STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No.16-AP-2209-CR

DARRICK L. BENNETT,

Defendant-Appellant.

ON NOTICE OF APPEAL TO REVIEW A JUDGMENT OF CONVICTION AND DENIAL OF POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE DAVID BOROWSKI AND JOSEPH M. DONALD, RESPECTIVELY PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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Defendant-Appellant, by counsel and pursuant to section 809.19(1), Stats., hereby submits the following brief and appendix in support of his appeal to this court:

ISSUES PRESENTED

I

Was Bennett entitled to a postconviction hearing to address his claims that his plea was was not voluntarily or intelligently given, or

that he was denied effective assistance of counsel at the plea hearing because he was persuaded by counsel that the facts as he understood them afforded him no defense, when in fact he had a valid defense? (And if not, did the court properly exercise its discretion in denying such a hearing?)

The trial court answered NO, Bennett was not entitled to a hearing. (It did not answer the follow-up question.)

II

Was Bennett entitled to a hearing to determine whether his sentence should be modified where the court relied on an exaggerated understanding of the offense conduct, falsely indicating prolonged beating, imaginary cuts and other injuries, a stereotyped version of the aggressor-victim dynamic that omitted victim's extensive history of criminality and violence, and inaccurate speculation as to the effect of the crime on the victim on nonexistent or estranged family members; and where the court rejected or ignored valid mitigators such as defendant's acting in the heat of passion, and in imperfect self-defense, and taking steps to avoid conflict, and his service to family and community, his age, and deterrent collateral harms he already suffered? (And if not, did the court properly exercise its discretion in denying such a hearing?)

The trial court answered NO, Bennett was not entitled to a hearing. (It did not answer the follow-up question.)

III

> Was Bennett entitled to postconviction discovery, public assistance in hiring an expert, or a hearing on such matters, where he presented preliminary evidence that the victim's medical records would disclose prior injury predisposing her to an easily-triggered death unforeseeable to the defendant, or supporting Defendant's contention that she was aggressive and had a short life-expectancy contrary to facts relied on by the court? (And if not, did the court properly exercise its discretion in denying such a hearing?)
>
> The trial court answered NO, Bennett was not entitled to a hearing. (It did not answer the follow-up question.)

STATEMENT ON ARGUMENT AND PUBLICATION

Argument can be provided if the court deems that it would be useful; Defendant is content to stand on the record. Publication of issue II is warranted because, although it does not propose any creative extension of the law, the lower courts should be reminded that sentence modification serves a vital function and ought not face insurmountable burdens when a court's broad misperceptions of sentencing factors are brought to light.

STATEMENT OF THE CASE

This case concerns a death in a domestic abuse setting; Defendant admits the abuse but seeks to withdraw a plea for first degree reckless homicide, of which he is in fact innocent, the seeks a sentence modification. (R61.)

The son of a foundry supervisor and an executive secretary (R14:14[8][1]), Defendant Darrick Bennett stayed out of trouble as a youth, (R14:11,14[5,8]) and completed high school, but later became (and remained) a drug addict (R14:17[11]), and ran up 11 criminal convictions, receiving a variety of fines, probations, and short prison terms (R14:11-12[5-6]). A stink of domestic abuse clung to three misdemeanor citations from 2003-2006. (R14:12[6]).When able, he helped his father and aunt, and volunteered with the Boys and Girls Clubs and Running Rebels. (R61:17[¶¶67-68].) Through most of 2009 and 2010, he was gainfully employed, but by September 2011, he was 40 years old, on public assistance, working odd jobs. (R1:1;R14:16-17[10-11].) He'd been living in an apartment in a two-story house near 60th and Congress with his two children aged about 5 and 7 (having permanent placement and shared custody with his former girlfriend of six years) and C.S. (R14:15-16[9-10];R61:17[¶65].)

Based on the use of initials, you can project this story does not end well for C. She was a survivor of physical and sexual abuse at an early age, who also became a drug addict and runaway, and suffered from PTSD and depression with psychotic features, which led to a series of hospitalizations

[1] Designations inside brackets represent internal page numbers.

and suicide attempts. (R61:13,14[¶¶49,53].) Like Bennett, she developed a criminal record, shorter but more violent. (R61:13-15[¶¶50-52,55].) She was ordered to anger management and a batterers program because of a pattern of domestic abuse that included falsely imprisoning and beating her disabled mother, who ultimately had to escape and be hospitalized with injuries including a broken nasal bone. (R61:13-14[¶¶52,54].) In 2007, CHIPS took her son away and he was later adopted. (R61:14-15[¶55];R14:10[4].) Her records show a pattern of lying to the police, including fabricating a burglary. (R61:15[¶55].) Her agent noted her uncontrollable temper. (Id.) When she moved in with Bennett, she was fresh from Taycheedah. (*See* CCAP, *State v. Santana*, Milwaukee County No. 04-CF-748.)

In 2010, Bennett obtained a restraining order against C., noting that she had attacked him and threatened to make false allegations against him. (R61:15[¶56].): C. began sleeping with Bennett's cousin. On September 12, 2011, C. reportedly told a neighbor that Bennett had been "beating her a lot lately" (nothing in the record suggests the neighbor made any observations to back up that statement) and that if she were to die, that Bennett would have been responsible (R1:1-2.)

That night, she did die, and Bennett was arrested.

Bennett readily admitted to police that he discovered that night C. had been unfaithful to him with his cousin. (R1:2.) She kept approaching him and he batted her away, which developed into a one-sided physical fight with her, during which he grabbed her throat and threw her around. (R1:2.) This occurred around 8;30 in the evening. (R1:2.) He

left to calm down, resting with his children in another room, then checked on her, at which point he thought she was faking a seizure. (R1:3.) (She had a documented seizure disorder which was not fully controlled by medication, R61:4[¶15],31[B2],37[C3];Appx.119. Within the prior month, she had suffered dizziness, vomiting and blurred vision. R72:14[2].)

He delivered his kids to their mother, Bennett's ex, around 3 a.m. (R1:3.) C. was by then unconscious, but not visibly distressed. (R1:3.) Bennett bought cocaine and immediately used it. (R1:3.) Sometime thereafter he found C. unresponsive. (R1:3.) He called 911 around 5:40 a.m. only after he realized that C. was dead and cold. (R1:3.) He also admitted that he knew he could not claim self defense. (R1:3.)

Bennett has attempted to make minor corrections or additions to this account but never varied from the essence of the confession.[2] He agrees that he criminally attacked C.

The police found the scene in reasonable order, with a spot of blood on one wall of the bedroom where C. died.[3] (R72:14[2].) The medical examiner found that she died as a result of the strangulation and head trauma.

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[2] For example, he did not originally tell police that at one point C. brandished a knife at him. (R61:13[¶57].) He knew this "drama" provided him no defense because he was not truly in peril. He also omitted his efforts to get his father to drive his children home, which he did not want to do while impaired. (R61:17[¶69].)

[3] C.'s injuries included a bloody nose and abrasions that broke the skin. It is reasonably (but not conclusively) inferred that the blood came from one of these injuries. The record did not indicate blood throughout the room, or in other rooms, damaged items or disturbed furniture such as to suggest a protracted conflict.

