STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Case No. 2018AP000296 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LORENZO D. KYLES,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and Order Denying Postconviction Relief, Both Entered in the Milwaukee County Circuit Court, the Honorable Richard J. Sankovitz and the Honorable Mark A. Sanders Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

JAY PUCEK
Assistant State Public Defender
State Bar No. 1087882

CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
pucekj@opd.wi.gov
augustc@opd.i.gov

Attorneys for Defendant-Appellant

TABLE OF CONTENTS

Page

ISSUE PRESENTED 1

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 3

ARGUMENT 17

I. Mr. Kyles Has Established Prejudice Because The August Offer Created A Reasonable Probability That He Would Have Been Sentenced To Less Prison Time Had He Entered His Plea Under That Offer Rather Than The September 13th Offer. 17

A. Legal principles and standard of review. . 17

B. Under the August offer, a reasonable probability exists that Mr. Kyles would have been sentenced to less prison time... 19

CONCLUSION 25

CERTIFICATION AS TO FORM/LENGTH 26

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12) 26

CERTIFICATION AS TO APPENDIX 27

APPENDIX 100

CASES CITED

Glover v. United States,
531 U.S. 198 (2001) 19

Lafler v. Cooper,
566 U.S. 156 (2012) 14, 16

Missouri v. Frye,
566 U.S. 134 (2012) 18, 19, 24, 25

Spiller v. United States,
855 F.3d 751 (7th Cir. 2017) 21

State v. Curiel,
227 Wis. 2d 389, 597 N.W.2d 697 (1999) 20

State v. Ludwig,
124 Wis. 2d 600, 369 N.W.2d 722 (1985) 18

State v. Pitsch,
124 Wis. 2d 628, 369 N.W.2d 711 (1985) 17, 18

State v. Thiel,
2003 WI 111,
264 Wis. 2d 571, 665 N.W.2d 305 17

Strickland v. Washington,
466 U.S. 668 (1984) 17, 18, 21, 24

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

United States Constitution
U.S. CONST. amend. VI 17, 19

Wisconsin Constitution
Wis. CONST. art. I, § 7 17

Wisconsin Statutes
§939.62 1

§939.63(1)(a)2 1

§940.02(1) 1

§941.29(2) 2

§973.01(2)(d) 2

ISSUE PRESENTED

Mr. Kyles entered a plea agreement with the State in this case. The terms of that agreement required him to plead guilty to first-degree reckless homicide. In exchange, the State and defense agreed to jointly recommend 33 years of initial confinement followed by 8 years of extended supervision. The circuit court imposed 32 years of initial confinement followed by 8 years of extended supervision. Did an earlier, more favorable, plea offer that defense counsel failed to communicate to Mr. Kyles create a reasonable probability of a different outcome?

The circuit court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication of this case is requested, as it will help guide litigants in future cases with similar facts.

While Mr. Kyles does not request oral argument, he welcomes the opportunity to discuss the case should the Court believe that oral argument would be of assistance to its resolution of the matter.

STATEMENT OF THE CASE

On May 21, 2002 the State charged Mr. Kyles with first-degree reckless homicide while armed, as a repeater in violation of Wis. Stats. §§ 940.02(1), 939.63(1)(a)2 and 939.62 as well as possession of a firearm by a felon, as a

repeater in violation of Wis. Stats. §§ 941.29(2) and 939.62. (1:1-2).

On September 30, 2002 Mr. Kyles pled guilty to first-degree reckless homicide while armed. (107). In exchange for his plea, the State agreed to dismiss the repeater enhancer as well as the possession of a firearm by a felon. (107:2). The parties also agreed to jointly recommend that Mr. Kyles be sentenced to 41 years in the Wisconsin prison system, bifurcated as 33 years of initial confinement followed by 8 years of extended supervision. (107:2-3). On November 12, 2002, the Honorable Richard Sankovitz sentenced Mr. Kyles to 40 years in prison, with 32 years initial confinement followed by 8 years of extended supervision, concurrent to Mr. Kyles' revocation sentence.[1] (108:39-40; App. 146-147).

