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STATE OF WISCONSIN

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

DISTRICT I

Case No. 2018AP000200 - CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

DEDRIC EARL HAMILTON, JR.,
Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in the Milwaukee County Circuit Court, the Honorable Ellen R. Brostrom Presiding, and from an Order Denying Postconviction Relief, the Honorable Mark A. Sanders, presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Was Mr. Hamilton entitled to a hearing on his postconviction motion in which he alleged, with the support of two experts, that his attorney provided ineffective assistance when she failed to challenge the voluntariness of his ***Miranda*** waiver and subsequent confession or to present evidence calling its reliability into question at trial?

   Circuit Court Answer: No.

2. Should this Court grant Mr. Hamilton a new trial in the interest of justice?

   Circuit Court Answer: The circuit court declined Mr. Hamilton's request for a new trial in the interest of justice.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication is not warranted in this case, which involves the application of well-settled law to a unique set of facts.

While undersigned counsel anticipates the parties' briefs will sufficiently address the issue raised, the opportunity to present oral argument is welcomed if this court would find it helpful.

STATEMENT OF FACTS

Mr. Hamilton was charged with one count of first degree child sexual assault and one count of incest with a child. (1). The complaint alleged that Mr. Hamilton assaulted

his eight-year-old niece, D.H. Specifically, the complaint related that D.H. told police that while she was sleeping on the living room floor at her grandmother's house, Mr. Hamilton, who is her uncle, asked her to give him a hug and then put his "dick" between her legs and pulled her leggings and underwear down and started digging his fingers in her private part. He asked if it hurt and picked her up and carried her to the bedroom while kissing her face. D.H. said that she pushed Mr. Hamilton away and went back to the living room. (1).

Mr. Hamilton was arrested on June 27, 2012. He was placed in an interrogation room, and Detective Wells read his ***Miranda*** rights very rapidly, taking only 21 seconds.[1] (13:23:04). During the interrogation, the detective told Mr. Hamilton that his "penis DNA" was found on D.H.'s clothing and DNA from his hand was found on her vagina. (13:46:43; 13:47:16; 13:47:30). The detective told Mr. Hamilton that his bare penis touched D.H.'s vagina over her clothes. (13:46:46). When Mr. Hamilton tried to deny it, the detective said "*that*, I know is true," pointing to the alleged DNA evidence. (13:46:56). Mr. Hamilton continued to deny the allegation and questioned how the DNA results were possible. (13:47:07). The detective then told Mr. Hamilton that his finger cells were found on D.H.'s bare vagina. (13:48:16). Mr. Hamilton continued to question the DNA evidence and asked where they obtained his DNA for comparison. (13:50:14). The detective told him his DNA could have been

[1] Portions of a DVD recording of the interrogation was introduced at trial as Exhibit 8. The DVD has been transmitted to this court. However, it does not have a record number assigned to it. These factual representations about the interrogation are from undersigned counsel's review of the recording. The notations in parentheses refer to the time noted on the video recording.

retrieved from household items. (13:50:42). Then he indicated that he would be asking for a sample from Mr. Hamilton to confirm the results. Mr. Hamilton readily agreed and gave a sample. (13:50:40; 13:51:40; 14:01:08).

Mr. Hamilton continued to insist that the allegations were not true and said that what he did do was hug D.H. and pat her on the butt (demonstrating a patting motion). (14:05:26-14:06:02). He said that when this happened, his mother and brother were "right there." (14:06:10). The detective refused to accept this, returning to the imaginary DNA evidence. (14:06:15). Mr. Hamilton said his penis was never out. (14:06:46). The detective again challenged this with the imaginary penis-specific DNA. (14:07:14).

The detective continued to use the DNA evidence to refute Mr. Hamilton's repeated denials, insisting that he had touched D.H. with his penis, that he had touched her bare vagina, and that his denials made him "look like a liar." (14:07:14-14:08:34). The detective indicated that authorities would be making decisions going forward based on his statement and whether it appeared he was being "up front" or not. (14:09:23). He explained that if the facts disputed what Mr. Hamilton said, it would make him "look bad." (14:10:05).

Mr. Hamilton explained that when he patted D.H.'s butt, it was not in a sexual way (he was "not trying to feel her."). (14:11:45). The detective woefully told Mr. Hamilton, "This is not going to look good," and it looked like he was "lying for no reason." (14:12:05). He told Mr. Hamilton, "You can only help yourself." (14:12:28). Mr. Hamilton said he should not have patted D.H.'s butt. (14:13:42). The detective said that he could not lie to Mr. Hamilton without

damaging his own credibility and even his ability to do his job. (14:14:41).

The detective said his interpretation of Mr. Hamilton's statements was that he had touched D.H.'s vagina over her clothes. (14:18:03). Finally, Mr. Hamilton reluctantly conceded that he touched D.H. on her vagina over her clothes. (14:18:15-14:18:40). He insisted it was between 12:00 and 1:00 in the afternoon when he patted her butt on the stairs. (14:19:04-14:19:44). This was the only incident of contact he ever admitted to. He said that during the incident, he "tapped her on her little stuff," which he explained was her vagina. (14:20:20). He clarified, "It was all in one motion though." (14:24:15). He said he didn't know what he was thinking and that he "went stupid." (14:24:38).

Mr. Hamilton's attorney did not challenge the admissibility of the statement or seek to introduce expert testimony on the reliability of the statement or the factors contributing to the danger of a false confession. The case proceeded to a jury trial.

Trial Evidence

As relevant to this motion, the following evidence was presented. This is *not* an exhaustive summary of the trial testimony.

The alleged victim, D.H.

Although the State had elected to introduce a video recording of a police interview with D.H. in lieu of direct examination, the State called her as a witness and took testimony from her before playing the recording. (112:35). On cross-examination, D.H. testified that on June 25, 2012 she spent the night at her grandmother's house, where she

slept on the living room floor with her brother. (112:38). Also present in the house were Mr. Hamilton, another uncle whom she referred to as "Man," her grandmother, and her grandfather. (112:37-38).

D.H. was sharing a blanket with her brother. She indicated that they slept approximately four inches apart. (112:40, 63). She said Mr. Hamilton woke her up and told her to give him a hug. Defense counsel asked, "Did anything else happen?" D.H. answered "No, I went back to sleep but he told me to come back." (112:41). D.H. said Mr. Hamilton wanted her to come back to the couch. Defense counsel asked, "Did you go to the couch?" D.H. responded, "I forgot after that." (112:41). Defense counsel asked if D.H. ever left the living room that night. She answered, "No." (112:41-42). When defense counsel asked, "did anything else happen besides him asking for a hug?" D.H. answered, "I forgot after that." Defense counsel asked, "So you don't remember anything out of the ordinary happening besides him asking for a hug? D.H. answered, "Yes." (112:42).