(R72:1;R61:44[D6]). The head trauma in particular resulted in subdural and subarachnoid hæmorrhages. (R72:3[1],18;R61:47[D9]). A private expert explained that the subdural component caused her death. (R72:21[¶6]). Essentially, broken blood vessels bled into her cranium, causing pressure to build on the brain until it stopped all flow of blood to the brain.[4] She suffered enuresis, vomiting, and eventual unconsciousness. (R61:4[¶17];Appx.119;R72:14[2].) Left without medical attention, the hæmorrhage was fatal. Apart from this, C. suffered abrasions and contusions but no broken bones ruptured organs or other great bodily harm. (R72:3,4,6,7,10[1,2,4,5,9]; R61:47,48,50,51,54[D9,10,12,13,16]).

Bennett, despite his confession, insisted from the outset that this "wasn't supposed to happen". (R1:3.) The presentencing interviewer believed that Bennett was "Extremely saddened by the victim's death" and that "Mr. Bennett cannot believe that he played a role in the death of Ms. S[]." (R14:10[4]; *see also* R39:17-18,20-21.)

For the first seven months of the case, it proceeded with the only significant events being the withdrawal of two of Defendant's attorneys (R5; R30; R33.) At all significant stages after the initial plea, Bennett's lawyer was Scott Anderson. (R34:1; R38:1; R39:1.) Anderson's disciplinary history included numerous citations for failing his criminal

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[4] *See* Dmitri Agmanolis, NEUROPATHOLOGY [online medical course], at http://neuropathology-web.org/chapter4/chapter4aSubdur-alepidural.html (explaining subdural bleeding); Medscape, "Subarachnoid Hemorrage" at http://emedicine.medscape.com/article/1164341-overview#a4 (explaining that high intracranial pressure negates blood pressure cutting off oxygen to the brain).

defendant clients. *OLR v. Anderson*, 2010 WI 39, ¶4 n.1, 324 Wis. 2d 627, 782 N.W.2d 100.

The state sought permission to use two 2010 misdemeanor domestic battery charges against Bennett as other acts evidence, and after briefing and argument, the court agreed. (R6; R9; R36.)[5] Bennett's last convictions had been in 2006 (90 days with Huber) and 2008 (a fine); some earlier offenses had been noted as domestic abuse-related; his longest prior confinement had been 30 months. (R14:11-12[5-6].)

From the outset Bennett was consumed with presenting a defense based on causation. (R72:20[¶2].) Anderson therefore asked an expert to reexamine the coroner's conclusions that Bennett had caused C.'s death. (R72:20-21[¶¶3,7].) When this was unavailing, he told Bennett he had no defense and effectively no choice but to take a plea. (R72:21[¶8]; R61:6[¶23];Appx.121.) Likewise, Anderson told the court that the case was never anticipated to ever be tried, and the plea was necessary because his export would not exculpate Bennett as the cause of death. (R39:20,22.) Bennett acquiesced. (R61:6[¶25];;Appx.121.)

A PSI was ordered. (R13.) At sentencing, the court relied on a combination of reliable facts, and what, without

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[5] C's medical history also included serious injuries in Spring 2011, including broken ribs and a ruptured lung, attributed to a seizure, and later less serious injuries attributed to a fall. (R72:14[2].) The court did not have or rely on this information at sentencing, and while they may appear suspicious, Bennett has not been accused of causing those injuries, which is why his response is not on the record.

attempting to color the facts, appear to be exaggeration, speculation and stereotypes. For example, the court gave hyperbolic descriptions of the victim's supposed deep cuts and "smashed' eye, that were at odds with the autopsy report. (*Compare* R39:27 *with* R724[2];R61:48[D10].) He opined on how C.'s death would emotionally impact her parents, who in fact had both predeceased her. (*Compare* R39:38 *with* R61:16[¶62],42[D4];Appx.131.) He also referred to the case as a "classic case…of domestic violence" speculating that C. lacked the "wherewithal to cooperate" with previous prosecutions of Bennett, and he might otherwise have been found guilty of prior domestic violence. (R39:27,29.)

The court sentenced Bennett to 45 years imprisonment (35 years initial confinement plus 10 years extended supervision). (R21:1;R39:39-40.)

Bennett's first appellate counsel found no merit for an appeal, but was unable to obtain the Court of Appeals' acceptance of a final no-merit report. (R25; R41; R44.)

Bennett filed a postconviction motion (R61) in which he sought to withdraw his plea, or in the alternative, reduce his sentence.

He contended, first, that his plea was not voluntary or intelligent and that his attorney was ineffective in advising the plea. (R61:2-8.) He contended that contrary to the advice he received, he could have pled not guilty, and potentially won, because some of the elements of the offense were not present. (R61:5-6[¶¶22-23].) Bennett has continuously contended that Santana's death was a shocking, unforeseen outcome from what he considered a relatively restrained use of physical

force. (R61:4[¶14]; R1:3;R14:10[4].) As such it did not meet the standards of criminal recklessness required to convict him. (R61:3[¶13].)

Furthermore, C. had a longstanding seizure disorder, which could have accounted for most of her symptoms as she was dying. (R61:4[¶¶15-17].) Bennett knew of the disorder, but was not an expert. (R61:5[¶18].) Under those circumstances it was not necessarily reckless that he did not seek help in time.

He also asked for a modification of his sentence, pointing out an array of about twenty-five factors that had not been considered, or were considered wrongly, by the court. (R61:8-19.) He noted that many of these additions or corrections were available to have been raised at the time of sentencing, but were overlooked, and argued that his counsel's failure to identify and raise these factors was ineffective. (R61:19-20.)

To summarize these factors in groups:

- The court exaggerated the offense, embroidering an unsupported narrative where C. begged for mercy and was beaten for hours, suffering cuts, a smashed eye, and countless defensive wounds, then lingered for hours in agonizing pain. In fact, the encounter was brief and left large parts of her untouched. She was scratched and bruised, and she was prone to easy bruising. The court accused Bennett of minimizing the offense when in truth his account was the accurate one. (R61:9-12[¶¶38-45].)

- The court portrayed Bennett as a stereotypical abuser and C. as a simple victim, when in fact, and unknown to the court, C. had a history of manipulating and abusing those weaker than her, and lying to police. She was a mentally unstable multi-substance abuser. She attacked Bennett and though that does not excuse his actions, it is a mitigator, since it entitled him by law to fight back, just not so hard. (R61:12-15[¶¶46-57].)

- C.'s infidelity was a mitigator, one of the longest recognized mitigators in Western jurisprudence. (R61:15[¶58].)

- C's drug use, mental illness, and history of lying to authorities (and her particular threat to falsely accuse Bennett) made her unconfontable accusations against Bennett unreliable. (R61:15,16[¶¶56,60].)

- The effects of the crime on C. and her family were exaggerated by the court; her life expectancy had been diminished by years of hard drug use, and her family members were mostly dead or in prison. Some had suffered violence at her hand. (R61:13-14,15,16[¶¶51, 52, 55, 61-62].)

- Bennett did some things right: he separated himself from C. while uncontrollably angry. He called a sober driver to take his kids when he was impaired. (R61:15-16,17[¶¶59,69].)

- Bennett had not faced severe punishment in the past that had failed to deter him; his record shows positive response to fairly

> lenient past sentences. Here he suffered a huge collateral loss: that of his partner, however dysfunctional their relationship. The court's guess that he would continue to be dangerous past 60 flies in the face of general studies and Bennett's particular facts. (R61:18-19[¶¶71-73].)