Mr. Kyles ultimately filed a timely notice of intent to pursue postconviction relief on December 4, 2014.[2] (43). Mr. Kyles filed a motion for postconviction relief with the circuit court on July 10, 2017. (79). On December 8, 2017 and December 22, 2017, the postconviction court, the Honorable Mark A. Sanders presiding, held an evidentiary hearing. (111:1; 112:1). On January 2, 2018, the postconviction court issued a written order denying Mr. Kyles' postconviction motion. (98; App. 103). This appeal follows. (101).

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[1] The sentencing court expressed some concern as to whether the recommended 33 years initial confinement and 8 years extended supervision violated Wis. Stat. §973.01(2)(d) because the extended supervision portion was not at least 25% of the initial confinement portion. The parties agreed to modify their recommendation accordingly, instead recommending 32 years initial confinement and 8 years extended supervision. (108:26-30, 37; App. 133-137, 144).

[2] The filing of that document was made timely under this Court's order dated December 11, 2014.

STATEMENT OF FACTS

Shooting and Initial Investigation

On May 17, 2002, D.S. arranged to purchase crack cocaine from Mr. Kyles. (1:5-6). D.S.'s friend, Jennifer Martinson, agreed to give D.S. a ride to the drug deal. (1:4). Ultimately, they met up with Mr. Kyles at a local gas station. (1:4).[3] D.S. and Mr. Kyles then walked "off to the side of the gas station." (1:5). According to Gary Winters, who drove Mr. Kyles to the drug deal, he heard D.S. yell "No, no, Main, no." (1:5). Mr. Winters heard a single shot. (1:5). He then witnessed Mr. Kyles fire two more shots at D.S. (1:5).

Martinson also witnessed the shooting from her car. (1:4). She heard a single gunshot and, while looking in her rearview mirror, witnessed D.S. fall to the ground. (1:4). She drove off at a high rate of speed. (1:4). As she was leaving, she heard several more shots. (1:4).

Mr. Kyles was arrested and made a statement to police. (1:6). He told police that D.S. had called and asked Mr. Kyles to sell him crack cocaine. (1:6). He arranged to meet up with D.S. at a nearby gas station. (1:6). Ultimately, D.S. and Mr. Kyles walked to a gangway between the gas station and another business. (1:6). At that point, D.S. became loud, started calling Mr. Kyles a "motherfucker," and "acted like he was going to cause a problem." (1:6). In response, Mr.

[3] The witnesses in the criminal complaint do not agree as to the precise sequence of events: According to Martinson, she drove D.S. directly to the gas station. (1:4). However, Gary Winters told police that Martinson actually drove D.S. to Mr. Kyles' residence. (1:5). D.S. got in the car with Mr. Winters and Mr. Kyles and Martinson followed that car to the gas station. (1:5). Mr. Kyles' statement also has Martinson driving directly to the gas station. (1:6).

Kyles told D.S. he was armed and lifted up his shirt to show D.S. a handgun which was concealed in his pants. (1:6). D.S. grabbed the gun and pulled it from Mr. Kyles' waistband. (1:6). According to Mr. Kyles, both men began struggling for control of the gun. (1:6). Mr. Kyles told police he was able to gain control of the gun and that he pulled the trigger at least two times but admitted it could have been more. (1:6-7). Mr. Kyles then ran to the car and left the scene with Mr. Winters. (1:7). He told police that he threw the gun into a creek on Brown Deer Road. (1:7).

Plea Negotiations

After being charged in this case, Mr. Kyles privately retained counsel. (108:20; App. 127). According to statements made by trial counsel at sentencing, Mr. Kyles consistently expressed remorse and expressed a desire to plead guilty. (108:20; App. 127). In fact, he disclaimed any desire to have a trial in his very first meeting with counsel. (108:20; App. 127). Although he ultimately "allowed" trial counsel to conduct pretrial investigation, trial counsel was candid that he never expected the matter to actually go to trial. (108:20; App. 127).

