STATE OF WISCONSIN

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

DISTRICT I

Case No. 2017AP000967-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GITAN MBUGUA,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in the Milwaukee County Circuit Court, the Honorable Janet Protasiewicz Presiding, and an Order Denying Postconviction Relief, the Honorable Michael J. Hanrahan Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Was Mr. Mbugua's first trial attorney ineffective as a matter of law for misinforming him that a conviction for false imprisonment, a plea to which was required in the initial plea offer, carried with it the possibility of sex offender registration?

The postconviction court did not conduct the analysis regarding deficiency of counsel, instead concluding that even if counsel was deficient, there was no prejudice because the sentencing court did not impose additional incarceration time permitted by the repeater enhancer.

2. Was Mr. Mbugua's second trial attorney ineffective for failing to inform him that the newly negotiated offer carried with it greater prison exposure than the State's previous offer?

The postconviction court concluded that successor counsel could not be held responsible for Mr. Mbugua's decision to reject the first plea offer due to misinformation provided by predecessor counsel, and also determined that even if he was deficient, there was no prejudice because the sentencing court did not impose additional incarceration time permitted by the repeater enhancer.

3. Was Mr. Mbugua prejudiced when, based upon his counsel's advice, he pled guilty to a Class F felony and a Class H felony as a repeater rather than pleas to a Class F felony and a different Class H felony without the repeater enhancers as contemplated by the original pretrial offer, even though the court ultimately imposed the maximum sentence of the original plea deal?

The circuit court held that there was no prejudice because the sentencing court did not impose the four additional years available due to the repeater enhancer.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

While this case involves the application of well-settled precedent to a set of facts, it also involves a unique question of what "prejudice" means in the context of a claim of ineffective assistance counsel in the plea negotiation process. Therefore, Mr. Mbugua requests publication of the decision in this matter and welcomes oral argument if the court would find it helpful.

STATEMENT OF FACTS

The Incident and Criminal Charges

On October 21, 2015, C.C.S., the longtime girlfriend of Mr. Mbugua, left his residence and was picked up by a friend near the home. (1). C.C.S. told her friend that Mr. Mbugua had physically assaulted her, and the friend drove her to the police station. (1). While at the police department, C.C.S. reported that she had gone to the home of Mr. Mbugua on the evening of October 19, 2015, to discuss the status of their relationship. (1). C.C.S. reported that during the conversation, Mr. Mbugua struck her repeatedly with his fist and then whipped her with a white cell phone cord. (1). C.C.S. told the police that after the assault, Mr. Mbugua asked her not to leave so that he would not get into trouble. (1). She explained that she stayed at the home for the following two days, eventually leaving on October 21, 2015. (1). The police encouraged C.C.S. to go to the hospital, and

her injuries were documented by medical report and photographs. (1).

Mr. Mbugua was arrested and charged in Milwaukee County Case Number 15CF4647. (1). The complaint contained two counts: (1) first degree recklessly endangering Safety as a repeater, domestic abuse assessment; and (2) false imprisonment as a repeater, domestic abuse assessment. (1:1-2).

Pre-Trial Offer #1

On December 14, 2015, a written pre-trial offer was extended by Assistant District Attorney Sarra M. Kiaie. (18:14-15). The offer contained two options:

> 1. Plea "guilty" to both counts as charged, with the repeater enhancers, with the State agreeing to take no position on the sentence, leaving it up to the court; or
>
> 2. Plea "guilty" to both counts, striking the repeater enhancer with both parties free to argue at sentencing.

(18:14-15).

The offer also contained notice that if Mr. Mbugua did not accept the offers and proceeded to trial, the State would not only revoke the agreement, but would possibly add multiple charges, potentially including attempted first-degree intentional homicide, first-degree reckless injury or aggravated battery, noting that a dangerous weapon enhancer could also be added. (18:14-15).

In his postconviction motion, Mr. Mbugua alleged that his first trial attorney, Attorney Cheryl Ward, discussed the two alternative offers while he was incarcerated and also

spoke to him about a potential proposal that she suggested that would involve a plea to a Class E felony (possibly aggravated battery with intent to cause great bodily harm). (18:2-3). As alleged in the postconviction pleadings, during the discussion of the plea agreements, Attorney Ward told Mr. Mbugua that a conviction for the charged false imprisonment offense carried the potential for sex offender registration. (18:2-3). Mr. Mbugua was adamantly opposed to any plea that would expose him to the possibility of sex offender registration. (18:3).