- Bennett was not the pure-evil monster the court depicted. He had family support. He helped his family and volunteered for charities. Even his ex-wife, who accused him of abuse, said his violence was a singular aberration, not a character trait. Removing him from the community exacerbates a host of neighborhood ills caused by mass incarceration. (R61:16-18[¶¶64-68,70].)

To assist Bennett in supporting his contentions, he asked for postconviction discovery. (R60.) In particular, he asked for C.'s private medical records, which were off limits to counsel without a court order, pertaining to: (1) prior head injuries; (2) blood-thinning agents or conditions; (3) psychiatric conditions; (4) life expectancy; and (5) next-of-kin data and other potential aids to further investigation. (R60:3.)

In support of these requests, Bennett not only explained what he hoped to find that would be material, but why such records would be material, why he suspected the existence of such beneficial records, and why he had no alternative sources for the same information. (R60:5-6.)

The court denied both the postconviction motion and discovery motion after briefing but without hearing or other action. (R79.) This appeal followed. (R82.)

ARGUMENT

I. The Circuit Court should have conducted a hearing on Bennett's claims to withdraw his plea.

When Darrick Bennett was arrested, he freely confessed because he understood that he should have been convicted and sent to prison – but for domestic battery, not homicide. If you look at the law, it turns out he was right all along, even if a succession of lawyers have failed to get it. He was entitled to have his position tested at trial but gave up that right because of bad legal advice. This court cannot give him the correct conviction or even allow him to withdraw his plea. All it can do is open the door for him to receive a fair hearing on his claims, and this it must do.

A. Standard of Review and Other Applicable Standards

1. Standard of Review; Hearing Requirement. A defendant may seek to withdraw a plea because of an insufficient colloquy by the court, a "*Bangert* motion," or because of factors outside the record that rendered the plea invalid, a "*Nelson/Bentley* motion." *See State v. Howell*, 2007 WI 75, ¶74, referencing *Nelson v. State*, 54 Wis.2d 489 (1972); *State v. Bentley*, 201 Wis. 2d 303 (1996). Defendant's claim was of the *Nelson/Bentley* type.

To obtain a hearing on such a motion, he was required only make allegations of "facts sufficient to entitle [him] to relief" *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568. If the allegations were not conclusory, and the record itself did not conclusively determine the outcome, a hearing was his right. *Id.* Otherwise, the court would have retained discretion to order one.

Hence this court uses a twofold standard. First, it must review the motion to determine whether it was sufficient to mandate a hearing. If not, then the court's denial of a hearing is reviewed for erroneous exercise of discretion.

2. Plea Withdrawal. After sentencing, a plea may be withdrawn where denying the withdrawal would work a manifest injustice. *State v. Booth*, 142 Wis. 2d 232, 235 (Ct. App. 1987). A showing that the plea was not knowingly, intelligently, and voluntarily entered satisfies this standard. *State v. Brown*, 2006 WI 100, ¶18, 293 Wis. 2d 594. So does a showing of ineffective assistance of counsel. *State v. Washington*, 176 Wis. 2d 205, 213-14 (Ct. App. 1993).

3. Ineffective Assistance, Ineffectiveness means Defendant suffered prejudice from some deficient action or omission of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984); *State v. Johnson*, 153 Wis. 2d 121, 127 (1990). Simple oversights, unsupported by strategic consideration, are deficient: the requisite level of performance requires deliberateness, caution, and circumspection. *State v. Felton*, 110 Wis. 2d 485, 502 (1983). A single mistake may make the entire representation deficient. *Murray v. Carrier*, 477 U.S. 478, 496 (1986). Moreover, deficiencies should not be examined only piecemeal, but also for their aggregate

prejudicial effect. *State v. Thiel*, 2003 WI 111, ¶59, 264 Wis. 2d 571.

Prejudice means there was a reasonable probability of a different result absent defense trial counsel's errors. *State v. Jenkins*, 2014 WI 59, ¶49, 355 Wis.2d 180,; *Strickland*, 466 U.S. at 694. Here "reasonable probability" does not mean "more likely than not." *State v. Dyess*, 124 Wis.2d 525, 544 (1985); *Strickland*, 466 U.S. at 693. A defendant fails to demonstrate prejudice if "it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Jenkins*, 2014 WI at ¶37.

B. Bennett's plea was invalid because he didn't know he had a defense.

1. Elements of the Offense. Reckless homicide, whether in the first or second degree, requires that a defendant engage in conduct which he *subjectively knows* to create an unreasonable and substantial risk of death or great bodily harm to another, and that conduct be a substantial factor in actually bringing about the death of another person; *See* Wis. Stats., §§940.06(1), 940.02(1) (reckless homicide); §939.24 (recklessness defined); *State v. Below*, 2011 WI App 64, ¶¶5, 6, 24, 333 Wis. 2d 690 (same, and substantial factor test). Great bodily harm means serious, protracted, disfiguring or life-threatening injury. Wis. Stats., §939.22(14).

The first degree version of the offense adds the element that the circumstances of that conduct evince an utter disregard for human life. §940.02(1); Wis. JI-Criminal 1020. *State v. Edmunds*, 229 Wis.2d 67, 75-77 (1999). Utter disregard homicide is the same as depraved indifference

homicide. *Id.*; *State v. Holtz*, 173 Wis. 2d 515, 519 n.2 (Ct. App. 1992). It implies action "so fraught with danger to the victim's life that to engage in it implies a constructive intent to maim or kill." *Id.*, 173 Wis. 2d at 520. Though the test for utter disregard is ultimately objective, it depends on the totality of the circumstances, *Edmunds*, 229 Wis.2d at 77; it has to do with mental state and may be shown by subjective state-of-mind evidence, *State v. Jensen*, 2000 WI 84, ¶17, 236 Wis. 2d 521.

2. Bennett's Possible Defenses. Because the elements of the offense include Bennett's subjective awareness of the jeopardy he posed to C., and a quasi-subjective consideration of his indifference to life, and because he did not have that subjective awareness at all, he was innocent.

One possible trial strategy was to come forward and tell the jury:

> Mr. Bennett was involved in a fight with C. He admits that. It was not an even fight. He was not in fear for his life. He was powerful and she was frail. He meant to hurt her and he did. He hit her again and again. She did not deserve it. He threw her back against some furniture and caused her to hit her head, hard, and if he had not, she would probably still be alive. It was a horrible thing to do, and a crime for which he should go to jail. He admits all of that. He's not hiding from the truth.
>
> This case is not about whether Mr. Bennett did a terrible thing and belongs in jail. He agrees to that. The question before this jury is whether he is beyond reasonable doubt guilty of *first degree reckless homicide*. The court will

> explain to you that to be guilty of this particular crime, Mr. Bennett had to realize in his own mind that he was subjecting C. to a real and present risk of death or great bodily harm, and to have shown a complete and utter disregard for whether she lived or died.
>
> But what the evidence will show is something entirely different. Mr. Bennett was angry. He assaulted this woman. But he left her hurt and crying on the bed but he had no idea that he had inflicted a critical injury. She had a slow bleed in her brain that no one could see. Sometimes these occur after a mild injury, sometimes they occur after no injury at all. Most often they occur after a serious injury to the head, but even then, in most cases they no not occur.
>
> This was a terrible misfortune. But Mr. Bennett had no understanding of such things. He had no way to guess this could happen. C's death is something he never wanted and he's having a hard time with the idea that he could have caused her untimely end.
>
> And that's why he asks you to find him guilty of the lesser included charge…

Such would be a strategy of truthfulness: Bennett would admit his real crimes of battery, likely even causing death, and fight only the charges that were untrue. For purposes of this court's analysis, it must presume that the jury would have heeded the instructions of the court and not acted out of prejudice. *State v. Truax*, 151 Wis.2d 354, 362, 444 N.W.2d 432, 436 (Ct.App.1989). Hence the jury would have focused on the elements, and applied a reasonable doubt standard.