On June 28, 2002, the parties appeared for a scheduling conference. (106). On that date, the State filed a motion to amend the information from first-degree reckless homicide to first-degree intentional homicide. (5). However, the State asked the Court to defer ruling on that motion until after a scheduled final pretrial. (106:2). According to the State, "The reason for that is that I believe that Mr. Flanagan [defense counsel] and Mr. Molitor [the State] have ongoing negotiations and they are hoping to resolve this matter in some way." (106:2).

On August 19, 2002, the State sent a letter to Mr. Kyles' trial counsel containing a settlement proposal (hereinafter "August offer"). (88:1-2; App. 104-105). The terms of the proposed offer were as follows:

- Mr. Kyles would plead guilty or no contest to both first-degree reckless homicide while armed and felon in possession of a firearm.
- The State would move to dismiss the repeater enhancer on both counts.
- The State would request a presentence investigation report.
- D.S.'s family would be free to address the court at sentencing and recommend whatever disposition they felt appropriate.
- The State would recommend a substantial period of imprisonment at the Wisconsin State Prison with a substantial period of initial confinement and extended supervision with the exact length left to the discretion of the court.
- The State would also leave it to the Court's discretion whether that sentence would be concurrent or consecutive to any other sentence.
- The State would request all lawful restitution.

(88:1-2; App. 104-105). Under the August offer, Mr. Kyles would retain his right to argue to the sentencing court for whatever sentence he thought was appropriate under the law. (88:1-2; App. 104-105; 111:25).

Under the terms of that offer, the maximum possible penalty was 70 years imprisonment, with a potential of 47 years of initial confinement followed by 23 years of extended supervision, and a presumptive minimum 3 years of confinement due to the while armed enhancer. (88:1; App. 104; 112:115; App. 163).

The August offer expired on September 12, 2002. (88:2; App. 105). The State indicated that if Mr. Kyles failed to resolve the matter with a plea, it would renew its request to amend the information to first-degree intentional homicide. (88:2; App. 105).

On September 9, 2002 Mr. Kyles' trial counsel proposed a counter-offer to the State, which involved a guilty plea by Mr. Kyles to an amended charge of second-degree reckless homicide while armed and felon in possession of firearm, both with repeater enhancers. (108:28; App. 135). Trial counsel further proposed that both the State and the defense would recommend the maximum possible penalty for those offenses, which totaled 33 years of initial confinement and 8 years extended supervision. (108:28; App. 135).

The State rejected this counter-offer and submitted a second written offer to resolve the matter on September 13, 2002 (hereinafter "September 13th offer"). (108:28; App. 135; 92:1; App. 106). The modifications from the earlier written offer are as follows:

- Mr. Kyles would plead guilty or no contest to first-degree reckless homicide while armed.
- The State would move to dismiss both the repeater enhancer on the homicide charge as well as the felon in possession of a firearm charge.

- The parties would jointly recommend 33 years of initial confinement followed by 8 years of extended supervision. (92:1-2; App. 106-107).

Under the September 13th offer, the maximum possible penalty was 65 years imprisonment with 45 years of initial confinement followed by 20 years of extended supervision, again with a presumptive minimum sentence of 3 years in prison. (92:1; App. 106). The State's offer letter again stated that failure to resolve the matter with a plea would result in the State renewing its request to amend the information to first-degree intentional homicide. (92:1-2; App. 106-107).

Plea and Sentence

On September 30, 2002, Mr. Kyles appeared before the Honorable Richard J. Sankovitz and pled guilty under the terms of the September 13th offer. (107:6).