At a hearing on January 14, 2016, in response to the trial court's inquiry, the State confirmed that it had extended a plea offer to Mr. Mbugua, and outlined its offer letter for the court. (33:2-3). The court asked Mr. Mbugua if he had discussed the case with his attorney and whether he was going to accept either of the proposals outlined in the written plea offer. (33:6). Mr. Mbugua confirmed with the court that he had discussed the offer briefly with his attorney. (33:6-7). The court then briefly adjourned so that Mr. Mbugua and trial counsel could discuss the plea offer further. (33:7).

When the court resumed, counsel explained that Mr. Mbugua would not be accepting the offer. (33:8). The court did not inquire with the parties why Mr. Mbugua turned down the negotiated plea, and neither Mr. Mbugua or Attorney Ward offered any additional information. The case remained on for trial the following week, but was ultimately adjourned on the next court date at the State's request due to the unavailability of a witness.

On February 22, 2016, trial counsel moved to withdraw. Attorney Ward informed the court that there was "a breakdown" in the attorney-client relationship that created a potential conflict. (35:2-3). The court granted trial counsel's

request to withdraw and the matter was set over for appointment of successor counsel. (35:3).

In his postconviction motion, Mr. Mbugua alleged that his rejection of the pretrial offer obtained during Attorney Ward's representation was due primarily to her misrepresentations that a conviction for false imprisonment could result in sex offender registration. (18). Mr. Mbugua asserted that, but for the inaccurate information from Attorney Ward regarding sex offender registration, he would have accepted the second alternative in the original pretrial offer. (18).

Pre-Trial Offer #2

Attorney Matt Ricci was appointed by the State Public Defender as successor counsel, and made his first appearance on Mr. Mbugua's case on March 7, 2016. At the hearing, Attorney Ricci informed the court he had not yet met with Mr. Mbugua to discuss the case. (35:2). The matter was set for trial. At some point before the trial was set to occur, the State extended a different pretrial offer to Mr. Mbugua. A note from Attorney Ricci's file which appears to be drafted by a representative of the District Attorney's Office handling the matter outlined the new pretrial offer. (18:16). The unsigned, typed note read:

> As far as the plea offer is concerned, I am willing to make some adjustments. In exchange for a plea to 1st Degree RES § 941.30(1) and Aggravated Battery §940.19(4), I would strike the habitual repeater only on the 1st Degree RES charge (leaving the habitual repeater with the Aggravated Battery charge). Both parties would be free to argue with respect to sentencing.
>
> I also want to confirm that you received all discovery materials from prior counsel. This would include my

> offer letter that outlines the additional charges I would intend to try should this matter proceed on that route…

(18:16).

Notably, under the original pretrial offer, Mr. Mbugua would have had the following maximum exposure:

> First Degree Recklessly Endangering Safety, Class F Felony: 7.5 years initial confinement, 5 years extended supervision
>
> False Imprisonment, Class H Felony: 3 years initial confinement, 3 years extended supervision

The new pretrial offer to Attorney Ricci carried four years greater exposure than one of the two plea options offered by the State in its original December 14, 2015 offer letter. (18:14-16). Specifically, Mr. Mbugua faced the following amount of imprisonment under the new offer:

> First Degree Recklessly Endangering Safety, Class F Felony: 7.5 years initial confinement, 5 years extended supervision
>
> Aggravated Battery, *Repeater*, Class H Felony: *7 years initial confinement*, 3 years extended supervision

In his postconviction motion, Mr. Mbugua alleged that he did not know at the time he accepted the plea agreement that he was facing significantly greater exposure than that posed by the second option of the original pretrial offer. (18:4). Furthermore, Mr. Mbugua's inaccurate belief due to the misinformation he received from his first trial attorney regarding sex offender registration under the original plea offer was never corrected by successor counsel. (18:2-4). At the time he entered the plea, Mr. Mbugua still believed that a conviction for false imprisonment exposed him to potential

sex offender registration. Mr. Mbugua alleged in his pleading that, had he known at the time of the plea hearing that the false imprisonment charge would not subject him to sex offender registration and that the original plea deal including that charge subjected him to four fewer years of initial confinement, he would have chosen to enter a plea to option two of the original offer over the new plea offer. (18).