Bennett might have prevailed. First, the state was required to prove Bennett's state of mind beyond a reasonable doubt, but "any inquiry into a person's state of mind…is an especially difficult determination to make." *State v. Jimmie R. R.*, 2000 WI App 5, ¶ 16, 232 Wis.2d 138, 606 N.W.2d 196.

There battery would have provided scant circumstantial evidence against Bennett, because he didn't crack C.'s skull but merely gave her a bump on the head. Force enough to leave fractures or deep lacerations would have shown a risk of great bodily harm, but here it was literally bruises, scrapes and scratches. This order of magnitude does not suggest the kind of force that a reasonable person would assume was potentially lethal.

Although his conduct after the fact *could* suggest disregard for C., it could equally well suggest dysfunctions like Bennett's fear of arrest, state of denial, or his stated belief that C. was faking a seizure, which was quite plausible. That he sought his children, and then drugs, to seek comfort and escape suggests hurt and confliction, not indifference..

3. Ineffective Waiver. A defendant has the fundamental right to decide whether to plead innocent or guilty. He has the right to make a good decision, or a bad one. It is one of the few decisions that must be exercised by the defendant and not his counsel. *Krueger v. State*, 84 Wis.2d 272, 281-82, 267 N.W.2d 602 (1978); *Brookhart v. Janis*, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966). After all, "He, not his attorney, has the benefit of being tried by his peers." *State v. Moore*, 97 Wis.2d 669, 672, 294 N.W.2d 551 (Ct. App. 1980). That right cannot be taken away because trial counsel or the court thinks he was induced to take what

anyone else considers the best option. If Bennett wants to withdraw his plea, he can.

Bennett does not need to show that his abandoned defense would have won at trial, or that his chances of winning were even close. All he needs to show is a chance significantly above zero, so that belief in there being zero chance was not being "reasonably informed" as to his options. *United States v. Bui*, 765 F.3d 363, 367 (3d Cir. 2015).

Even a very small possibility of success would have motivated him to fight here, because the benefits given him in his plea deal were not great. They ultimately resulted in him obtaining what is still likely a *de facto* life sentence. (R61:7[¶30];Appx.121;R39:40,41.) The only advantage of the plea was the possibility of living past his release date, which ended up uncertain at best. He might reasonably have thought that taking the matter to trial would give him better odds.

It should be obvious that a materially misinformed decision is not "voluntary, knowing and intelligent." As Judge Schudson noted in a partial concurrence in *State v. Jackson*, 229 Wis. 2d 328, 355, 600 N.W.2d 39 (Ct. App. 1999), had the defendant therein been misinformed that he had no right to counsel, "we would all easily conclude that Jackson's waiver of counsel was neither knowing nor voluntary" – a point the *Jackson* majority did not dispute. Here Bennett's rights surrendered by his plea included the right to present a defense. *See State v. Bartelt*, 112 Wis.2d 467, 476, 334 N.W.2d 91 (1983) (referring to failure to inform defendant of such right as a plea deficiency). Analogously to *Jackson*, it would obviously not have been a

valid waiver if Bennett had been told he had no right to present a defense.

What Bennett misunderstood was not *exactly* this, but something just as important: whether he *had* a defense which it was his right to present. The waiver of the trial right of presenting a defense was not voluntary or intelligent where he falsely believed that he had no defense to present. It is knowledge that a right exists that makes its abandonment "knowing" – it is an understanding of its application that makes its loss "intelligent." *See, e.g., U.S. v. LaBare*, 191 F.3d 60, 68 (1st Cir. 1999) ("intelligent" decision to waive counsel requires detailed understanding of function and advantages of counsel).

A valid guilty plea must be supported by defendant's "understanding of the law *in relation to the facts*." *McCarthy v. United States*, 394 U.S. 459, 466 (1969) (emphasis added). A defendant must know his conduct meets the elements of the offense. *Id*. at 467; *State v. Thomas*, 2000 WI 13, ¶ 21, 232 Wis.2d 714, 605 NW 2d 836. A defendant's understanding of the nature of the charge must "include an awareness of the essential elements of the crime," *Bangert*, 131 Wis. 2d at 267, and this is part of Defendant's ability to "realize that the conduct to which she pleads guilty does not fall within the offense" – something essential for an intelligent plea. *State v. Lackershire*, 2007 WI 74, ¶ 35, 301 Wis. 2d 418, 734 N.W.2d 23.

To have believed he had no defense necessarily meant that Bennett did not understand that under the law, he was innocent, because his conduct did not meet the elements of the crime to which he pled.

This is not just a question of intelligence, but also of voluntariness *proper*. What good is a trial when your lawyer does not acknowledge that you have *any* defense, and hence conveys he will present none, and you will lose? Under these circumstances, the choice is between no trial, and a trial with counsel who refuses to provide any defense.

C. Counsel was ineffective.

Because Bennett shows his pleas was not sufficiently knowing, intelligent or voluntary, he must be allowed to withdraw it irrespective of the role of counsel.

Alternatively, he may show counsel was ineffective, this led to the plea, and this constitutes a manifest injustice. *See Bentley,* 201 Wis. 2d at 311, *citing Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) (*Strickland* test applies to plea advice and prejudice prong tests whether "there is a reasonable probability that, but for counsel's errors, [defendant] would not have pleaded guilty and would have insisted on going to trial.") See also *Iowa v. Tovar*, 541 U.S. 77, 80-81 (2004); *State v. Fritz*, 212 Wis.2d 284, 293, (Ct. App. 1997); *State v. Ludwig*, 124 Wis.2d 600, 608-612 (1985).

Counsel's most fundamental obligation in advising the plea was to realize that Bennett had a defense, and then assess its viability. Counsel's duty was then to tell Bennett – if he so believed – that Bennett's prospects of winning a trial were dismal. *State v. Rock*, 92 Wis.2d 554, 562-64, 285 NW 2d 739 (1979), so that Bennett's choice would be informed.

Fundamental to our system is that all elements of a criminal charge must be proven beyond a reasonable doubt, that is, to a moral certitude, excluding all reasonable hypotheses of innocence. *State v. Johnson*, 11 Wis.2d 130, 135-36, 104 N.W.2d 379 (1960). As noted in his postconvction motion, Bennett was innocent of reckless homicide: the evidence supported battery, and perhaps felony murder, but the additional elements that would have elevated the charge beyond this were not provable because they were not true.

Bennett has not specifically alleged whether his lawyer didn't acquire a basic knowledge of the facts of the case, or did not properly apply the facts to the law, or whether he failed at the point of conveying the correct analysis to Bennett. It does not matter, because competent counsel is required to avoid all three failures. *Rock*, 92 Wis. 2d at 563, citing ABA Project on Standards for Criminal Justice Standards Relating To The Prosecution Function and The Defense Function, §5.1 (Approved Draft, 1971).