Prior to Mr. Kyles' sentencing hearing, the Department of Corrections submitted a presentence investigation (PSI). (10). Mr. Kyles admitted his guilt to the PSI writer. (10:3). Specifically, he told the writer:

> He affirmed he knew [D.S.] for years and that they were "cool." Lorenzo said if this had never happened [D.S.] would still be here, with his kid, and he would still be living. He admitted that he must be the "devil" to have done such a thing, and that he really messed everything up.

(10:3). The PSI writer acknowledged that Mr. Kyles was also under the influence of alcohol when he committed the offense. (10:12). The PSI writer stated:

> During the interview with Mr. Kyles he expressed extreme remorse for his actions and appears to understand the wrongfulness of his behavior. He also

> acknowledged the impact his action had on the victim, his children, his family, and anyone else who may have had any type of relationship with [D.S.] This writer does believe the defendant's expression of remorse, is in fact genuine, although it does not excuse his behavior. Mr. Kyles appeared to be an intelligent man with the ability to choose between "right" and "wrong."

(10:12). The PSI writer ultimately recommended that Mr. Kyles be sentenced to a term of imprisonment, with initial confinement somewhere in the range of 26 to 40 years. (10:13).

On November 12, 2002, the parties appeared for sentencing before Judge Sankovitz. (108; App. 108). A cousin of D.S.—Jadeia Arnold—addressed the Court on behalf of D.S.' family. (108:4; App. 111). Mr. Arnold told the court that the family wanted Mr. Kyles to go to prison, but he struggled to articulate a specific number. (108:7; App. 114). Mr. Arnold appeared, however, to disfavor "a long lengthy sentence." (108:4; App. 111).

The State acknowledged the seriousness of the offense. (108:8; App. 115). As to Mr. Kyles' character and rehabilitative needs, it stated that Mr. Kyles was "somewhat of a paradox." (108:9; App. 116). The State was impressed with his remorseful comments in the PSI. (108:9; App. 116). He also had a work history. (108:9; App. 116). His prior record was a negative for the State, however. (108:9; App. 116). That record included a prior conviction for second-degree sexual assault of a child—a thirteen-year old female. (108:10; App. 117). According to Mr. Kyles, he touched that child over her clothing while heavily intoxicated, a version of events not contradicted by the State. (10:6; 108:10; App. 117). He received a probation disposition and was on probation when he committed this offense. (108:10; App.

117). Mr. Kyles had struggled while on probation and, according to the State, had a history of substance abuse issues. (108:12; App. 119).

Trial counsel spoke at length about Mr. Kyles' remorse:

> I want to begin my remarks by talking about -- there was mention of Mr. Kyles' remorse. Now, there are few clients I have had that expressed more deeper remorse in the beginning. I was hired by Mr. Kyles' mother and father. The first day I met him he told me there will be no trial. There will be no trial. I have to pay for what I did. I'm the one that told him I understand that, but listen to me, I've bean (sic) hired to at least investigate this case before you make up your mind to do that so please let me do my job. I'm not telling you I'm going to push you into a trial or push you into negotiations, but please let me at least hire somebody to investigate this case and let me do my job. Your parents are paying me a lot of money to do that. He allowed me to do so, but I don't think we're ever going to try this case.
>
> As far as remorse, that has been expressed to me every single time I've seen him. He—he--I don't know how to put it into words when somebody -- when you do something that cost someone their life, I can't even begin to imagine how that would make someone feel who does have a conscience and does feel bad. I know he's got to be tortured probably today and the rest of his life for what's occurred.

(108:20-21; App. 127-128).

Trial counsel also stated that he was baffled by how this incident could have happened, as Mr. Kyles did not strike him as somebody who is violent or "capable of a malicious or evil act such as has taken place." (108:24; App. 131). In his sentencing argument, trial counsel emphasized that he

believed the plea was consistent with Mr. Kyles' account of a shooting that was rooted in self-defense. (108:23; App. 130). Mr. Kyles also made a statement personally apologizing for his actions. (108:30; App. 137). He acknowledged the fairness of the joint sentencing recommendation. (108:31; App. 138). As to the nature of the agreement, trial counsel told the court that while he "would love to be free to argue" he did not "believe that's the terms of our agreement." (108:18-19; App. 125-126).