Plea Hearing

On May 12, 2016, Mr. Mbugua appeared in court and entered guilty pleas to an amended information which reflected the second plea offer. (37). Specifically, Mr. Mbugua entered pleas to the following two charges:

> Count 1: First Degree Recklessly Endangering Safety, Class F Felony: 7.5 years initial confinement, 5 years extended supervision
>
> Count 2: Aggravated Battery, Repeater, Class H Felony: 7 years initial confinement, 3 years extended supervision

(9; 37). Both counts included the domestic abuse assessment. (11). During the plea colloquy, the court properly told Mr. Mbugua the maximum possible penalties, which reflected that Count 2 was, in fact, a Class H felony with a repeater enhancer, and Mr. Mbugua acknowledged that he understood the maximum possible penalties. (37:3-5). The court ultimately accepted Mr. Mbugua's guilty pleas and the matter was set over for sentencing.

Sentencing Hearing

On June 7, 2016, the Honorable Janet Protasiewicz sentenced Mr. Mbugua to the maximum imprisonment on Count 1, first-degree recklessly endangering safety – seven-and-a-half years initial confinement and five years extended

supervision, consecutive to a revocation sentence he was serving. (14). On Count 2, aggravated battery as a repeater, Mr. Mbugua received three years initial confinement and three years extended supervision, consecutive to Count 1 and to his revocation sentence. (14). Thus, on both counts, Mr. Mbugua received a total sentence of ten-and-a-half years initial confinement and eight years extended supervision. (14).

Postconviction Proceedings

Mr. Mbugua filed a postconviction motion alleging ineffective assistance of counsel in the plea negotiation process on February 7, 2017. (18). A briefing schedule was ordered and both parties submitted pleadings in accordance with the timeline set by the court. (18, 20, 23, 24).

On May 10, 2017, the postconviction court, the Honorable Michael Hanrahan, denied Mr. Mbugua's motion for postconviction relief by written order and without a hearing. (25). First, the postconviction court addressed the claim that Attorney Ward was ineffective in the plea negotiation process and that Mr. Mbugua was prejudiced as a result. The court opined that even if Attorney Ward was deficient, Mr. Mbugua did not established prejudice in his postconviction motion. The court wrote:

> First, the plea offer the defendant accepted did not carry a sex offender reporting requirement – something he was adamantly opposed to when discussing the initial plea offer with Attorney Ward. Although the defendant now states that he would have entered a guilty plea to a false imprisonment charge, the defendant, through his attorney, questioned the factual basis for that charge in light of the victim's statements at the revocation hearing. The defendant has made no admission to facts that would have supported a conviction for false

> imprisonment. But more importantly, even though a conviction for false imprisonment without the enhancer would have carried four years less maximum incarceration exposure than the defendant faced…, the court did not use any of the penalty enhancer time in sentencing the defendant for battery.

(25:6). The court concluded that, "while a lesser sentence was possible, the defendant cannot base his ineffective assistance of counsel claim upon speculation about the sentence he would have received." (25:7).

Regarding Mr. Mbugua's claim that Attorney Ricci was deficient in the plea negotiation process, the postconviction court held that there has been no showing that the original offer would have been available to Mr. Mbugua at the time he ultimately entered his plea. (25:7). Further, the court concluded that even if the offer was available and that Attorney Ricci had an ethical duty as counsel to inform Mr. Mbugua that the new offer exposed him to four additional years of incarceration, there again was no prejudice "because the sentence he received did not exceed the maximum sentence that could have been imposed under option two of the initial plea offer." (25:7).

The postconviction further held that there was no reason to believe the sentence would have been any different had Mr. Mbugua entered a plea to option two of the original offer. (25:8). The court wrote:

> [Mr. Mbugua] theorizes that the sentencing court might have imposed less than the maximum sentence for the offenses under the initial plea offer, since it imposed less than the maximum sentence for the offenses under the second plea offer. This kind of speculation may be the fodder for academic discussion, but it does not present a

> valid legal basis for granting the defendant a "do over" so that he can put his theory to the test.

(25:8).

ARGUMENT

I. Mr. Mbugua received ineffective assistance of counsel during the plea bargaining process when he was given inaccurate information regarding sex offender registration and the maximum exposure he faced, and therefore, he should be allowed to withdraw his plea and take advantage of the original plea offered by the State.

Both Attorney Ward and Attorney Ricci failed in their ethical duties to properly inform Mr. Mbugua of the details of all plea offers extended to him by the State. Had Mr. Mbugua received accurate information about the plea options presented to him, he would have accepted option two of the original plea offer. Further, counsels' failures caused substantial prejudice, as the resulting conviction exposed Mr. Mbugua to significantly more imprisonment (four additional years of confinement). For these reasons, Mr. Mbugua should be allowed to withdraw his plea and enter a plea to option two of the original pretrial offer.