Defense counsel reminded D.H. that she had spoken to Officer Trisha Klauser, who conducted the forensic interview. She asked D.H. if she told the officer a different story. D.H. responded, "I remember telling her something else, but I forgot what I said." She was asked if she told the officer lies, and she said, "No." Defense counsel again asked D.H. what she had told the officer, and D.H. said she told the officer that she was sleeping on the floor, Mr. Hamilton woke her up, he told her to give him a hug, she tried to go back to lie down, but he wouldn't let her. (112:43). Defense counsel asked if she and the officer talked about "private parts," and she said "Yes," but then said she forgot what they talked about. She was asked if she ever saw her uncle's private parts or if he ever saw hers, and she answered, "No." (112:32).

The prosecutor reminded D.H. that she promised to tell the truth and told her that if she said she forgot something but she really remembered, that was not the truth. (112:44). He then asked her, "Do you really remember what happened that day?" Still, she said, "No." He asked her again if she remembered what happened, and she again said, "No." Then the prosecutor asked her, "Do you remember anything about your uncle touching your private part?" D.H. responded, "No, I can't." The prosecutor asked yet again, "What do you remember about your uncle touching your private part?" Then D.H. said, "He pulled my pants down. Then he had take his hand down there and start touching it." (112:44-45). Upon further questioning D.H. also testified that her uncle touched her private part with his "dick." (112:45).

D.H. then continued to testify that Mr. Hamilton had touched her private part with his hand and his private part, although she said multiple times that she had never seen his private part. (112:46). She said that when his private part touched her private part, his pants were down (112:54), and her tights and underwear were off. (112:60). However, D.H. said that his bare private part did *not* touch her bare private part. When confronted with this inconsistency, D.H.'s explanation was "The feet still had the front of it on but the back off." (112:60).

D.H. acknowledged that she had told the officer that her big sister had been molested by her other uncle. (112:56). When asked if her sister had ever talked about it at all, D.H. said "never." (112:57).

Forensic Interview Video

A video recording of a forensic interview of D.H. was received into evidence and played for the jury.[2] D.H. initially told the police interviewer that Mr. Hamilton woke her and told her to give him a hug and then "took his you-know-what out and put it in my private part," after which he let her go and went in the bathroom and back to the bedroom. (16:52:41-16:53:57). She then added that at some point he picked her up and was kissing her face. (16:54:09).

When asked to tell it again from the beginning, D.H. related that Mr. Hamilton also pulled down her pants and "started digging in my you-know-what." (16:56:09). She also added that before going to the bathroom Mr. Hamilton took her in the bedroom, put her on the bed and lay on top of her. (16:57:48). During the recorded interview, D.H. said her leggings were on and pulled up when Mr. Hamilton put his "dick" between her legs. (16:58:30).

When asked if this had happened other times, D.H. responded "It happened with my sister and my uncle Man." (17:01:06). When D.H. was asked how she felt when Mr. Hamilton did this to her, D.H. abruptly shifted her focus to her sister's experience, saying, "Sad and mad. My sister said that she would feel like it's hurting him." (17:01:26). D.H. then added "that whole day, he was squeezing my butt." (17:02:19). Regarding the squeezing of her butt, she said "it happened that whole day, and I was so mad at him." (17:03:05).

[2] The DVD was introduced at trial as Exhibit 1. It was transmitted to this Court but has not been assigned a record number.

D.H.'s mother, S.H.

D.H.'s mother testified that D.H. was "completely normal" when she picked her up from her grandmother's house. (112:71). After they were home for a time, D.H. began to tell her mother that when she was sleeping in the living room, Mr. Hamilton woke her up. (112:72). S.H. testified that D.H. told her that he pulled down her pants, and S.H. stopped D.H. because she did not want to hear the story. S.H. called her friend to come over and hear D.H.'s story. When the friend arrived, she sent D.H. upstairs with the friend to tell the story. (112:74). She also called the police. (112:73).

When confronted with a letter containing a detailed account of the incident that she wrote to the prosecutor, S.H. said that D.H. had related the story to her days later, and then she wrote the letter. (112:75-77). S.H. related that when asked if Mr. Hamilton had done anything else that made her uncomfortable, D.H. told her that earlier in the day she was on the porch, and Mr. Hamilton hugged her and "grabbed her butt." (112:91). S.H. testified that she had never discussed D.H.'s sister's sexual assault with D.H., and D.H. would only know about it "If they discussed it, them two as sisters." (112:82).

Officer Trisha Klauser

Officer Klauser testified that she responded to S.H.'s call and went to D.H.'s house. (113:18). She testified that she spoke only briefly with D.H. due to the lateness of the hour. She scheduled an interview to be conducted at the child protective center. (113:18-19). During their brief encounter, D.H. told the officer that Mr. Hamilton put his "you-know-what" between her legs. She then stated that Mr. Hamilton had pulled out his "dick" and rubbed it on her pants on top of her "pussy." (113:23).

Amber Rasmussen

This witness was a DNA analyst with the State Crime Lab. She testified that DNA testing was done, but no DNA implicating Mr. Hamilton was found. (113:33).

Detective Steve Wells

This detective interrogated Mr. Hamilton. He acknowledged that he lied to Mr. Hamilton about the existence of DNA evidence. When asked "why did you keep telling him that he must have done it because his DNA was on her?" the detective responded "That was basically part of the interrogation, just trying to find out the truth as to what happened, what he'd admit to doing." (114:6). The detective acknowledged that in the end Mr. Hamilton never admitted putting his penis on D.H. or having any contact with her under clothes. He acknowledged that while Mr. Hamilton admitted patting D.H.'s butt at 12:00 to 1:00 in the afternoon, he never indicated that he did so for the purpose of sexual arousal. (113:6-7). The detective acknowledged that Mr. Hamilton never admitted to any conduct at night, but only between 12:00 and 1:00 in the afternoon. (113:7).

Christina Hildebrand

This witness was the nurse who performed an examination of D.H. She testified that D.H. had redness, some abrasions, and a bruise in her vaginal area that she described as "more redness than we would normally see" and "not a normal finding." (114:20-26). Ms. Hildebrand noted no injury to D.H.'s hymen. (114:27). Ms. Hildebrand described her observations as "consistent with" D.H.'s report. She acknowledged that the injuries could be caused by normal playing, although she considered it "unlikely." (114:28).

