wis. Stat. § 968.075(1)(a)1., 2., or 3. by Egerson.

The plain language of Wis. Stat. § 968.075(1)(a)4 requires that the defendant engage in a "physical act" against the victim to be an act of domestic abuse. "All words and phrases shall be construed according to common and approved usage; but technical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning." Wis. Stat. § 990.01(1).

Nowhere in the statutes does "physical act" have a special definitional meaning; therefore, physical act is given its common meaning. Physical is defined as: "having material existence." *Merriam Webster's Collegiate Dictionary* 877 (10th ed. 1993). Act is defined as: "the doing of a thing." *Merriam Webster's Collegiate Dictionary* 11 (10th ed. 1993). Thus, "physical act" means the doing of a thing having material existence, i.e., a thing that can be seen and felt. There is no material existence to Egerson's oral communication with A.E. Thus, Egerson never engaged in any physical act against A.E. A.E. even acknowledged in the complaint of in case 13CF3435 that Egerson has not done anything physical. (R48R2:5).

Another reason Egerson did not commit domestic abuse is that Egerson's oral communication with A.E. did not cause A.E. to reasonably fear imminent engagement by Egerson in any of the conduct described in Wis. Stat. § 968.075(1)(a)1., 2., or 3. Egerson's oral communication with A.E. would did not cause A.E. to reasonably fear that Egerson would engage in the conduct described under Wis. Stat. § 968.075(1)(a)1-3, let alone engage in that conduct imminently.

The facts alleged in the complaints in these cases are similar to the facts alleged in *State v. O'Boyle*[4]. In *O'Boyle* the facts in the complaint did not support that the underlying crime was an act of domestic abuse as defined in Wis. Stat. § 968.075; therefore, the court vacated the domestic abuse surcharge. *State v. O'Boyle*, 13-AP-1004, ¶24.

In *O'Boyle*, the court acknowledged that the facts in the complaint may have caused the mother of the defendant's child to be frightened by the defendant's underlying criminal conduct; however, it would not have been reasonable for her to fear *imminent* engagement in any of the conduct described in Wis. Stat. § 968.075(1)(a)1., 2., or 3., because the defendant never entered her home, never threatened her and no conversation between the two took place. *O'Boyle*, 13-AP-1004, ¶23(Court's emphasis).

The same conclusion is reached in Egerson's case. When the verbal contact between Egerson and A.E. occurred Egerson was in jail all but one time. And unlike the victim in *O'Boyle*, who was scared and frightened, *O'Boyle*, 13-AP-1004, ¶3. In these cases A.E. was never scared, frightened or fearful because Egerson never threatened A.E. Rather the conversations between A.E. and Egerson ranged from mundane –

> "... the majority of their conversations revolved around their children and their household matter along with his [Egerson's] subtle attempts to get her to not come to court so the charges would be dropped..."

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[4] *State v. O'Boyle*, No. 2013AP1004, unpublished slip op., (Feb. 4, 2014). (Unpublished but as a single-judge opinion citable as persuasive per Wis. Stat. § 809.23(3)(b))(See Attached Opinion)

(47R2:4). – to conversations about the end of their relationship. (45R2:3; R48R2:5). The court noted that Egerson's offenses were not offenses of physical violence. (48R33:42-43).

While Egerson's case is similar to *O'Boyle*, Egerson's case stands in contrast to *State v. Edwards*, 2013 WI App 51, 347 Wis.2d 526, 30 N.W.2d 109. In *Edwards* the court found that the defendant's underlying crime of disorderly conduct was an act of domestic abuse pursuant to Wis. Stat. § 968.075(1)(a)1-4. *Id.* at ¶ 2, 12. The court based this on the defendant beating the victim for nearly an hour before the calling the victim and threatening suicide if she did not come home immediately, and the police found the defendant in his bed with the covers pulled over him and a knife beside him. *Id.* at ¶ 12. The court concluded the defendant's conduct would give rise to fear of imminent harm and is not reasonably construed as presenting a threat to the defendant alone given his pleas/threats to have the victim return home. *Id.* at ¶ 12.