A. A criminal defendant has a constitutional right to effective assistance of counsel in the plea bargaining process.

The right of a criminal defendant to the effective assistance of counsel extends to the plea bargaining process. ***Lafler v. Cooper***, 566 U.S. 156 (2012); citing ***Missouri v. Frye***, 566 U.S. 133 (2012); ***Padilla* v. *Kentucky***, 559 U.S. 356 (2010); ***Hill v. Lockhart***, 474 U.S. 52, 57 (1985).

Further, defendants are "entitled to the effective assistance of competent counsel" during the negotiation process. ***McMann v. Richardson***, 397 U.S. 759, 771 (1970). In ***State v. Frey***, the Wisconsin Supreme Court described the responsibilities of effective legal counsel during the plea negotiation stage:

> Defense counsel have many responsibilities in plea bargaining, including researching the factual basis for the offenses charged, discussing the possible penalties the defendant faces if he does not accept a plea offer, seeking to reduce a defendant's exposure to prison, discussing a defendant's chances of success in a trial, and discussing the implications of a plea offer—including the impact that read-in offenses might have as well as the effect of dismissed charges.

Frey, 2012 WI 99, ¶ 60, 343 Wis. 2d 358, 380–81, 817 N.W.2d 436, 447.

When a claim of ineffective assistance of counsel is intertwined with a request for plea withdrawal, a defendant must make a *prima facie* case of ineffective assistance of counsel. ***State v. Wesley***, 2009 WI App 118, ¶ 23, 321 Wis. 2d, 151, 772 N.W.2d 232. When determining whether counsel was ineffective for failing to properly advise a client of a plea bargain, the two-part test set forth in ***Strickland v. Washington*** is applied. *See* ***Hill v. Lockhart***, 474 U.S. at 58; ***Lafler***, 566 U.S. at 162-163; ***Frye***, 566 U.S. at 140-141; ***Strickland***, 466 U.S. 668, 687 (1984). The ***Strickland*** test requires that a defendant show: (1) counsel's performance was deficient; and (2) counsel's errors or omissions prejudiced the defendant. ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997).

In order to satisfy the "prejudice" prong of the ***Strickland*** test, there must be 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." ***Smith***, 207 Wis. 2d at 276 (citing ***Strickland***, 466 U.S. at 694).

To establish "prejudice" in a plea withdrawal case, a defendant must establish that: (1) he would have accepted the favorable plea offer had he received effective assistance of counsel, (2) the plea would have been entered without the prosecution cancelling the offer or the trial court refusing to accept it, and (3) under the original offer, the terms of the resulting conviction or sentence or both would have been less severe than that which was ultimately imposed. ***Lafler***, 566 U.S. at 164.

B. Attorney Cheryl Ward provided deficient representation to Mr. Mbugua because she inaccurately advised him that a conviction for false imprisonment exposed him to sex offender registration.

Attorney Ward provided deficient legal representation when she misadvised Mr. Mbugua of the collateral consequences of a conviction for false imprisonment as contemplated by the original plea deal offered by the State. As asserted by Mr. Mbugua in his pleadings, had he received accurate information about the plea options presented to him – specifically that sex offender registration[1] could not have

[1] Generally, failure of trial counsel to inform a defendant of collateral consequences of a plea (i.e., sex offender registration) is insufficient to sustain a claim of ineffective assistance of counsel. ***State v. Bollig***, 2000 WI 6, 232 Wis. 2d 561, 605 N.W.2d 199. This case, however, poses a different legal question. Here, Mr. Mbugua alleges that Attorney Ward was ineffective for giving clearly incorrect legal advice (continued)

been imposed for the false imprisonment as charged in his case – he would have accepted the second alternative in the original plea offer.

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about the collateral consequences posed by a conviction for false imprisonment. Wisconsin courts have held under similar circumstances that affirmative incorrect advice about a collateral consequence of a conviction can deem an otherwise legally sufficient plea not knowing and voluntary. See ***State v. Woods***, 173 Wis.2d 129, 496 N.W.2d 144 (Ct. App. 1992); ***State v. Riekkoff***, 112 Wis. 2d 119, 332 N.W.2d 744 (1983).

In ***State v. Woods***, the Wisconsin Court of Appeals permitted Mr. Woods to withdraw his plea after he had established that he had ineffective legal representation during the plea and sentencing process. While sentence structure is typically a collateral consequence the court need not inform a defendant about during the plea process, because Mr. Woods was unaware that his attorney had negotiated an illegally consecutive sentence recommendation, the court of appeals held that Mr. Woods' guilty plea under those terms was not knowing or voluntary and therefore, plea withdrawal was the appropriate remedy. ***Id.*** at 139-140.