D.H. reported to Ms. Hildebrand that she got a bruise on her thigh "falling into a tree" and also that she had fallen while racing friends. (114:32). Ms. Hildebrand did not learn which body parts D.H. injured racing or falling into a tree and did not rule out that she injured her vaginal area that way. (114:33). Ms. Hildebrand indicated that the redness she observed could have "endless causes." (114:34). Ms. Hildebrand was unable to say that the injuries she observed were caused by a sexual assault. (114:37).

Verdict and Postconviction Proceedings

Mr. Hamilton was found guilty. A presentence report was ordered. During his interview for the PSI, Mr. Hamilton repeatedly denied that he had sexually assaulted D.H. (29:3). On January 25, 2013, Judge Ellen R. Brostrom sentenced him to sixteen years initial confinement and three years extended supervision on Count 1 and five years initial confinement and two years extended supervision consecutive on Count 2 for a total of 21 years initial confinement and five years of extended supervision. (33).

Mr. Hamilton filed a notice of intent to pursue postconviction relief, and Attorney John Wasielewski was appointed to represent him. He filed a motion for resentencing on Count 2. That motion was granted, and on February 11, 2014, Judge Brostrom resentenced Mr. Hamilton on Count 2 to sixteen years initial confinement and four years extended supervision, increasing his total sentence on both counts 21 years initial confinement and six years extended supervision. (43).

Mr. Hamilton again filed a notice of intent to pursue postconviction relief (44). Undersigned counsel was appointed to represent Mr. Hamilton and filed a motion for leave to file a supplemental postconviction motion, which this

Court granted. Mr. Hamilton filed a supplemental motion for postconviction relief. (83). The motion alleged all of the above facts and requested an evidentiary hearing. Additionally, the motion alleged that undersigned counsel had retained Dr. David Thompson to evaluate Mr. Hamilton to determine whether he had cognitive issues or mental health factors that would have made him particularly vulnerable to police interrogation tactics. His report and curriculum vitae were attached to the motion. (84). As discussed more fully below, the report discussed Mr. Hamilton's remarkably high scores on tests designed to measure suggestibility and compliance and the ways in which those characteristics, in combination with interrogation techniques used against him, contributed to the danger of a false confession. The motion stated that Dr. Thompson would testify consistent with that report at a hearing.

The postconviction motion also related that undersigned counsel had retained Attorney Keith Findley as an expert in the area of professional standards for attorneys representing the criminally accused. The motion stated that Attorney Findley would testify at a hearing that in his professional opinion, trial counsel's failure to present expert testimony regarding the phenomenon of false confessions, the interrogation tactics that contribute to them, and the personal characteristics of Mr. Hamilton that made him particularly vulnerable to these tactics was deficient performance.

The postconviction motion argued that Mr. Hamilton's ***Miranda*** waiver was invalid, his statement was not knowing and voluntary, and that his attorney provided ineffective assistance when she did not move to exclude the statement for those reasons. Additionally, the motion asserted that trial counsel provided ineffective assistance at trial when she failed to present expert testimony regarding Mr. Hamilton's

personal characteristics which, in combination with the tactics employed by the interrogating officer, contributed to the danger of a false confession.

The motion was assigned to Judge Mark A. Sanders, who denied it without a hearing.

ARGUMENT

I. Mr. Hamilton was entitled to a hearing on his postconviction motion in which he alleged, with the support of two experts, that his attorney provided ineffective assistance when she failed to challenge the voluntariness of his ***Miranda*** waiver and subsequent confession or to present evidence calling its reliability into question at trial.

A. Introduction and standard of review.

Mr. Hamilton argued in his postconviction motion that his ***Miranda*** waiver and subsequent statement were involuntary. He argued that even if the statement was deemed admissible, its reliability was questionable due to the interrogation techniques that were used and his particular vulnerability to them. He supported his argument with Dr. David Thompson's report.

Trial counsel did not have Mr. Hamilton evaluated by an expert to determine whether he had any personal characteristics that would have made him particularly vulnerable to subtly coercive police interrogation tactics or increased the risk that he would make false admissions during interrogation. Trial counsel did not challenge the admissibility of his statement to police. Counsel specifically waived Mr. Hamilton's right to a pretrial hearing on the admissibility of the statement. (112:65). Nor did Mr.

Hamilton's attorney seek to present any evidence at trial bearing on the interrogation techniques that were used or Mr. Hamilton's vulnerability to them in order to explain to the jury how he could have falsely admitted touching D.H.'s vagina. Therefore, Mr. Hamilton was required to raise these issues in his postconviction motion under the rubric of ineffective assistance of counsel. He did so. (83).

Mr. Hamilton was constitutionally entitled to representation that was equal to that which the ordinarily prudent lawyer, skilled and versed in the criminal law, would provide. ***State v. Harper,*** 57 Wis.2d 543, 557, 205 N.W.2d 1 (1973). Trial counsel's performance did not meet this standard.

An accused's right to the effective assistance of counsel derives from the Sixth and Fourteenth Amendments to the United States Constitution, and Art. I, sec. 7 of the Wisconsin Constitution. ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). In assessing whether counsel's performance satisfied this constitutional standard, Wisconsin applies the two-part test outlined in ***Strickland v. Washington***, 466 U.S. 668 (1984). ***Smith***, 207 Wis. 2d at 273. To establish a deprivation of effective representation, a defendant must demonstrate both that: (1) counsel's performance was deficient, and (2) counsel's errors or omissions prejudiced the defendant. ***Id.*** To prove deficient performance, the defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed to the defendant by the Sixth Amendment." ***Id.*** (citations omitted).

The prejudice prong requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Smith***, 207 Wis. 2d at 276 (citation omitted). The defendant need only demonstrate to the court that the outcome is suspect, but need not establish that the final result of the proceeding would have been different. ***Id.*** at 275.

Generally, a circuit court should hold a hearing when a defendant alleges that his trial counsel provided ineffective assistance. ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). A defendant is entitled to a hearing if his motion alleges facts which, if true, would entitle him to relief. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). The circuit court has the discretion to deny a postconviction motion without a hearing only if the motion "fails to allege sufficient facts to raise a question of fact, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief." ***State v. Roberson***, 2006 WI 80, ¶43, 292 Wis. 2d 280, 717 N.W.2d 111. In assessing whether there are sufficient allegations to raise a question of fact, the court must assume the allegations are true. ***State v. Allen***, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433.