As to the gravity of the offense, the circuit court asserted that that this was a serious offense, although it did not believe that this was an "ambush" or a "revenge killing" as was suggested in the State's motion to amend the information. (108:23; App. 130; 5). Although the circuit court believed it was "intentional" it was "satisfied with the fact that it's been charged as reckless and that Mr. Kyles has been convicted of a reckless crime." (108:23; App. 130). The circuit court discussed several aggravating factors, including Mr. Kyles' prior felony conviction, his probation status, and the caliber of the firearm used. (108:33; App. 140). The circuit court also acknowledged Mr. Kyles' employment history, favorable letters from family, and acknowledgment of responsibility. (108:36; App. 143). The circuit court also recognized that the family of the victim was asking for a more lenient sentence than what was being recommended. (108:38-39; App. 145-146).

The court told the parties that the existence of a joint recommendation made a "big difference." (108:19; App. 126). While the court had not decided on a specific number prior to the sentencing hearing, it "was certainly in that neighborhood." (108:19; App. 126). It viewed the joint recommendation as "appropriate." (108:31; App. 138). It therefore sentenced Mr. Kyles in accordance with the

amended joint recommendation of 32 years initial confinement and 8 years extended supervision. (108:39-40; App. 146-147). The court chose to make the sentence concurrent to Mr. Kyles' revocation sentence of 5 years in prison. (108:10-11, 40; App. 117-118, 147; 10:4).

Relevant Postconviction Proceedings

On July 10, 2017, Mr. Kyles filed a Rule 809.30 postconviction motion alleging that his lawyer failed to communicate the August offer to him. (79:4). Mr. Kyles further alleged that he was unaware of that offer's existence until undersigned counsel procured a copy of the offer letter as part of his postconviction investigation. (79:6). As a remedy, Mr. Kyles asked that he be given an opportunity to accept the earlier offer and be resentenced under its terms. (79:10).[4]

During evidentiary hearings on the motion, trial counsel testified that, given the length of time that has lapsed between his involvement in the case and the postconviction proceedings, he simply could not recall many details about the case. (111:7). Trial counsel testified that he was the sole attorney on the case at the trial level and, as such, it would have been his responsibility to communicate the August offer to Mr. Kyles. (111:7-8).

Trial counsel testified that he had no recollection of the August offer or whether he had communicated its contents to Mr. Kyles. (111:9-10). He also could not recall if he had

[4] While Mr. Kyles later filed a supplemental postconviction motion asking for plea withdrawal, he abandoned that claim during the postconviction hearing and unambiguously asked for the remedy specified in the initial pleading. (112:61-63, 83-87).

informed Mr. Kyles about any counteroffers that might have occurred in this case. (111:11). While trial counsel had no specific recollection of conveying offers to Mr. Kyles in this case, he testified that it is his usual practice as an attorney to convey all offers to clients. (111:11). Trial counsel believed that his file on this matter would have been destroyed prior to this litigation, although he had no specific memory of doing so. (111:13).

At a continued hearing on December 22, 2017, Mr. Kyles testified that he recalled the details of his case, and he remembered his attorney communicating the September 13th offer to him during a jail visit on September 20, 2002. (112:7, 9). Although his trial counsel did not have the actual offer letter with him when they met, Mr. Kyles remembered counsel reading the offer's terms to him from a legal pad. (112:9). Mr. Kyles testified that, following his conviction and sentence, he requested and obtained a copy of the offer letter from the clerk of courts. (112:8). That letter was placed in the court file on the date of Mr. Kyles' plea hearing. (8).