In ***Riekkoff***, the defendant entered a plea with the unchallenged and incorrect belief that he would be entitled to appellate review of the court's refusal to allow Mr. Riekkoff's proposed expert testimony at trial. ***Riekkoff***, 112 Wis. 2d at 121-122. The guilty-plea-waiver-rule, a collateral consequence of conviction following plea, prohibits this type of appellate review. The Wisconsin Supreme Court concluded that Mr. Riekkoff's plea was neither knowing nor voluntary because he was led to believe based on his attorney's inaccurate advice that he would retain the right for appellate review of the decision on his expert. ***Id.*** at 128.

While Mr. Mbugua's claim involves a dispute about a proper understanding of the collateral consequences of a plea deal, like the defendants in ***Riekkoff*** and ***Woods***, Mr. Mbugua's misunderstanding and decision on a plea deal was directly related to inaccurate information provided by trial counsel. Therefore, Mr. Mbugua retains the right to challenge his plea based on ineffective assistance of counsel.

Mr. Mbugua acknowledges that Attorney Ward briefly reviewed with him the original plea offer letter extended by the State. (18, 33). He did not personally receive a copy of the offer letter from the district attorney's office, but rather discussed it with Attorney Ward during a jail visit and in court. (18). During those discussions, as Mr. Mbugua alleged in his postconviction motion, Attorney Ward told him that a plea to the false imprisonment charge as charged in Count 2 of the criminal complaint exposed him to potential sex offender registration. This advice was legally incorrect and affected his decision-making in the plea negotiations throughout the remainder of the proceedings.

A conviction for false imprisonment, codified in Wis. Stat. § 940.30, does not mandate that the offender register as a sex offender. See Wis. Stat. § 301.45(1d)(b) (2015-16). Instead, a conviction under Wis. Stat. § 940.30 invokes a registration requirement only when the victim is "a minor and the person who committed the violation was not the victim's parent." Wis. Stat. § 301.45(1d)(b) and (1g) (2015-16). That requirement was not met here, as there is no allegation that C.C.S. was a minor. In addition, as there is no allegation that Mr. Mbugua's underlying conduct was sexually motivated, the discretionary sex offender registration provisions of Wis. Stat. § 973.048(1m)(a) are also inapplicable,

Had Attorney Ward not provided inaccurate legal advice regarding sex offender registration reporting requirements, he would have chosen option two of the original plea offer, which was more favorable in terms of potential prison exposure. (18). Therefore, Attorney Ward was deficient and the first prong of the ***Strickland*** test has been satisfied.

C. Attorney Matt Ricci was deficient in his representation of Mr. Mbugua, as he did not explain that option two of the original plea offer provided for significantly less exposure than the new offer he negotiated for his client.

The offer negotiated by Attorney Ricci was objectively less favorable than that which was initially offered by the State. (18:14-16). Under option two of the original pre-trial offer, Mr. Mbugua would have faced a total of ten-and-a-half years initial confinement and eight years extended supervision, which was four years less confinement than the offer negotiated by Attorney Ricci. Wis. Stat. §§ 940.30, 940.19(4) and 939.50(3). As Mr. Mbugua articulated in his postconviction motion, he was unaware that option two of the initial plea offer exposed him to less time than the subsequent plea offer presented by Attorney Ricci. (18). Mr. Mbugua argued in his motion that, had he been aware of this fact, along with the fact that sex offender registration would not have been possible under the original plea offer, he would have accepted option two of the original offer. Attorney Ricci was therefore deficient for failing to communicate this information to Mr. Mbugua, so that he could make an accurately informed choice about all of the plea offers before him. See ***Strickland*** at 687.

D. Mr. Mbugua was prejudiced by the deficient performance of his trial attorneys during the plea negotiation process because upon the advice of counsel, he entered a plea to a Class F felony and a Class H felony as a repeater rather than a plea to a Class F felony and a different Class H felony without the repeater as contemplated by the original pretrial offer, and as a result, the terms of his ultimate criminal

> conviction were more serious than those contemplated in the initial offer.