An ineffective-assistance-of-counsel claim ordinarily presents a mixed question of fact and law. ***Thiel***, 264 Wis. 2d 571, ¶21. Where, as here, the circuit court has denied the defendant a ***Machner*** hearing, this Court independently reviews whether the postconviction motion was sufficient to warrant a hearing. ***Bentley***, 201 Wis. 2d at 310.

B. Mr. Hamilton's motion contained sufficient factual allegations to entitle him to an evidentiary hearing on his claim that trial counsel performed deficiently when she failed to challenge the admissibility of the statement or, alternatively, to present evidence of the statement's unreliability at trial.

As Mr. Hamilton argued in his postconviction motion, "[a] confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." ***Arizona v. Fulminante***, 499 U.S. 279, 296 (1991)(citation omitted). Mr. Hamilton argued in his postconviction motion that trial counsel must have known that the biggest obstacle he faced at trial was his "confession" to touching D.H.'s vagina. Even the weak partial admission Mr. Hamilton made was highly inculpatory given the known tendency of jurors to believe that nothing short of torture could be expected to lead an innocent person to confess, particularly to a crime as vile as child sexual assault.

In his motion, Mr. Hamilton asserted that it was evident in the interrogation video that the interrogator had read the ***Miranda*** warnings at breakneck speed. Further, trial counsel's review of the interrogation video should have alerted her to the fact that the interrogator had used subtly coercive tactics to extract a confession and the need for an expert to evaluate her client to determine whether he had characteristics that would render him particularly vulnerable to those tactics. Mr. Hamilton argued that failure to obtain this evidence and to challenge the admissibility of the statement was deficient performance.

Alternatively, Mr. Hamilton argued that counsel should have presented expert testimony at trial to minimize the impact of the statement. Trial counsel was aware that aside from the admission produced by his interrogation, Mr. Hamilton had steadfastly maintained his innocence. Given that, counsel should have sought expert testimony to place Mr. Hamilton's statement in context for the jury, explaining Mr. Hamilton's weaknesses and how police interrogation techniques exploit those weaknesses, leading to confessions of questionable reliability.

At a hearing, Mr. Hamilton proposed to present the testimony of Keith Findley, an experienced defense attorney and associate professor at the University of Wisconsin Law School, who is well known for his work on wrongful convictions with the Wisconsin Innocence Project and the International Innocence Network. (86). Attorney Findley would have testified regarding the actions that an ordinarily prudent lawyer, skilled and versed in the criminal law, would have taken to address the confession evidence in this case. Attorney Findley would have testified that at the time trial counsel was preparing for trial in this case, the myth that innocent people do not confess had been exploded more than ten years before. It was well known at that time that false confessions were a leading contributor to wrongful convictions. Attorney Findley would have testified that this was well known among the community of attorneys representing the criminally accused. He would have testified regarding the wealth of literature, studies, and training materials available that would have been revealed to an attorney conducting even superficial research in this area. (83:15-16).

Mr. Hamilton also proposed to present Attorney Findley's testimony that there were psychologists producing

studies and literature and giving expert testimony at that time regarding the interrogation tactics employed by police, in particular the "Reid Technique," and the ways that those methods work psychologically and how they contribute to the risk of false confessions. He would have testified that there were experts available to test defendants to determine whether they had individual psychological characteristics that made them particularly vulnerable to subtly coercive interrogation techniques, leading to a further increased risk of a false confession. (83:15).

Attorney Findley would have testified that based on his experience and in his professional opinion, a reasonably prudent attorney, faced with a case such as Mr. Hamilton's would have investigated the literature on interrogations and false confessions, and upon conducting basic research would have found a large body of materials on false confessions, psychological interrogation tactics, and the use of experts on these topics. Informed by that research, a reasonably prudent attorney then would have presented evidence regarding the phenomenon of false confessions and would have had her client evaluated and presented the testimony of an expert such as Dr. Thompson regarding her client's extreme suggestibility and compliance. Attorney Findley would have testified that in his professional opinion, trial counsel's failure to have Mr. Hamilton evaluated and to present expert testimony fell below the standard of reasonable professional competence. (83:16).

Mr. Hamilton sufficiently alleged deficient performance to entitle him to an evidentiary hearing. ***Bentley***, 201 Wis. 2d at 310.

C. Mr. Hamilton's motion contained sufficient factual allegations to entitle him to an evidentiary hearing on his claim that trial counsel's deficient performance caused prejudice.

In order to establish that trial counsel's deficient performance caused prejudice, Mr. Hamilton must establish that trial counsel would have succeeded if she had challenged the admissibility of the statement or, alternatively, if she had sought to present expert testimony at trial to minimize its impact. The postconviction court's decision to deny the motion without a hearing rested in part on its erroneous determination without a hearing that the ***Miranda*** waiver and subsequent statement were voluntary. Mr. Hamilton's motion contained sufficient facts to entitle him to an evidentiary hearing on those questions. His motion also contained sufficient facts to establish that had counsel challenged the statement or mitigated its effect at trial, there would have been a reasonable probability of a different outcome.

1. Mr. Hamilton is entitled to an evidentiary hearing on his claim that his ***Miranda*** waiver was invalid.

As Mr. Hamilton pointed out in his postconviction motion, the State bears the burden of proving that a suspect's ***Miranda*** waiver was "the product of a free and deliberate choice rather than intimidation, coercion or deception" and with "*full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it*." ***Moran v. Burbine***, 475 U.S. 412, 421 (1986). (Emphasis supplied). ***Miranda*** itself requires police to inform the suspect in "clear and unequivocal terms" of his right to remain silent, to consult a lawyer and to have a lawyer present during the

interrogation. ***Miranda v. Arizona***, 384 U.S. 436, 467-468 (1966). A court decides whether the State has carried its burden of proof by examining the totality of the circumstances. ***Moran*** at 421.

Mr. Hamilton alleged in his postconviction motion that he would testify at a hearing that he did not, in fact, fully understand his rights and that he answered questions because he thought it was the only way to end the encounter with law enforcement. (83:9). In his motion, he presented substantial evidence that his ***Miranda*** waiver was neither knowing nor intelligent. First, the interrogating detective did not read the ***Miranda*** rights in a clear or effective manner. Mr. Hamilton alleged in his motion that the detective read a version containing 105 words[3] as one run-on sentence in just 21 seconds (or 300 words per minute).[4] By comparison, the average American speaks at 110-150 words per minute.[5] Second, Mr. Hamilton asserted in his motion that Dr. David Thompson would testify at a hearing that there were a number of risk factors present, including Mr. Hamilton's extremely high score on the Gudjonsson Compliance Scale, his untreated ADHD, and his history of low academic

[3] Mr. Hamilton alleged in his motion that the actual word count may have been 106 or 107. There were one or two words that, despite listening multiple times, undersigned counsel was unable to discern due to the rapidity with which they were spoken.