D. The circuit court failed to address Defendant's claims.

The court considered an argument different from that raised in the postconviction motion, and never rationally considered the claim Bennett was making.

First, although the circuit court did note that Bennett's claim was based on his actual conduct not satisfying "the element of recklessness." (R79:3;Appx105.) Nevertheless, the court ignored this claim entirely and incorrectly restated Bennett's overlooked defense as one going to the element of causation. (R79:4;Appx.106.) The court thence bizarrely

shifted to answering a claim never presented by the Defendant: whether counsel adequately sought to develop a defense that C.'s death was caused by a pre-existing injury, concluding that counsel was not deficient in this regard. (R79:5; Appx.107.)

Not surprising, since Defense had not raised this issue and had no interest in arguing it. Because the causation element here only required Bennett's actions to have been a "substantial factor" in C.'s death, *State v. Below*, 2011 WI App at ¶¶ 26–27. Bennett even acknowledged that this was probably the case. (R61:3[¶10],5[n.6];Appx.118,120.) He raised the issue of pre-existing injury because it made her ultimate plight less foreseeable, supporting Bennett's narrative that he did not attack C. with deadly force and was shocked to find she had died. The court seems to have been fixated on prior counsel's claims, rather than those presented for it to decide.

Because the court never addressed Defendant's actual claim, its ruling was manifestly defective. A proper judicial decision must "articulate the factors upon which it [is] based." *Trieschmann v. Trieschmann*, 178 Wis.2d 538, 542, 504 N.W.2d 433 (Ct. App. 1993). It must explain in non-conclusory terms why it found one party's position to be convincing and not another's. *Id.* at 542-44. This presupposes the issue be engaged at all. As one federal circuit has opined:

> Judicial opinions are the core work-product of judges.… they constitute the logical and analytical explanations of why a judge arrived a specific decision. They are tangible proof to the litigants that the judge actively wrestled with their claims and arguments and made a scholarly decision based on … reason and logic.

Bright v. Westmoreland County, 380 F.3d 729, 732 (3rd Cir. 2004). A decision without a display of independent logic "obscures the reasoning process of the judge,…deprives the court of the findings that facilitate intelligent review,….and causes the losing litigants to conclude that they did not receive a fair shake from the court." *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 313 (7th Cir. 1986).

Because the court erred so fundamentally in not addressing Bennett's claim at all, it seems anticlimactic to also point out that the court considered his plea withdrawal only under an ineffectiveness standard (R79:4-6; Appx. 106-08), and never made an assessment of whether the plea met standards of being intelligent or voluntary, or that the court never cited or attempted to apply the standards of *Nelson/Bentley* concerning whether a hearing was required by law. Nor did it ever acknowledge that it possessed discretion, ergo it did not apply it. Non-exercise of required discretion is of course reversible. *Barstad v. Frazier*, 118 Wis.2d 549, 554, 348 N.W.2d 479, 482 (1984)

II. The ciruit court should have heard Bennett's claims for sentence modification.

A. Standard of review

Whether a defendant's proffered facts constitute a new factor is a question of law this court reviews independently. *State v. Harbor*, 2011 WI 28, ¶¶ 25, 36, 333 Wis.2d 53, 797

N.W.2d 828. If they do, a defendant is entitled to a hearing in order to meet his burden of proving his claims by clear and convincing evidence. *See id.; Nelson, Bentley, supra*.[6] Whether to permit a hearing in absence of requisite pleading, or whether to modify a sentence upon showing of the new factor, are discretionary decisions. *Id.*

In this case, a different judge ruled on the postconviction motion than presided over the sentencing (*Compare* R39 *with* R79.) In such a case, no deference is owed to the circuit court's interpretation of orders or transcripts. *Compare, e.g., State v. McCallum*, 208 Wis.2d 463, 479-80, 561 N.W.2d 707 (1997) (deference on credibility issue with judge having observed in-court demeanor) *with Holder v. Welborn*, 60 F.3d 383, 388 (7th Cir. 1995) (no deference on *Batson* issue with new judge having only access to cold record).

B. The facts overlooked or mis-depicted by the court were highly important to the sentence.

A new factor is a set of facts, highly relevant to the sentence, that were overlooked at the time of sentencing. *Harbor*, 2011 at ¶52.

A court demonstrates its subjectively perceived importance attributed to facts by giving them explicit consideration on the record. *State v. Tiepelman,* 2006 WI 66 ¶ 14, 291 Wis.2d 179, 717 N.W.2d 1. When the court relies on inaccurate information, subsequent correction of that information can constitute a new factor. *State v. Norton*, 2001

[6] It appears that Wisconsin courts have applied *Nelson/Bentley* guidelines to modification motions, but that an explicit finding that this standard applies has evaded publication.

WI App 245, ¶ 13, 248 Wis. 2d 162, 635 N.W.2d 656. As noted in the Statement of Facts, Bennett alleged (and could have proven) that many of the statements made by the court in justifying the sentence it issued were simply wrong, or at best invite serious skepticism.

Of course, a new factor need not be such a correction. Certain factors are considered primary and generally require consideration. *Elias v. State*, 93 Wis. 2d 278, 284, 286 N.W.2d 559 (1980). A court may not give too much weight to one factor against a countering consideration. *State v. Steele*, 2001 WI App 160, ¶ 10, 246 Wis. 2d 744, 632 N.W.2d 112. The sentencing ideal is to have as much information as possible, particularly about the offender. *State v. J.E.B.*, 161 Wis.2d 655, 666, 469 N.W.2d 192 (Ct. App. 1991); *State v. Skaff*, 152 Wis.2d 48, 53 (Ct. App. 1989). There were areas where the court did not explicitly consider contrary facts, but where the facts discovered after sentencing nevertheless would be considered highly important.

The court spent a significant portion of its sentence explanation discussing the severity of the offense. Its account, however, veered into speculation of such flights of fancy as C. looking Bennett in the eye and pleading for mercy. Even though an expert report existed detailing C.'s injuries, the court relied on its lay impressions of photographs to assert that C. suffered gashing cuts and possibly hours of forceful blows, conclusions that were simply false, not consistent with the medical evidence. There were scratches and bruises, no cuts, no fractures, and a protracted beating was just not reconcilable with the evidence. While most victims of a serious brain injury suffer a terrible headache, it is quite

possible that the injury left C. increasingly insensate, as opposed to the "hours" of "agony" the court imagined.

On the other end of the spectrum, the court said nothing about Bennett's children, whom he treated well and protected, who will be harmed by his removal from their life, subjected to an imputed stigma, and subtly predisposed to a less positive future. Or about the organizations or individuals Bennett served in the community. There were no assertions by the court that he didn't ever do anything good in his life. Likewise there was no consideration of the C.'s history. But these considerations should have been highly important to the sentence, and they did jarringly conflict with the court's overall depiction of Bennett as a mere monster and C. as a mere victim. He had a good side; perhaps it was not his best side that was brought out when he chose to live with a fellow addict and serial abuser.