To establish that he was prejudiced by his attorneys' deficient performance in a case involving ineffective assistance of counsel during the plea negotiation process, Mr. Mbugua must establish the following:

> (1) He would have accepted the favorable plea offer had he received the effective assistance of counsel;
>
> (2) The plea would have been entered without the prosecution cancelling the offer or the trial court refusing to accept it; and
>
> (3) Under the original offer, the terms of the resulting conviction or sentence or both would have been less severe than that which was ultimately imposed.

Lafler, 566 U.S. at 164. Mr. Mbugua did so in his postconviction motion.

> 1. Mr. Mbugua would have accepted the more favorable plea offer had he received effective assistance of counsel from either Attorney Ward or Attorney Ricci.

Contrary to the postconviction court's assessment, the record does not establish that Mr. Mbugua would not have accepted the more favorable plea agreement which included a plea to false imprisonment had he had a proper understanding of the consequences of the original plea deal. While there were references during the sentencing hearing by Attorney Ricci regarding C.C.S's revocation hearing testimony that there were times over the two-day period during which Mr. Mbugua left her at the residence alone and with telephone

access, this is not inconsistent with the claim that Mr. Mbugua would have accepted the more favorable plea agreement had he known that conviction for the false imprisonment offense in his case would not have subjected him to sex offender registration. (37, 38).

Based on Attorney Ward's misadvice, both at the time he rejected the initial plea agreement and when he ultimately resolved his case, Mr. Mbugua erroneously believed that a conviction for the crime of false imprisonment could result in a requirement for sex offender registration. As Mr. Mbugua alleged in his postconviction motion, he would have accepted the original plea offer had it not been for Attorney Ward's incorrect advice. A hearing was necessary to determine whether this claim is credible and the court cannot conclude without hearing that it is not. See ***State v. Love***, 2005 WI 116, 284 Wis. 2d 111, 700 N.W.2d 62 (citing ***Honeycrest Farms, Inc. v. A.O. Smith Corp.***, 169 Wis. 2d 596, 604, 486 N.W.2d 539 (Ct. App. 1992)). For these reasons, Mr. Mbugua has satisfied the first prong of the prejudice analysis.

2. Mr. Mbugua would have been permitted to enter a plea under option two of the original plea agreement without the prosecution cancelling the offer or the trial court refusing to accept it.

There is no reason to believe that Mr. Mbugua could not have taken advantage of option two of the original plea offer during Attorney Ward's representation. That offer was made in writing, Mr. Mbugua had not committed any new offenses that would have led the State to rescind the offer and the State represented in court on January 14, 2016 that the plea was still an available option. The second prong of the

analysis has therefore been satisfied as it relates to the time period Attorney Ward was appointed on the case.

Regarding Attorney Ricci's representation, the postconviction court improperly concluded in the face of evidence to the contrary that the original pretrial offer had been withdrawn and not extended again as available to Mr. Mbugua. (25). Mr. Mbugua does not dispute that at the January 14, 2016 hearing, the final pretrial before his first trial date, upon hearing that Mr. Mbugua was pursuing trial the following week and declining to accept the offers at that time, the State told the court on the record that the offer was revoked. (33). However, Mr. Mbugua contends that the offers were reinstated by the State. (18, 24).

As presented in both the postconviction motion and the Mr. Mbugua's reply brief, the State had given Attorney Ricci a typewritten note that read:

> As far as the plea offer is concerned, I am willing to make some adjustments. In exchange for a plea to 1st Degree RES § 941.30(1) and Aggravated Battery §940.19(4), I would strike the habitual repeater only on the 1st Degree RES charge (leaving the habitual repeater with the Aggravated Battery charge). Both parties would be free to argue with respect to sentencing.
>
> I also want to confirm that you received all discovery materials from prior counsel. This would include my offer letter that outlines the additional charges I would intend to try should this matter proceed on that route…

(18:16). While the postconviction court seemed to question the authenticity or origin of the letter in footnote three of its decision (25), the State did not dispute that this was a note from the prosecutor on the case in its response to the postconviction motion. (23).

Ultimately, both the State and postconviction court concluded that because the note made "no reference" to the original offer, that Mr. Mbugua had not made a showing the deal had in fact been extended again prior to his entry of the plea. Mr. Mbugua disagrees with this conclusion. Notably, the State never asserted in its response to the postconviction motion that the plea offer had not been reinstated, nor did the State assert that it would not have accepted a plea under the terms of the original agreement. (23). Instead, the State argued simply that Mr. Mbugua had "not established that either of those options were (sic) still viable after they had been affirmatively revoked." (23:10).