Mr. Kyles testified that the only plea offer that trial counsel presented to him was the September 13th offer. (112:28). Trial counsel never told him about any other offers. (112:10). He further testified that the first time he saw the August offer letter was five to six months before the postconviction motion hearing, when he received a copy from postconviction counsel. (112:29-30). Mr. Kyles confirmed that not only did trial counsel not show him the letter, he also never communicated its terms to him. (112:30-31).

Mr. Kyles testified that, had trial counsel informed him of the August offer, he would have accepted it because he viewed it as a better offer. (112:32). Mr. Kyles viewed the August offer as more favorable because it allowed defense

counsel to argue for a lower sentence while restricting the State from recommending a specific number of years in prison to the court. (112:32).

In addition, Mr. Kyles testified about his general willingness to accept a plea in this case. (112:11). He was highly motivated to resolve the case as he was aware of the State's request to amend the case to first-degree intentional homicide should he proceed to trial. (112:11). He was candid about his guilt and the level of evidence against him. (112:12-13).

Mr. Kyles also testified about a letter that he wrote to trial counsel in 2007. (112:39). After making his open records request and receiving a copy of the September 13th offer letter, Mr. Kyles read that offer letter and saw that it referenced the August offer. (112:39-40). After discovering the existence of the August offer letter, Mr. Kyles wrote to trial counsel in an attempt to obtain a copy. (112:40). In that 2007 letter to trial counsel Mr. Kyles wrote:

> I have obtained a copy of the state's plea proposal dated September 13, 2002. This document references the initial plea proposal made by you, of which I do not have a copy of, it's dated August 19, 2002. Would you please send me a copy of the proposed plea made by you.

(96:1).

Trial counsel's letter did not respond to Mr. Kyles' request regarding the August offer letter. (97:1).

Following the postconviction motion hearing, the postconviction court, the Honorable Mark A. Sanders, issued oral findings of fact and a decision. (112:104-136; App. 152-184). The court found that trial counsel's testimony was generally credible and worthy of belief "but it is of

diminished credibility" because trial counsel could not remember much about the case. (112:107; App. 155).

The court also found that Mr. Kyles' testimony was credible and worthy of belief "but of somewhat diminished weight." (112:110; App. 158). The court identified only two reasons why Mr. Kyles testimony was of "somewhat diminished weight." (112:108-110; App. 156-158). First, he is the defendant and is serving a long sentence. (112:108; App. 156). Second, in his 2007 letter to trial counsel Mr. Kyles indicated that he was looking to withdraw his plea. (112:108-109; App. 156-157). The court noted, however, that it was logical that Mr. Kyles would have a better memory regarding the case events than trial counsel, as this was Mr. Kyles' only homicide case, and trial counsel had represented many defendants. (112:109; App. 157).

The court chose not to make any findings on the deficient performance prong—whether trial counsel had actually failed to communicate the offer. (112:136; App. 184).

Instead, the court rested its decision on the prejudice prong of the ineffectiveness inquiry. (112:136; App. 184). The court began its discussion of prejudice by citing the test articulated by the U.S. Supreme Court in *Lafler v. Cooper*, 566 U.S. 156, 164 (2012), correctly observing that the defense must show that there is a reasonable probability that Mr. Kyles would have accepted the plea offer, that the State would not have withdrawn that offer and the court would have accepted it, and finally that the number of convictions or the sentence or both under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. (112:126-127; App. 174-175).

The court found that there is a reasonable probability that Mr. Kyles would have accepted the August offer. (112:127-128; App. 175-176). In making this determination the court stated:

> I think [Mr. Kyles] credibility is sufficient for me to conclude, though, that the August – that the defendant would have been – or that the defense has been willing to demonstrate that the defendant would have accepted that plea had it been offered at the time. I don't mean –
>
> That does not necessarily mean for the purposes of my findings of fact that it was not offered.
>
> But looking at the prejudice prong, there is sufficient testimony for me to reach the conclusion that the defendant would have accepted that plea.