[4] This figure was arrived at by timing the detective's reading of the *Miranda* warnings on the DVD of the interrogation. That DVD was transmitted with the record to this Court. (101).

[5] And auctioneers speak at 250-400 words per minute. *See* https://www.quora.com/Speeches/For-the-average-person-speaking-at-a-normal-pace-what-is-the-typical-number-of-words-they-can-say-in-one-minute (last visited Sept. 29, 2017).

achievement. Dr. Thompson opined that these risk factors combined with the complexity of the ***Miranda*** warnings and the rapidity with which they were read to "raise serious concerns as to Mr. Hamilton's comprehension of his rights at that time." (84:7).

The circuit court concluded that Mr. Hamilton was not entitled to a hearing on this issue because "the defendant read (or was read) the ***Miranda*** warnings several times previously in connection with prior cases and never failed to understand them." (97:3; App. 103). The support for this conclusion comes from the interrogation DVD in which Detective Wells asked Mr. Hamilton if he had been given and understood ***Miranda*** warnings previously, and he said he had. (97:3; App. 103). The circuit court also found it significant that the detective told Mr. Hamilton that he could ask questions at any time. (97:3; App.103). However, Dr. Thompson's report, which was attached to the postconviction motion, in addition to questioning whether Mr. Hamilton understood the ***Miranda*** warnings, also described his extreme suggestibility and compliance as discussed below. Given that, the circuit court had no basis to dispose of the factual question whether Mr. Hamilton actually understood the ***Miranda*** warnings based on his failure to assert himself and demand clarification during the interview.

Whether Mr. Hamilton would prevail on this issue remains to be seen. However, he alleged sufficient facts to entitle him to a hearing on the validity of his ***Miranda*** waiver.

2. Mr. Hamilton's motion contained sufficient factual allegations to entitle him to a hearing on the question whether his confession was knowing, intelligent and voluntary.

Mr. Hamilton pointed out in his postconviction motion that the State bears the burden of proving that a confession was voluntary by a preponderance of the evidence. ***State v. Jerrell C.J.***, 2005 WI 105, ¶17, 283 Wis. 2d 145, 699 N.W.2d 110. A defendant's statements are voluntary "if they are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of conspicuously unequal confrontation in which the pressures brought to bear on the defendant by the representative of the State exceeded the defendant's ability to resist." ***Id.***, ¶18 (quoting ***State v. Hoppe***, 2003 WI 43, ¶38, 261 Wis. 2d 294, 661 N.W.2d 407).

Mr. Hamilton acknowledged in his motion that "[a] necessary prerequisite for a finding of involuntariness is coercive or improper police conduct." ***Id***. ¶19. But he pointed out that coercion can be subtle.

> *[S]ubtle pressures* are considered to be coercive if they exceed the defendant's ability to resist. Accordingly, pressures that are not coercive in one set of circumstances may be coercive in another set of circumstances if the defendant's condition renders him or her uncommonly susceptible to police pressures.

Id. (quoting ***Hoppe***, ¶37). (Emphasis supplied).

When evaluating a confession, a court considers the totality of the circumstances and balances the defendant's personal characteristics against the pressures and tactics that law enforcement used to induce the confession. ***Id***. ¶20;

Hoppe, ¶38. The relevant personal characteristics are the defendant's (1) age, (2) education and intelligence, (3) physical and emotional condition, and (4) prior experience with law enforcement. ***Hoppe***, ¶3. The police tactics and pressures to be considered are:

> The length of questioning, any delay in arraignment, the general conditions under which the statements took place, any excessive physical or ***psychological pressure*** brought to bear on the defendant, any ***inducements***, threats, ***methods or strategies used by the police*** to compel a response and whether the defendant was informed of the right to counsel and the right against self-incrimination.

Id. (Emphasis supplied).

Regarding Mr. Hamilton's personal characteristics, he alleged in his postconviction motion, he was 24 years old.[6] He had some prior experience with the criminal justice system as a juvenile and as a young adult, with his last arrest occurring when he was 21 years old. (29:3). He attached to his postconviction motion the report of Dr. David Thompson, which alleged that he had untreated ADHD. He had a history of low academic achievement. (84:6). Most strikingly, he scored in the 95th percentile on the Gudjonsson Suggestibility Scale (GSS-2), an instrument designed to measure a person's susceptibility to suggestion. According to Dr. Thompson:

> These data suggest that Mr. Hamilton is far more suggestible than a normative sample of adult offenders (95th percentile) and that his tendency to change his responses in the presence of mild interrogatory pressure

[6] Mr. Hamilton's birth date is 12/13/1987, and the interrogation occurred on 6/27/2012.

> is even higher (above the 99th percentile) when compared to the same population.

(84:6). Mr. Hamilton's score was similarly high on the Gudjonsson Compliance Scale (GCS), which is an instrument designed to measure "an individual's eagerness to please and tendency to avoid conflict and confrontation when in the presence of people in authority." (84:6). The instrument measures a person's susceptibility to give in to pressure. Dr. Thompson explained:

> Compliance differs from suggestibility primarily in that it does not require a private acceptance of the proposition or request. In other words, the person makes a conscious decision to carry out the proposed or requested behavior, even if he or she privately does not agree with it. This might be evidenced in the context of a police custodial interview in order to terminate the police interview, be released from custody more quickly, escape from the stress of the situation, or to please the interviewer.

(84:6). Mr. Hamilton scored above the 99th percentile on this instrument.

Against Mr. Hamilton's extreme suggestibility and compliance, the circuit court was required to weigh the police interrogation tactics used against him. In his report attached to the postconviction motion, Dr. Thompson notes that "the interrogator used a number of powerful psychological techniques designed to extract confessions from persons that police believe are guilty." (84:7). Dr. Thompson identifies these tactics as components of the "Reid Technique."

Mr. Hamilton explained in his motion that the Reid Technique includes isolating the suspect in a small room in order to increase his anxiety and desire to escape; confronting

the suspect with accusations of guilt, bolstered by real or manufactured evidence; refusing to accept denials; using positive and negative incentives to induce confessions; and offering sympathy and moral justification for commission of the crime. Saul M. Kassin et al., ***Police Induced Confessions: Risk Factors and Recommendation***s, 34 Law and Hum. Behav. 3, 6 (Feb. 2010). *See also* ***Miranda***, 436 U.S. at 450-451 (1966)(criticizing these very aspects of the Reid technique).