In his postconviction pleadings, Mr. Mbugua asserted that the original plea offer was available to him at the time he resolved his case. (18). In addition to his written assertion in the motion, there was additional support for his claim found in the typed note from the prosecutor. (18:16). Mr. Mbugua alleged the following in his reply brief:

> The State claims that the only reference to the prior offer is the statement that additional charges may be filed if Mr. Mbugua proceeds to trial. What the State ignores is the opening sentence of its written offer. It says, "As far as the plea offer is concerned, I am willing to make some adjustments." If one is to make "adjustments," it stands for the proposition that there is something that is already in existence…If there was no other offer that was being referenced by the State, that line would make no sense. Furthermore, the State has not pointed to a third pretrial offer that was being changed or adjusted…Therefore, contrary to the State's response, the record shows the offer was still available and that it was adjusted at the request of Attorney Ricci…

(24).

If the postconviction court questioned Mr. Mbugua's claim that the original pretrial offer had been reinstated, the appropriate course of action would have been to hold a hearing in which the parties involved in the negotiation – the prosecutor, Attorney Ricci and Mr. Mbugua – would testify regarding the status of the original offer at the time of the plea.[2] The postconviction court, however, denied the motion without a hearing. Therefore, based on the record as it exists and without any factual challenge by the State, Mr. Mbugua has established that the original plea offer was available at the time of the plea and the second prong has been satisfied.

3. Under option two of the original offer, the terms of the resulting conviction (and likely the sentence) would have been less severe than that which was ultimately imposed.

While Mr. Mbugua acknowledges it is unknown whether the trial court would have imposed a less severe sentence had he accepted the original plea offer, his conviction and maximum exposure was indisputably more severe under the plea deal he accepted. It is undisputed that the total prison exposure Mr. Mbugua faced under the plea agreement he ultimately accepted was substantially greater than he faced under the original offer. While both the false imprisonment and aggravated battery charges were Class H felonies, under the plea offer, Mr. Mbugua entered a plea to the aggravated battery Class H felony with a repeater enhancer, which added four additional years of confinement exposure, while the original plea offer would have dismissed

[2] Credibility determinations are generally resolved by live testimony. ***Love***, 2005 WI 116, citing ***Honeycrest Farms, Inc. v. A.O. Smith Corp.***, 169 Wis. 2d 596.

the repeater enhancer. The postconviction court determined this more severe potential term was harmless because the sentencing court did not ultimately utilize the additional confinement time available due to the repeater enhancer: Mr. Mbugua was sentenced to ten-and-a-half years initial confinement and eight years extended supervision, when the court had fourteen-and-a-half years of initial confinement and eight years extended supervision available under the offenses to which Mr. Mbugua pled. (25).

In its decision, the postconviction court wrote:

> …[Mr. Mbugua] theorizes that the sentencing court might have imposed less than the maximum sentence for the offenses under the initial plea offer, since it imposed less than the maximum sentence for the offenses under the second plea offer. This kind of speculation may be fodder for academic discussion, but it does not present a valid legal basis for granting the defendant a "do over" so that he can put his theory to the test.

(25:8).

This conclusion misstates Mr. Mbugua's burden in establishing prejudice in a plea withdrawal case due to ineffective assistance of counsel in plea negotiations. ***Lafler*** requires only that "under the original offer, *the terms of the resulting conviction or sentence* or both would have been less severe than that which was ultimately imposed." ***Lafler,*** 566 U.S. at 164 (emphasis added). Neither ***Lafler*** nor ***Frye*** create a requirement that the ultimate penalty imposed be outside the maximum bounds of the original pretrial offer. ***Id.***; ***Frye***, 566 U.S. 133. While ***Lafler*** and ***Frye*** represented the extreme scenarios involving deficient advice in the plea negotiation process, the U.S. Supreme Court did not limit ineffective assistance claims to just those extreme cases. Thus, the postconviction court's determination that Mr. Mbugua was

not in fact prejudiced because he did not actually receive the additional penalty made available by his plea to the more severe offense improperly interprets U.S. Supreme Court holdings on this issue. (25).