The court's one-sided depiction of Bennett was apparently a factor in the court's projection that he would remain an extremely dangerous person at age 60, along with the argument that his prior incarcerations had not altered his behavior. That again does not mesh with the facts. From 1990 to 2000, Bennett had six felonies, starting with a shooting. (R14:13[7].) In the next ten years, he had five misdemeanors, two of which were considered minor enough for him to be merely fined. (R14:12[6].) None of the confinements exceeded the maximum for an I Felony. Bennett's misbehavior had been sharply reduced, and he was mainly staying out of prison and working, but he remained in need of drug treatment. The record did not reflect the need for a *de facto* life sentence. The court gave no thought to the idea that

Bennett having now killed someone, and one he loved at that, might serve as a wake-up call.

It is important here to look at proposed new factors in the aggregate. Getting a single detail wrong may fail to rise to the point of a new factor, but repeated small errors can add up to a substantially different picture of events, and that is what happened here. It was not just that the court referred to a "gash" that was really a scratch or a "smashed eye" that was just a bad shiner. It was a complete re-envisioning of the offense as being far more brutal than it was, along with refusal to acknowledge any good that Bennett had ever done, or any evil that C. had ever done; ignoring Bennett's provocation and his loss, to go beyond reasonable inferences from the record into speculation of how C.'s parents were devastated by her loss, when they were gone; how she would have had 30-40 good years left, when she was suicidal and had spent years killing herself slowly with narcotics. The court gave complete credit to unproven allegations of abuse, despite C.'s documented paranoia, fabrication, and aggression. One detail off, two details off, eventually becomes a story that is unrecognizable as a whole.

C. The Circuit Court applied the wrong standards in denying Bennett's motion.

1. The court demanded more than a *prima face* case. The task of the circuit court in reviewing a postconviction motion is usually just to decide whether to order a hearing under *Nelson/Bentley*, not whether to grant final relief. Here the court did not even reference the correct standard. Instead it repeatedly referenced the "clear and convincing" standard for final relief after a hearing.

For example, it was "not persuaded that the defendant has established by clear and convincing evidence that a new factor exists." (R79:6;Appx.108.) Likewise, it opined that "defendant has not demonstrated" the court considered inaccurate information that defendant was minimizing his fault, (R79:9;Appx.111), and stated it was "not persuaded that the defendant has demonstrated" trial counsel's deficiency (R79:10;Appx.112). Of course, meeting this high standard is almost impossible absent an evidentiary hearing to present evidence, and is simply not required.

Under the proper standard, the court would have evaluated the sufficiency of allegations, not required the defendant to meet a burden of persuasion. If defendant had failed, the court would then have discretion to proceed to a hearing anyway, or take other measures. *See, e.g., State v. Harris*, 2012 WI App 79, ¶10, 343 Wis.2d 479, 819 N.W.2d 350 (noting with tacit approval that the circuit court ordered defendant to report how he would prove his allegations by identifying witnesses). Here the court gave no indication that it recognized its discretion to do other than reject the motion if the (incorrect) standard of clear and convincing evidence was not met.

In cases where the court is silent, it would usually be presumed to have applied the correct law. But its having referred repeatedly to wrong standards without ever mentioning the right one serves to overcome that presumpton in this case.

2. Shifting goalposts. Under *State v. Gallion*, 2004 WI 42, *passim* ¶¶3-6,8,24,28,38,40,46,49,50,51,56, a court is required to say what it means. Under *Tiepelman*, it is deemed

to mean what it says. There is no general rule that "hyperbole" is considered accurate as the court suggested. (R79:8;Appx.110.) The question is whether the expression conveyed an objective fact. *See State v. Saunders*, 196 Wis. 2d 45, 51, 538 N.W.2d 546 (Ct. App. 1995). If so, its correction may warrant relief, but a "single hyperbolic remark" amid a well-rationed sentence may be harmless. *State v. Carlson*, 2014 WI App 124, ¶ 38, 359 Wis.2d 123, 857 N.W.2d 446.

Here the Circuit Court denied Bennett postconviction relief by ignoring these rules, and not holding the court to what it said.

So for example, at sentencing, the court speculated that C. was beaten for "20 minutes or an hour or two hours" or "a long period of time." (R39:26,32.) It seemed important to the court before that the duration was long. This would have extended the period of maximum pain and fear that C. suffered, and every minute that Defendant did not stop would show him ever more heartlessly cruel and savage. The court even elaborated from thin air that C. would have looked Bennett in the eye over this protracted time and pleaded for him to stop. (R39:32.) What a bastard he would have been if any of that were true!

But on second viewing, the circuit court was unwilling to defend its prior estimate, and would subject to review only the tautological idea that C. was beaten for a duration "significant enough" to account for her injuries. (R79:8;Appx.110.) Or, "*possibly* a long time." (R79:13; Appx.115) (emphasis added). After all, the court

acknowledged at sentencing that it did not know exactly what the duration was.

But this is ridiculous because the court clearly had some idea in mind that was off by orders of magnitude. C.'s injuries could all have been inflicted in a couple of minutes. If the court tosses out an estimate or 1-2 hours for something that took 1-2 minutes, it should not be allowed to fall back on, "close enough; I didn't say I knew *exactly*." This is simply a case of what mattered to the court when it was assumed true suddenly losing significance when challenged, which is foul play.

The court seems to be doing that in other areas as well. At sentencing, it made various points about facts which seemed important to it at the time – that C.'s parents would suffer the incomparable pain of being predeceased by their child, for example. But when these facts turn out to have been completely wrong, they suddenly turn out never to have mattered in the first place. (R79:10;Appx.112.) Who knows what else in the record, if the Defendant had found evidence to contradict it, would turn out in hindsight to not have mattered? How can we tell that anything the court said was relied upon?

3. The Defendant's claim is based on reality, not what the court perceived. In its Decision and order, the Circuit Court emphasized that it (meaning the predecessor judge) had recognized it was not a medical expert and that Court's observations were based on injuries as they appeared in the crime scene photos.[7] (R79:8;Appx.110.) This would be a

[7] The court noted that its opinion was based not on autopsy photos but crime scene photos. (R79:7/) These photos (R18) do not appear

good response if Defendant had been arguing that the court was subjectively unreasonable. But hanging a lampshade on the court's lack of knowledge does not answer Defendant's claim that it used unreliable conclusions or bad facts that he has a right to correct. To protect the integrity of the sentencing process, the court must base its decision on reliable information. *State v. Mosley*, 201 Wis. 2d 36, 44 (Ct. App. 1996).

The Court said that the lesser degree of injury in fact did not mitigate the offense. (R79:8;Appx.110.) It was not intended as absolute mitigation, but to show that the sentencing court had unduly *aggravated* the offense based on bad assumptions.

Nor was the new factor directed at the court's subjective opinion that the crime produced relatively "unpleasant" imagery. (R79:7-8;Appx.110.) The fact that the victim, according to the actual expert, did not really suffer the gashes that the court perceived, or her eyes were intact, and perhaps never hit at all (R61:10[¶41];Appx.125), as opposed to "smashed in" the court considered not mitigating. What really matters, the court suggested, was that the pictures were ugly – not the worst ever, but "among the worst" the court had seen in "year and a half." (R39:26.)[8] Defendant

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substantially more graphic than those relied on by the Defendant (*e.g.*, R61:57-59[F-H].) Defendant's autopsy photos are a more rational basis for comparison because the court compared these photos to autopsy pictures from other cases. (R39:26.)