Egerson's case stands in contrast to *Edwards* for three reasons. First, all but one of Egerson's phone calls occurred while Egerson was confined in jail, which A.E. knew at the time of the phone calls; thus, because Egerson was secured safely in jail A.E. had no reason to fear imminent physical pain or injury by Egerson.

Second, the tenor of the phone conversations did not give reason for A.E to fear imminent physical pain or injury by Egerson because unlike the phone conversations in *Edwards*, none of the conversations between A.E. and Egerson's contained any threats.

Third, the context of Egerson's phone calls to A.E. did not give A.E. reason to fear imminent physical pain or injury by Egerson. In *Edwards* the defendant committed the disorderly conduct against the victim after beating her for nearly an hour; there existed a close proximity in time between the defendant's violence against the victim and the defendant's subsequent disorderly conduct that created a reasonable fear of imminent harm by the defendant. Here, the complaints do not contain allegations of a close proximity in time is between prior violence and the underlying crimes. The complaints in case 13CF1401 and case 13CF1860 do not even allege what if any prior violence occurred between A.E. and Egerson. The history between Egerson and A.E. detailed in the complaint was that Egerson was not permitted to contact A.E. as a result of two convictions that stemmed from more than a year before and the temporary restraining order and a restraining order A.E. obtained.

The context of Egerson's phone calls to A.E., coupled with the tenor of the phone calls and the fact that A.E. knew Egerson was confined in jail at the time of the phone calls made it so A.E. did not reasonably fear that Egerson would imminently engage in the conduct described under Wis. Stat. § 968.075(1)(a)1-3.

The facts of the complaints are not sufficient to support the domestic abuse repeater charges and counsel was ineffective when counsel did not move to dismiss the domestic abuse repeaters because the court would have dismissed the repeaters. Counsel's course of action was not reasonable, and was the result of oversight rather than a reasoned defense strategy.

Counsel's performance was also deficient when counsel failed to move to dismiss the felony bail jumping charge in 13CF1860 because there was no basis in fact to support the charge; Egerson was not released on bond when he allegedly violated his term of bond. A simple review of the record in 13CF1401 shows that Egerson was not released on bond on April 17, 2013. Therefore, the court would have granted counsel's motion to dismiss.

Counsel's performance was also deficient when counsel failed to move to dismiss one of the two counts of intentionally contact victim in case 13CF1401 because on March 22, 2013, Egerson was only serving one sentence due to the sentences from cases 11CM5728 and 11CM406 being consecutive and the complaint only contains one contact of A.E. by Egerson. Again a simple review of the record shows there was no factual basis to charge Egerson with two counts of intentionally contact victim; therefore, the court would have granted counsel's motion to dismiss.

Counsel's failure to move to dismiss the charges that were not supported by fact was deficient.

C. TRIAL COUNSEL'S DEFICIENT PERFORMANCE PREJUDICED EGERSON BECAUSE EGERSON WAS ERRONEOUSLY SUBJECTED TO FELONY BAIL JUMPING CHARGES AND PENALTIES.

Egerson must show that his attorneys' deficiency was prejudicial. *Strickland*, 466 U.S. at 687. In order to satisfy the prejudice prong of the *Strickland* test, Egerson must allege facts to must show that there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland* v. Washington, 466 U.S. 668, 694 (1984).

Confidence in the outcome of Egerson's cases - his guilty pleas and sentences - is undermined for three reasons. First, as shown above, the complaints did not support the domestic abuse repeaters; thus, but for counsel's error in not moving to dismiss the erroneous domestic abuse repeaters, Egerson would have been charged with misdemeanor bail jumping charges, not felony bail jumping charges. Second, as shown above, no factual basis existed for the State to charge Egerson with two counts of intentionally contact victim in case 13CF1401. Third, as shown above, no factual basis existed for the State to charge Egerson with one count bail jumping in 13CF1860.

Trial counsel's error in not moving to dismiss the domestic abuse repeaters resulted in Egerson pleading guilty to two-felony bail jumping charges that, if counsel had been effective, would have been misdemeanor bail jumping charges. Egerson pled guilty to a felony bail jumping charge in case 13CF3152 and to a felony bail jumping charge in case 13CF3435.