Contrary to the postconviction court's conclusion, the holding in ***Lafler*** does not apply only to situations in which the State offered a plea to a lower-class criminal charge (e.g., amending a Class A felony to a Class C felony) or that the original sentencing recommendation was for a lesser amount of confinement or supervision than what was possible under the second pretrial offer. Moreover, the postconviction court's interpretation of the ***Lafler*** holding would create absurd results. For example, under the postconviction court's interpretation of the ***Lafler*** rule, essentially that the statutory classification of a charge is the sole factor when considering whether a "conviction" is more severe for the purposes of ***Lafler***, prejudice would occur when a defendant is convicted of a Class A misdemeanor rather than a Class B misdemeanor that was contemplated in an earlier plea deal, but rejected due to counsel's incorrect advice about the consequences of the plea. Under those circumstances, the potential harm to the defendant would be much less than is present in the instant case as the hypothetical defendant faced just six more months of confinement due to counsel's error. Here, Mr. Mbugua was subjected to the possibility of four additional years in prison due to his rejection of the initial plea deal.

Furthermore, the maximum sentence Mr. Mbugua faced for the aggravated battery charge as a repeater to which he pled guilty was seven years initial confinement and three years extended supervision, which is greater than the five-year maximum confinement for a Class G felony, and nearly as much as the seven-and-a-half year maximum confinement for a Class F felony. However, the postconviction court

contends that because Mr. Mbugua would have been convicted of a Class H felony under either of the two plea options, no prejudice has occurred. Mr. Mbugua contends that this is an absurd view of the meaning of prejudice and not possibly what the U.S. Supreme Court intended in ***Lafler***.

Additionally, Mr. Mbugua points to the carefully chosen language of the ***Lafler*** holding in support of his claim. The U.S. Supreme Court specifically wrote that if the "*terms*" of the resulting conviction or sentence were less severe in a previous offer, then counsel's deficiency has caused prejudice. ***Id.*** at 164. The use of the phrase "terms of conviction" makes it clear that the court did not intend to limit remedial action only to those cases in which the charge itself would have been different. ***Id.*** at 171. Moreover, in Mr. Mbugua's case, the "terms of the conviction" were certainly less severe under the first plea offer as he would have avoided a conviction for a Class H felony with an additional statutory penalty enhancer that exposed him to four more years in prison. Ultimately, the fact that the charges were of the same felony class under either plea offer is irrelevant.

Finally, the postconviction court assumes that the sentence would have been the same regardless of whether Mr. Mbugua would have accepted the original offer with four less years of exposure. In support of the court's presumption, as the postconviction judge writing the opinion was not the person who sentenced Mr. Mbugua, the decision points to the "court's comments" at sentencing about the seriousness of Mr. Mbugua's conduct. The postconviction court is right that the sentencing court did focus a great deal on the injuries C.S.S. sustained, but this ignores that Mr. Mbugua would have entered a plea to a different charge applying to different conduct of Mr. Mbugua.

As discussed throughout this brief, Mr. Mbugua had the opportunity to pleae to first-degree recklessly endangering safety and to false imprisonment, without the penalty enhancers. This plea contemplated one count related to the reckless conduct involved in assault of C.S.S. and the other to not assisting C.S.S. in obtaining medical attention and telling her that she could not leave his apartment. (1). Instead, Mr. Mbugua entered a plea to first-degree recklessly endangering safety, without an enhancer, and to aggravated battery, intentionally causing great bodily harm, as a repeater. Again, the first count penalized Mr. Mbugua's reckless conduct, but in this plea, the second count contemplated an intentional and substantial physical assault on C.S.S. The differences in the actual conviction charge very well could have changed the sentencing court's assessment of appropriate sentence.

Under one scenario, Mr. Mbugua is convicted of acting recklessly and exposing C.S.S to great bodily harm, of not obtaining medical attention for C.S.S. when she requested and telling her that he didn't want her to leave so that he wouldn't get into trouble for the assault. Under the second scenario and what the court actually had before it, Mr. Mbugua admitted by his guilty plea to not only acting recklessly and exposing C.S.S. to great bodily harm, but also to intentionally inflicting great bodily harm. Even without considering that the original plea deal exposed Mr. Mbugua to four less years in prison (which he contends would have also influenced sentencing), the facts supporting each offense result in very different assessments for the court to make in determining sentence. It is reasonable to conclude that had the court could well have determined sentence differently had it been presented with a different offense (false imprisonment) rather than the aggravated battery as a repeater to which Mr. Mbugua pled and which carried greater potential prison exposure.

For these reasons, Mr. Mbugua has satisfied all prongs of the prejudice analysis and established that the failures of trial counsel resulted in prejudice to him within the meaning of ***Strickland*** and ***Lafler***.

CONCLUSION

For the reasons stated above, Mr. Mbugua asks this court to vacate the judgment of conviction in this matter and order that the State extend the original pretrial offer.

Dated this 18th day of August 2017.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,311 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 18th day of August 2017.

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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) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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

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

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