Mr. Hamilton's motion alleged that the video recording of his interrogation reveals that he admitted having hugged D.H. on the front stairs at his mother's home and patting her butt in the presence of his mother. However, he repeatedly denied having inappropriately touched D.H. in the ways she claimed. The interrogator lied to Mr. Hamilton, repeatedly telling him that his DNA was found on D.H.'s vagina and that his "penis DNA" was found on her clothing. The interrogator provided Mr. Hamilton with the conduct he wanted Mr. Hamilton to admit to, saying that the evidence indicated that Mr. Hamilton must have touched her vagina and was lying. Mr. Hamilton's motion alleged that ultimately, he bowed to this pressure and admitted touching D.H.'s vagina over her clothing "all in one motion" while patting her butt while hugging her. (84:9-12).

Weighing Mr. Hamilton's personal characteristics against the interrogator's tactics, Mr. Hamilton argued in his postconviction motion that the State would be unable to prove that his statement was the product of a free and unconstrained will, reflecting a deliberate choice. As Dr. Thompson indicated:

> Mr. Hamilton's GSS-2 and GCS test results clearly demonstrate that his personality characteristics are such that he is highly susceptible to even mild interrogatory

> pressure (greater than the 99th percentile when compared to adult offenders) and particularly likely to change his responses when even mildly pressured to do so. The recording of his interrogation clearly demonstrates that significant interrogatory pressure to report that he touched the alleged victim was placed on Mr. Hamilton by the interrogating detective.

(84:7). Mr. Hamilton's postconviction motion alleged that his confession was the result of an unequal confrontation where the detectives' pressures exceeded Mr. Hamilton's ability to resist. *See* ***Jerrell C.J.***, ¶5

The postconviction court concluded without a hearing that "the tactics utilized by police did not amount to the type of coercion so as to render his statement involuntary." (97:4; App. 104). The court relied on ***State v. Triggs***, 2003 WI App 91, 264 Wis. 2d 861, 663 N.W.2d 396, for the proposition that misrepresentation by police interrogators is "not so inherently coercive that it renders a statement inadmissible." ***Id***., at ¶ 24. But ***Triggs*** says only that an interrogator's use of deception is not so inherently coercive that it, *standing alone*, necessarily renders a statement involuntary. ***Id***., at ¶14, ¶17, ¶24. Mr. Hamilton never argued that the misrepresentations alone rendered his statement involuntary. He alleged that the misrepresentations were one factor among many that rendered his statement involuntary under the totality of the circumstances. (83:10).

Triggs, in fact, supports Mr. Hamilton's position and illustrates why a hearing on his motion is necessary. The Court in ***Triggs*** held that misrepresentations did not *ipso facto* render a statement involuntary, but found that misrepresentations are relevant and that when that tactic is employed by interrogators, an analysis by the circuit court of the totality of the circumstances *is required*. ***Id***. at ¶15, ¶17.

Under ***Triggs***, Mr. Hamilton presented more than sufficient facts to require the circuit court to examine the totality of the circumstances to determine whether his statement was voluntary. That is simply not possible without an evidentiary hearing.

Here, the postconviction court paid lip service to the "totality of the circumstances" but then simply ignored many of the facts alleged in Mr. Hamilton's motion. (97:5). The court made no mention of Dr. Thompson's report. The court ignored the testimony Mr. Hamilton proposed to present about the "Reid Technique" and the psychological tactics that Dr. Thompson found in the interrogation in addition to the misrepresentations. Among the techniques referenced by Dr. Thompson and asserted by Mr. Hamilton in his postconviction motion, were:

(1) The interrogator repeatedly accused Mr. Hamilton of lying (e.g. "It makes you look like a liar." "Looks like you lying for no reason.").

(2) The interrogator implied that Mr. Hamilton's "lying" would lead to harsher treatment (e.g. "This is not going to look good. Looks like you lying for no reason."), and that admitting would aid him ("You can only help yourself")

(3) The interrogator steered Mr. Hamilton toward the conduct he wanted Mr. Hamilton to admit to ("Any investigator worth his salt.. . [would conclude] you're saying you touched her over her clothes.").

(83:14; R. 84:7).

Although the defendant's personal characteristics are a crucial component of any voluntariness "totality of the circumstances" analysis, ***Jerrell C.J.***, 2005 WI 105, ¶17, the only personal characteristic that the circuit court mentioned was the fact that Mr. Hamilton had previous arrests. (97:5; App. 105). Strikingly, the postconviction court entirely ignored Dr. Thompson's proposed testimony about the testing he performed and what it revealed about Mr. Hamilton's personal characteristics.

The postconviction court ultimately rejected Mr. Hamilton's factual assertion that the interrogation techniques caused him to confess because the detective used a "friendly and conversational tone" and his demeanor was not coercive or threatening. (97:5; App. 105). Mr. Hamilton has never argued that the detective used force or threat of force or took an aggressive approach to the interrogation. That was not the detective's strategy at all. That does not mean that he did not employ techniques that were designed to coerce. In ***Colorado v. Connelly***, 479 U.S. 157 (1986), the United States Supreme Court noted that "as interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the 'voluntariness' calculus." ***Id***., at 164. Yet here, the circuit court ignored Mr. Hamilton's proposed expert testimony about his mental condition.

Assuming that it is ever possible to properly analyze the totality of the circumstances relating to the voluntariness of a confession without a hearing, that certainly did not happen here. A hearing is necessary.

3. Mr. Hamilton's motion presented sufficient factual support to entitle him to a hearing on his claim that expert testimony undermining the reliability of his statement would have been highly relevant at trial.

Mr. Hamilton argued in his postconviction motion that even if the court concluded that Mr. Hamilton's statement was admissible, evidence that the interrogation techniques used on Mr. Hamilton can lead to a false confession and that Mr. Hamilton's personal characteristics heightened that risk was highly relevant evidence that should have been presented at trial. Expert testimony in these areas would have assisted the jury in evaluating the reliability of the statement.

All of the evidence Mr. Hamilton proposed to present relative to the voluntariness of his statement bore equally on the statement's reliability. Dr. Thompson's report references the interrogation tactics used on Mr. Hamilton, describing them as "a number of powerful psychological techniques designed to extract confessions from persons that police believe are guilty." (84:7). Mr. Hamilton repeatedly denied wrongdoing, insisting that his DNA could not possibly have been found on D.H.'s vagina. Only after considerable pressure was brought to bear and the interrogator asked him again "Did you touch her vagina over her clothes?" did Mr. Hamilton acquiesce and say he did.