Case 13CF3152 charged two felony bail-jumping charges, one of which Egerson pled guilty to. The two bail-jumping charges stemmed from Egerson's violation of a bond condition in case 13CF1401 and in case 13CF1860. Cases 13CF1401 and 13CF1860 were only charged as felonies because of the domestic abuse repeater charges contained in each complaint. If trial counsel had not been ineffective and moved to dismiss the domestic abuse repeaters, then cases 13CF1401 and 13CF1860 would have been misdemeanors and Egerson would have been on misdemeanor bail.

Case 13CF3435 also charged two felony bail-jumping charges, and again Egerson pled guilty to one of the charges. Again, the two charges stemmed from Egerson's violation of a bond condition in case 13CF1401 and 13CF1860. As shown above, if trial counsel had not been ineffective and moved to dismiss the domestic abuse repeaters, then cases 13CF1401 and 13CF1860 would have been misdemeanors and Egerson would have been on misdemeanor bail.

As a result of trial counsel's errors Egerson unnecessarily plead guilty to and was sentenced on two-felony bail jumping charges. The court sentenced Egerson to a total of ten years in the Wisconsin State prison system on the two-felony bail jumping charges. Had Egerson plead to two-misdemeanor bail jumping charges, then his maximum time imprisonment would have been 18 months. Egerson's unnecessary imprisonment as a result of trial counsel's deficient performance undermines the confidence in the outcome of Egerson's cases. Therefore, trial counsel's deficient

performance prejudiced Egerson and Egerson has met the second prong of the *Strickland* test.

In addition, trial counsel's errors resulted in Egerson being unnecessarily exposed to fifty-five years and six months of imprisonment because if counsel had been effective, then Egerson would have been properly charged with 13 misdemeanor counts and one felony count and Egerson would have faced a potential 20 years and six months of imprisonment rather than the 76 years of imprisonment Egerson actually faced on the day of his trial. The court also imposed the Domestic Abuse assessment for each of Egerson's charges, even though, like the domestic abuse repeater charges, the assessment was not supported by the criminal complaints.

Egerson's unnecessary exposure of imprisonment as a result of counsel's errors made the plea-bargaining process fundamentally unfair and undermines the confidence in the outcome of Egerson's cases. Therefore, trial counsel's deficient performance prejudiced Egerson and Egerson has met the second prong of the *Strickland* test.

Before Egerson can obtain relief for ineffective assistance of counsel a postconviction hearing is necessary. See *State v. Machner*, 92 Wis. 2d 797, 804 (Ct. App. 1979). The circuit court may deny this motion without a hearing "if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief." *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

Egerson's postconviction motion provided sufficient facts to entitle Egerson to relief. The postconviction motion showed: (1) on March 22, 2013, Egerson was serving one sentence when he contacted his wife once; (2) on April 22, 2013, Egerson was not released on bond in case 13CF1401 and (3) the facts of the complaints did not support the domestic abuse repeaters.

Egerson has shown with the postconviction motion and now again with this brief that he was denied effective assistance of counsel; therefore, this Court should order a *Machner* hearing or in the alternate withdraw Egerson's guilty pleas and vacate the judgment of conviction.

II. THE COURT SHOULD ORDER A NEW TRIAL IN THESE CASES IN THE INTEREST OF JUSTICE BECAUSE THE INAPPROPRIATE DOMESTIC ABUSE REPEATERS VIOLATED EGERSON'S FUNDAMENTAL RIGHT TO DUE PROCESS.

A. STANDARD OF REVIEW

This Court has broad power of discretionary reversal. Vollmer v. Luety, 156 Wis.2d 1, 19, 456 N.W.2d 797 (1990).

> "If it appears from the record that ... it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice."

Wis. Stat. § 752.35

B. THE MISCARRIAGE OF JUSTICE IN EGERSON'S CASES REQUIRES THE REVERSAL OF THE JUDGMENT OF CONVICTIONS AND THE DISMISSAL OF DOMESTIC ABUSE REPEATERS AND THE FELONY BAIL JUMPING CHARGES BE AMENDED TO MISDEMEANOR BAIL JUMPING CHARGES.