[8] There is no perfect way to assess how strong a point this is, but in all likelihood it means little. Judge Borowski was assigned to one of at least three dedicated homicide benches in Milwaukee County. First Judicial District, CHIEF JUDGE DIRECTIVE 11-05 (Apr. 19, 2011) at 2 (available at http://county.milwaukee.gov/ImageLibrary/

understood this was taken as a mere signifier of the actual material issue of medical severity, not a factor in itself. (If it were the latter, wouldn't that imply that badly beaten African Americans with dark complections would receive less justice because their skin tends to hide bruises better?)

4. Mitigation is not absolution. Another disturbing pattern in the circuit court's decision is an equivocation between mitigation, which calls for a guilty party to receive some lenity, and a perfect defense.

This comes into play when the court addressed arguments based on C.'s infidelity, which it noted "does not justify a death sentence." (R79:10;Appx.112.) Obviously true. But that is a straw man. The question before the court was whether Bennett's acting out in the immediate wake of learning of this intimate betrayal makes his conduct even marginally less sinister than had it been bloodlessly cold or triggered by some flyspeck. This was not the familiar trope of the hyperjealous beast who uses imagined infidelities to justify violence for its own sake; here is a man who already

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Groups/cntyCourts/documents/11-05JudicialRotation-Courtroo.pdf). Homicide rates and details can be found in the Milwaukee Homicide Review Commission, 2013 DATA REPORT (hereinafter REPORT) (available at http://city.milwaukee.gov/ImageLibrary/Groups/cityHRC/reports/2013AnnualReport-latest.pdf). In the 18 full months before sentencing, the City of Milwaukee had 135 homicides. (REPORT at 23.) Most were by gun; only 4% of those in 2012 were by bodily force. (Id. at 32.) The same is true of the last few years. *See* Milwaukee Journal Sentinel, MILWAUKEE HOMICIDES [database] (available at https://projects.jsonline.com/apps/Milwaukee-Homicide-Database/). Assuming high clearance for beating cases and few suburban homicides, a typical judge in Borowski's position would have seen about 1-2 beating cases, which are apt to produce worse-looking injuries than guns.

had some anger issues, trying to tamp down a temper when it suddenly is confirmed that his companion has been ushering his kids into the next room so she can have sex with his cousin. (R1:2)

The court responded the same way to Defendant's arguments that C.'s condition as a sadly broken person, a violent felon in her own right and a notorious liar with perceptual distortions whose unreliable accusations contributed to the court's views, might have some nuanced effect on the sentence. The court said, "no matter what the victim did in the past, she did not deserve to be beaten to death." (R79:10;Appx.112.) Of course not. But what about Defendant's actual arguments?

5. Potential "backfire." Bennett noted C.'s life history, criminal record, and mental condition for specific reasons: it was not simply a series of *ad hominems*. A court's duty is to consider victim-side information such as the impact on family members, which may include the victim's character. *Gallion*, 2004 WI at ¶¶65, 68. Where the court specifically relied upon factors like C.'s life expectancy, the grief of her parents, and other factors, Bennett was certainly in the right to point out contrary facts. Likewise, because the court relied on C.'s statements, Bennett could fairly challenge her credibility, based on her paranoia and past fabrications. Raising C.'s past violence against the community is fair because the community's loss is something the court is to consider. Her cuckolding of Bennett was a provocation that tends, among other things, to negate the court's view that Bennett is dangerous to any woman he might encounter, and not just those who very intimately and acutely hurt him. (R79:9;Appx.111.)

The court noted however that any reference to the victim's character or role in her own demise might have been "disastrous" for counsel to mention. (R79:11;Appx.113.) It would have been seen as "justification" of Bennett's conduct, as "minimization" of his role and undermining the "genuineness of his remorse." (R79:11;Appx.113.) Even to have suggested at postconviction that C. had legally invited injury upon herself was "insulting." (R79:10;Appx.112.)

With all due respect, a defendant should never have to fear presenting legally valid mitigation simply out of fear that the court would react in such an illogical and emotional manner. The circuit court, sitting here on the circumstance of C.'s death, had no duty to be solicitous of the victim's character and reputation. The court's duty, instead, was to "obtain the fullest information possible" on which to base its decision. *J.E.B.*, 161 Wis.2d at 666; *see also Gallion*, 2004 WI at ¶¶31,34,36,47,65. As noted above, the ideal in considering character is to take into account all aspects of an offender's life. *Skaff*, 152 Wis.2d at 53. His interaction with the victim is part of that, and is interwoven with her character and actions.

Nothing Bennett related concerning C. in his motion sought to justify his actions morally or legally, and in one case, he explicitly said so. (R61:15[¶57];Appx.130.) Nor does anything he claimed in his motion reflect minimization or a lack of remorse. Such conclusions are simply illogical. Minimization implies denial or rationalization, not correction of genuinely inaccurate information. Remorse means being sorry for what one has done, not how another perceives things. Alerting the court to its exaggeration or invention of aggravating facts has nothing to do with genuine remorse.

Even if it did, nothing can be learned about defendant's remorse from counsel's decision to raise sentencing arguments that may appear insensitive. Defendant *in pro per* simply has no say in that decision.

It is a simple matter of law that under the scenario presented in this case, Bennett was legally privileged to use some force against C. to prevent her unlawful bodily interference with his person. That is not "insulting" – or if it is, the insult came from the state legislature, when passing section 939.48 of the statutes.

At sentencing, nothing is more important to defense counsel than to be able to rely on the court's dispassionate assessment of the facts. The defendant has already been adjudged guilty, and this usually carries not just the general stigma of criminality, but responsibility for conduct that is genuinely reprehensible. Counsel must argue in shades of grey, that while nothing he can say will excuse the act, there will be factors that make defendant's conduct by degrees more evil or less. In taking up the cause of the despised, prejudice is a perpetual adversary. For many the natural reaction is that the perpetrator of a serious offense deserves no argument and no aid. Without the court's protection, he or she walks a minefield, trying to offer some mitigation without setting off irrational hatred in the defendant's direction. This the law cannot tolerate.

It is true that counsel is not ineffective for failing to make a meritless or a futile argument. *State v. Berggren*, 2009 WI App 82, ¶ 21, 320 Wis.2d 209, 769 N.W.2d 110. But Bennett's arguments were not meritless, and if they were futile only because the court would respond with something

like unconstitutional vindctiveness, then such futility merely shifts the error to the court. The circuit court essentially stated that it would have punished Bennett for raising these (mitigating) arguments. That is more, not less reason, to afford him relief.

III. The court should have ordered discovery.

A. Standard of review

A defendant such as Bennett who submits a motion for postconviction discovery and asks for *in camera* review (R60:3[¶¶11-12]) initially must make a preliminary showing that there exists "a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of [Bennett's postconviction claims] and is not merely cumulative to other evidence available to the defendant." *See State v. Green*, 2002 WI 68, ¶¶ 32-34, 253 Wis.2d 356, 646 N.W.2d 298; *State v. Robertson*, 2003 WI App 84, ¶ 22. 263 Wis. 2d 349, 661 N.W.2d 105.