Mr. Hamilton argued in his motion that the reliability of his confession was questionable because he was particularly susceptible to the techniques employed by his interrogator. As Dr. Thompson indicates, Mr. Hamilton was "highly susceptible in the presence of even mild interrogatory pressure (greater than the 99th percentile when compared to

adult offenders) and particularly likely to change his responses when even mildly pressured to do so." (84:7).

The circuit court did not address the relevance of the proposed expert testimony to challenge the reliability of the statement at trial. The circuit court declared that the primary basis for its decision denying the motion without a hearing was that there was no reasonable probability that Mr. Hamilton would have been acquitted if the statement had been suppressed or expert testimony had been presented to call is reliability into question. (97:6; App. 106).

Mr. Hamilton's motion explained how counsel's deficient performance was prejudicial. Setting aside the confession, this was not an easy case for the State. D.H. described a sexual assault that began in the living room where she slept very close to her brother. At one point, she described him sleeping mere inches from her and sharing a blanket with her. (112:63). There were four other people in the house. In her recorded interview, D.H. testified that she thought her other uncle was also present in the living room during the assault. The notion that Mr. Hamilton would commit these assaults, including pulling down his and D.H.'s pants, in the living room with other people in the house and D.H.'s brother and his own brother were inches away was problematic for the State.

Also potentially problematic was the child's unusual sexual knowledge and her awareness of her older sister's sexual assault. When she first spoke to the police D.H. described Mr. Hamilton rubbing his "dick" on her "pussy." (113 22). This is unusual language for an eight-year-old child and certainly indicates that she had been discussing sexual matters with someone (and there is no suggestion that she acquired this knowledge from Mr. Hamilton). What

makes this significant is the fact that D.H. had clearly heard about her sister's sexual assault. At trial D.H. insisted her sister had "never" talked to her about it. (112:57). However, it is clear that this testimony was false. First, D.H.'s mother denied ever discussing the matter with D.H. and insisted that she could only have learned of it by discussing it with her sister. (112:81). Second, D.H. revealed that she *had* heard about the assault from her sister during the forensic interview.

In fact, it is clear that her sister's experience was very much on her mind even as she told her own sexual assault story during the forensic interview. At one point, D.H. was asked whether anything like this had happened before, and she responded that it had happened to her sister with her other uncle. Then, when asked how she felt when she was being assaulted, she made the puzzling reference to her sister, saying "My sister said that she would feel like it's hurting him." (17:01:26).

Mr. Hamilton alleged in his motion that the child's forensic interview was odd in another way. For the most part, D.H. told her story in an unemotional manner that Mr. Hamilton submitted had a rote quality. At the very least, it appeared devoid of feeling. This could be explained as simply the child's style of coping with a trauma, except that at one point in the interview D.H. did express emotion. When she described Mr. Hamilton "squeezing" her butt, she said with some feeling, "I was so mad at him." (17:03:08). It is Mr. Hamilton's position that it is no coincidence that the only conduct that D.H. could not describe without emotion was similar to the conduct Mr. Hamilton had readily admitted to – patting D.H.'s butt while hugging her on the stairs. Mr. Hamilton submits that D.H.'s description of that event was emotional and had some ring of authenticity because that was the only part of her account that *actually happened*. (83:18).

In fact, D.H. described exactly this event to her mother. (112:90). Mr. Hamilton asserted in his motion that it had always been his belief, and the theory of defense in this case, that he innocently patted his niece on the butt, not appreciating that she was probably too old for that, and that it would make her uncomfortable, which it did. She was angry, and felt violated, which brought to mind her sister's victimization and led to the accusation. (83:18).

Mr. Hamilton's motion pointed out that at trial, D.H. repeatedly stated that she "forgot" what happened. When reminded that she had given a statement to the officer, she responded, "I remember telling her something else, but I forgot what I said." (112:41). This is disturbing in that it suggests the possibility that D.H. was not claiming to have forgotten an experience, but was trying to remember the story she had told. Certainly one interpretation of this testimony might be that the child was fearful at confronting her abuser in court. But another is that the child was having difficulty remembering her story (the record reflects that she kept rubbing her temples to try to remember). (112:46, 50). Yet another explanation is that she was nervous and reluctant to tell a *false* story in front of Mr. Hamilton in court. As Mr. Hamilton explained in his motion, the problem is that his inculpatory statement went a long way toward eliminating any need for the jury to sort that out. After all, why would he admit to something as awful as touching D.H.'s vagina if he was not guilty?

The postconviction court's decision ignored all of that. The court said that D.H. "detailed repeatedly the specifics of what occurred" and that her testimony was "dynamic." (97:6). The court said D.H.'s testimony was "supported by physical evidence," presumably referring to the bruise and abrasion in D.H.'s vaginal area that, according to the examining nurse,

could have been caused by sexual assault, or normal playing or a fall, and the redness to D.H.'s vaginal area that could have had "endless causes." (113 34). Essentially, the postconviction court found that there was no prejudice to Mr. Hamilton because it found D.H. to be credible. The court assumed the jury would too, declaring that there was no reasonable probability that Mr. Hamilton would have been acquitted "given D.H.'s testimony." (97:6). This was improper.

> In assessing *the prejudice caused by the defense trial counsel's performance, i.e.,* the effect of the defense trial counsel's deficient performance, a circuit court may not substitute its judgment for that of the jury in assessing which testimony would be more or less credible.

State v. Jenkins, 2014 WI 59, ¶ 64, 355 Wis. 2d 180, 848 N.W.2d 786. The postconviction court's reliance on its own belief that D.H.'s testimony was credible is particularly problematic here since the postconviction judge did not even hear that testimony. Because the postconviction judge did not preside over Mr. Hamilton's trial, his finding of credibility was based only on a review of the transcript.

The postconviction court further supported its finding of no prejudice with this scornful declaration:

> False confession? The court agrees with the State: There is no false confession, and thus, trial counsel was not ineffective for failing to call an expert to testify that vulnerable innocent souls such as the defendant could be coerced into giving a false confession.