The interest of justice requires that Egerson's guilty pleas be withdrawn and a new trial ordered because the inappropriate domestic abuse repeater enhancers violated Egerson's fundamental right to due process and justice has been miscarried. U.S. Const. amend. V; U.S. Const. amend. XIV. § 1. "Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness." *California v. Trombetta*, 467 U.S. 479, 485 (1984)

The errors in the process of Egerson's cases created a miscarriage of justice that requires this Court to reverse the judgments of conviction and dismiss the domestic abuse repeaters and amend the felony bail jumping charges to misdemeanor bail jumping charges. This claim is based on the aprevious analysis of the application of the facts contained in the criminal complaints to the domestic abuse repeater charges that were applied to Egerson's charges.

Egerson brings this claim in addition to the ineffective assistance of counsel claim because the errors of the State in filing charges against

Egerson that were not supported by fact and the errors of the circuit court in finding that probable cause existed to support the charges when that was no factual basis to support the charges contributed to rending the process fundamentally unfair.

On the day of trial Egerson was charged with 16 felony counts with a potential of 76 years of imprisonment; when in reality, but for the inappropriate charges and enhancers, Egerson should have been charged with 13 misdemeanor counts and one felony count with a potential 20 years and six months of imprisonment.

The error occurred because the State should not have charged the domestic abuse repeater enhancers; the Court should not have found probable cause to support the domestic abuse repeater enhancers; and Egerson's trial counsel should have motioned to dismiss the domestic abuse repeater enhancers. Egerson should not have been on felony bond in cases: 13CF1401, 13CF1860, 13CF3152 and 14CF0189.

The negotiated plea agreeement where the domestic abuse repeater enhancers were dismissed did not cure any errors because Egerson should not have had to negotiate to dismiss the domestic abuse repeaters; the domestic abuse repeaters should have been dismissed, as a matter of law and Egerson should not have faced the consequences of two-felony bail jumping convictions. The errors in the prosecution of Egerson's cases were never corrected.

Wisconsin has recognized that the prosecution and defense possess relatively equal bargaining power in the give-and-take negotiation common

in plea-bargaining. *State v. Johnson*, 2000 WI 12, ¶ 25, 232 Wis.2d 679, 605 N.W.2d 846. This was not present in the prosecution of Egerson's cases because of the unfounded enhancers and charges that Egerson faced. From start to finish, the prosecution of Egerson's cases was fundamentally unfair.

The errors infected the charging of Egerson; the plea negotiations; Egerson's discussions with his trial counsel; the plea hearing; and the sentencing of Egerson, where all parties mistakenly believed that the domestic abuse repeater enhancers were appropriately charged. Therefore, to redress the due process violations that resulted from the prosecution of Egerson's cases this Court should to vacate his guilty pleas and vacate the judgments of conviction and order a new trial to cure the constitutional errors.

CONCLUSION

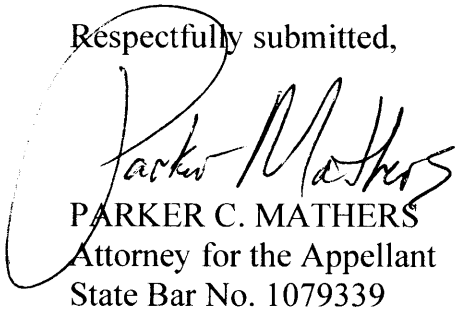
The circuit court erred in denying Egerson's postconviction motion claiming ineffective assistance of counsel.

The circuit court erred in denying Egerson's postconviction motion requesting the judgment of convictions be reversed in the interest of justice.

Based on the reasons set forth within this brief Defendant-Appellant, Terrance L. Egerson , respectfully requests the Court to order the judgment of convictions reversed or in the alternate order a *Machner* hearing.

Dated this 26th day of October, 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 5655 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 26th day of October, 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; and (3) 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 first names and last initials 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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