In this determination, factual findings of the court are reviewed for clear error; the sufficiency of the preliminary showing is reviewed *de novo*. *Green*, 2002 WI at ¶ 20. The circuit court may allow cure of a technically deficient motion at its discretion. If the court has erred in denying in camera review, the court remands unless the error was harmless. *Id.*[9]

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[9] *Green* refers to the *defendant* having the burden of showing harmful error. *Id.*, ¶20, citing *State v. Ballos*, 230 Wis. 2d 495, 500, 602 N.W.2d 117 (Ct. App. 1999). The cited pinpoint is not supportive. *Ballos* notes that an error is harmless if "there is no

If *in camera* review had been granted, the circuit court would have inquired whether the evidence reviewed is "relevant to an issue of consequence." *Robertson*, 2003 WI App at ¶ 22; *State v. O'Brien*, 223 Wis.2d 303, 321, 588 N.W.2d 8 (1999). That did not happen in this case.

B. Bennett made a preliminary showing.

The facts Bennett asserted, supported with a selection of court and other documents, are sufficient under the *Shiffra-Green* standard. It was not speculative that her private medical and other records would show in greater detail and potentially to a more severe extent what the public documents showed.

First, C. seemingly experienced prior traumatic brain injury that left portions of the cerebrum stained yellow. (R60:5;R78:2.) Her medical records would likely boil this down to a certainty, and detail when the trauma occurred, and how severe it was. The records might include images that suggest intact but weakened blood vessels, brain atrophy, or other conditions making her more susceptible to intracranial bleeding from with less exciting cause. The records would include narrative accounts of how traumas occurred, negating the conclusion that any injury C. suffered must have come from the Defendant.

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reasonable possibility that the error contributed to the [outcome]." *Id.*, 230 Wis. 2d at 501 (quoting *State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222, 232 (1985)). *Dyess*, in turn, adopts the more traditional formulation that the burden of showing harm is on the state. *Id.*, 124 Wis. 2d at 43. To the extent Defendant bears any burden, it would be to show a "possibility" of an effect, no more.

Second, C. was observed to bruise easily, which is an effect of "thin" blood which can contribute to a hæmatoma. Her medical records could support this by supplying an etiology, such as the effects of medications or drugs.

Third, medical evaluations in the public domain show that C. had a long psychiatric history, PTSD, and disordered perception including psychotic features. They show she was anxious, had difficulty dealing with people, and was sometimes extremely aggressive, erratic, and violent. Her records could show whether it was known or likely that these traits persisted at the time of the incident,. They could be relevant to show that some of C.'s reports of abuse, including that to her neighbor on the night of her death, were paranoid or fabricated, or even part of a pattern of self-inflicted injury. They likely would support Bennett's account that she attacked him. The records may show particular patterns of C's behavior or cognitive functions that resonate with the events of that night.

Fourth, the records may include evidence regarding C's life expectancy, which the court thought important to estimate at 30-40 years. This would include ongoing suicidal tendencies, noncompliance with physicians' instructions, or life-shortening activities, as well as any actual reference to her prognosis for long-term survival of all her problems.

C. The circuit court relied on erroneous legal theories.

The circuit court made no factual findings and relied on a combination of theories that do not bear scrutiny. Although this court evaluates independently whether a

preliminary showing was made, defendant will briefly respond to the circuit court's analysis.

First, the court simply ignored any potential relevance of records sought except for those that might show a preexisting existing making C. more vulnerable to death by intracranial hæmatoma. Its decision was completely unsupported with respect to anything else Bennett asked for.

Second, the court refers to the doctrine of taking victims as they are found, known by various names, *e.g.*, the "eggshell skull" doctrine. *Stoleson v. United States*, 708 F.2d 1217, 1221 (7th Cir. 1983). The rule is that civil liability accrues for any damage that "legitimately flows directly from the negligent act, whether such damages might have been foreseen by the wrongdoer or not." *Koehler v. Waukesha Milk Co.*, 190 Wis. 52, 60, 208 N. W. 901 (1926); *see also Anderson v. Milwaukee* Ins., 161 Wis.2d 766, 769-70, 468 N.W.2d 766 (Ct. App. 1991); Wis JI–Civil 1720.

This doctrine has nothing to do with the element of criminal recklessness, which must be understood from the criminal statutes, not the common law of negligence. Even if some attempt were made to draw a lesson by analogy, the logical comparison would be between civil negligence and criminal negligence, not any degree of recklessness. Heedlessness of a transparent danger is the hallmark of recklessness.

The circuit court appears to argue that even if C's death was unforeseeable because it resulted in part from a hidden susceptibility to intracranial blood vessel rupture, the statute did not require *death* in particular to be foreseeable.

(R79:12.) The risk of other great bodily harm would suffice if it were substantial, unreasonable, and known. The state did not make this argument. The court raised it *sua sponte*.

The problem here is that the court appears to forget what argument Bennett is making. He is not arguing the evidence was insufficient for a jury to have convicted him. Rather, it would have been relevant to his *sentence*.

Insert yourself into the circuit court's thinking and ask, what difference would it make if medical records showed that C.'s death was an unforeseen consequence of actions that did not pose a clear and present risk of death, but rather some unspecified great bodily harm, a broken clavicle, say. Wouldn't that still make a difference? Isn't exposing someone to potential serious injury less heinous than exposing them to an equal risk of *death*?

Bennett's actions have been interpreted as more intense and vicious because their effect was so severe. It is natural to reason that if C. died, then absent some other explanation, the beating she endured must have been ferocious. The circuit court applied similar logic when it looked at photos of her injuries and reasoned that the beating must have been protracted – even though the actual injuries, ugly but limited as they are, do not evince an encounter anywhere near so long as the court opined. Consciously or not, the court likely considered C's death the same way, as evidence that the beating was more forceful and relentless than it really was. If C's death was facilitated by her being fragile in a way Bennett could not have anticipated, this would remove a basis for concluding he must have been extremely violent.

Likewise, the court opines that a hidden condition would not "negate a finding" that Bennett knowingly created a risk of death in particular. (R79:13.) There was no such finding to negate. But such a finding would have been false and not reliably based. The sought-after evidence may not have negated all possibility that Bennett created or knew such risk, but it would have eliminated one basis for thinking so. No more would be required to affect an "issue of consequence" to the sentence.

CONCLUSION

For the reasons stated above, this Court should remand for a hearing on whether to vacate the plea, or in the alternative, for the court to exercise discretion whether to conduct such a hearing. This court should also direct that if the plea is not withdrawn, a hearing be conducted on the motion for sentence modification, or in the alternative to consider modification based on new factors that are clear in the record. Finally, to the extent material to establish new factors, the court should remand for postconviction discovery of specified records.

Dated at Milwaukee, Wisconsin, October 6, 2017.

Respectfully Submitted

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APPENDIX

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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No.16-AP-2209-CR

DARRICK L. BENNETT,

Defendant-Appellant.

CERTIFICATION OF FORM AND 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 300 dots per inch, 13 point body text, 12 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The length of the brief is **10,089** words.

Respectfully Submitted,

_____

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CERTIFICATE OF MAILING

I hereby certify pursuant to Wisconsin Statutes (Rule) 809.80(4) that on the 6th day of October, 2017, I caused ten copies of the Brief and Appendix of Respondent-Appellant to be mailed by first class mail, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O.Box 1688, Madison, Wisconsin 53701-1688.

_____
GARY GRASS

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, if any, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format 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.

_____
GARY GRASS

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 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 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.

_____

GARY GRASS