(97:6).7 Earlier in its decision, the postconviction court similarly questioned whether Mr. Hamilton's admission to touching the victim's vagina was a "confession" at all. The court found it significant that Mr. Hamilton did not confess to *all* of the improper touching the victim had alleged and that his partial admission was "not even close to what the victim said occurred." (97:4; App. 104). This is a strange position for the court to take — that the admission of the statement was not prejudicial because Mr. Hamilton only admitted *some* of the child molestation that was alleged. Even though Mr. Hamilton did not admit everything the detective accused him of, there was still a damaging admission wrung from him. In a child sexual assault case it is difficult to overstate the significance of *any* admission to improper touching by the accused. It is also worth noting that once the interrogator got the admission from Mr. Hamilton, he did not press him much further, presumably because he knew that *any* admission was enough.

The prosecutor at trial certainly seemed to think the statement was important. This was evident in the State's closing argument in which the prosecutor relied heavily on the statement and Mr. Hamilton's dejected appearance when he finally made admissions. (114:60-61).

As Mr. Hamilton argued in his postconviction motion, if the statement had to be admitted at trial, expert testimony would have alerted the jury that Mr. Hamilton's dejected demeanor was not necessarily the result of his guilty conscience, but could just as easily be explained by the

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[7] The postconviction court's disdain for the whole notion of false confessions is palpable here, which should cause concern, given that the proposition that subtle coercion can lead to a false confession has been non-controversial for many years.

interrogation techniques that were specifically designed to induce a sense of hopelessness in him. (83:19). Without the expert testimony, the jury was left with the misimpression that an interrogation is a simple search for the truth when the interrogating detective was asked why he kept telling Mr. Hamilton that he must have done it because his DNA was on D.H., the detective responded "That was basically part of the interrogation, just trying to *find out the truth* as to what happened, what he'd admit to doing." (114:6).

As Mr. Hamilton explained in his motion, expert testimony would have explained to the jury that the technique in question — lying about the physical evidence — is not simply designed to ferret out the truth. Instead, such tactics are designed to "manipulate a suspect into thinking that it is in his best interest to confess" by conveying "the interrogator's rock-solid belief that the suspect is guilty and that all denials will fail." Saul M. Kassin et al, ***Police Induced Confessions: Risk Factors and Recommendations***, 34 Law and Hum Behav. at 12 (Feb. 2010). Tactics such as making an accusation, overriding objections, and citing evidence, real or manufactured, are employed to "shift the suspect's mental state from confident to hopeless." *Id*. The false evidence ploy is known to create a particular risk of a false confession based on basic psychological research. *Id*., at 17.

The credibility of the accusation was questionable, but the jury was left with no reason to question it given Mr. Hamilton's unchallenged and unexplained admission. Mr. Hamilton's postconviction motion adequately alleged that trial counsel's failure to adequately address the statement contributed to the conviction and was prejudicial.

II. This Court should grant Mr. Hamilton a new trial in the interest of justice.

This Court may grant discretionary reversal if either the real controversy has not been fully tried, or if it is probable that for any reason, justice has miscarried. Wis. Stat. §752.35. Mr. Hamilton asserts that the real controversy was not fully tried. For this Court to reverse on that standard, it is not necessary that the court find that a new trial would likely result in a different outcome. ***State v. Williams***, 2006 WI App 212, ¶ 36, 296 Wis. 2d 834, 723 N.W.2d 719. This Court may find that the real controversy has not been fully tried if the jury was not given the opportunity to hear evidence bearing on a significant issue in the case. ***State v. Davis***, 2011 WI App 147, ¶ 16, 337 Wis. 2d 688, 808 N.W.2d 130.

The problem of false confessions has long been studied and is well documented.

False confessions are, unfortunately, unexceptional. Almost a quarter of the approximately 2,000 exonerations studied in a 2012 report involved a defendant who either falsely confessed or was falsely accused by a co-defendant who confessed. According to recent data from the Innocence Project, approximately 25 percent of wrongful convictions overturned by DNA evidence in the United States have involved some form of false confession. Wisconsin is not immune to the risk of false confessions and false convictions.

State v. Stevens, 2012 WI 97, ¶ 138, 343 Wis. 2d 157, 822 N.W.2d 79 (Abrahamson, C.J., concurring in part and dissenting in part), citing Samuel R. Gross & Michael Shaffer, National Registry of Exonerations, *Exonerations in the United States*, 1989–2012, 41 (2012).

Still, Mr. Hamilton does not claim that the Court should grant him a new trial because the jury did not hear testimony about the abstract possibility of a false confession. He seeks a new trial because the jury did not hear that techniques used during his interrogation can create a risk of a false confession, and that he had personal characteristics that made that risk more than an abstract idea in his case. If this Court does not find that trial counsel was ineffective, Mr. Hamilton requests that the Court grant him a new trial in the interest of justice. Mr. Hamilton requests that the Court remand the case for a hearing to establish the facts relating to the techniques used during his interrogation and the interplay between those techniques and his personal characteristics.

A defendant may request a new trial in the interest of justice in his motion for postconviction relief. ***State v. Henley***, 2010 WI 97, ¶63, 328 Wis. 2d 544, 787 N.W.2d 350. A court may grant the new trial if it appears from the record that the real controversy has not been fully tried or where it is probable that justice has been miscarried for any reason, ***State v. Armstrong***, 2005 WI 119, 263 Wis. 2d 639, 700 N.W.2d 98; ***State v. Hicks***, 202 Wis. 2d 150, 549 N.W.2d 435 (1996). For example, courts have found that the real controversy has not been fully tried when important evidence has been excluded or where evidence has been admitted that should have been excluded. ***Armstrong,*** ¶ 113.

As discussed above, the case against Mr. Hamilton was based on a child's accusation whose credibility was questionable in a number of ways. It is very likely that the jury was persuaded to convict based on Mr. Hamilton's admission, which the jury was given no framework to understand or reason to question. Considering the record as a whole, it is impossible to say with any certainty that the lack of expert testimony challenging the reliability of the

confession played little or no part in the jury's verdict. *See* ***Hicks***, 202 Wis. 2d at 153 (granting a new trial because "we cannot say with any certainty that the hair evidence used by the State during trial played little or no part in the jury's verdict.").

Mr. Hamilton asks that this Court remand for an evidentiary hearing to develop the necessary factual record to allow this Court to decide whether to grant Mr. Hamilton a new trial in the interest of justice so that the real controversy can be fully tried.

CONCLUSION

Mr. Hamilton asks that this Court vacate the order of the circuit court denying his motion for postconviction relief and remand the case for an evidentiary hearing on all of the issues presented in his postconviction motion.

Dated this 27th day of April, 2018.

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 9,716 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 27th day of April, 2018.

Signed:

_____

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 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 juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 27th day of April, 2018.

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APPENDIX

I N D E X
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