(112:128; App. 176).

The court also found that the State would not have withdrawn that offer and the court would have accepted its terms. (112:128-129; App. 176-177).

With regard to whether or not there is a reasonable probability that the outcome would have been more favorable to Mr. Kyles, the court found that Mr. Kyles had not met his burden. (112:134-135; App. 182-183). The court found that the August offer involved more convictions than the September 13th offer and as a result the only question was whether the sentence would have been better. (112:135; App. 183). In determining that the August offer did not create a reasonable probability of a better sentence than the September 13th offer, the court focused on which offer was "better" and which was "worse." (112:106, 129-131; App. 154, 177-179).

The court also found that the August offer created a "theoretical possibility of a lower sentence," which the court

found insufficient under *Lafler*. (112:133; App. 181). The court stated that if a "theoretical possibility" were sufficient to show prejudice, then all a defendant would ever need to show is deficient performance because deficient performance "by definition creates a theoretical possibility of a different outcome." (112:133; App. 181).

The court also focused on why a substantial prison recommendation from the State could have resulted in more prison time for Mr. Kyles. (112:130-132; App. 178-180).

However, in its discussion the court also noted:

> There is *also favorable risk that it could be lower* than in this case 31 years – or I am sorry, 41 years.

(112:130-131; App. 178-179)(emphasis added).

The court therefore denied Mr. Kyles' postconviction motion. (98; App. 103; 112:136; App. 184). Mr. Kyles appeals.

ARGUMENT

I. Mr. Kyles Has Established Prejudice Because The August Offer Created A Reasonable Probability That He Would Have Been Sentenced To Less Prison Time Had He Entered His Plea Under That Offer Rather Than The September 13th Offer.[5]

A. Legal principles and standard of review.

Criminal defendants are guaranteed the right to effective assistance of counsel under both the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *State v. Thiel*, 2003 WI 111, ¶ 18, 264 Wis. 2d 571, 665 N.W.2d 305. To prove a claim of ineffective assistance of counsel, a defendant must first show that counsel's performance was deficient, and, second, that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687.

Both the deficient performance and prejudice components of the ineffectiveness inquiry involve a mixed question of law and fact. *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). Appellate courts will not reverse the circuit court's findings of fact unless clearly erroneous. *Id.* at 634. Whether trial counsel's performance

[5] Mr. Kyles does not address the question of deficient performance in this brief because that question is not properly before this Court. Given the postconviction court's decision not to address the deficient performance question, should this Court agree with Mr. Kyles regarding prejudice and reverse the postconviction court on that issue, Mr. Kyles would be seeking a remand to the circuit court so that it can enter a decision on deficient performance.

was deficient and whether it prejudiced the defendant are questions of law that this Court reviews *de novo*. *Id.*

When deciding whether a defendant was prejudiced by counsel's unprofessional errors, reviewing courts must look to whether there is a reasonable probability the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Defendants are not required to show that it is more likely than not that counsel's deficient performance altered the outcome of the case. *Id.* at 693.

In this way, the test laid out in *Strickland* is not an outcome-determinative test and the focus is on the reliability of the proceedings. *Pitsch*, 124 Wis. 2d at 642. A proceeding can be rendered unreliable and unfair "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.*

The right to effective assistance of counsel extends to "all critical stages of a criminal proceeding" including plea negotiations. *Missouri v. Frye*, 566 U.S. 134, 140 (2012); *see also State v. Ludwig*, 124 Wis. 2d 600, 369 N.W.2d 722 (1985). In the context of plea negotiations, counsel has a "duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Frye*, 566 U.S. at 145. If counsel allows a more favorable offer from the State to expire without advising the defendant or allowing him to consider it, as a matter of law, counsel did not provide effective assistance. *Id.*

Thus, in order to establish prejudice where an attorney fails to communicate an offer to the defendant and the defendant later enters a guilty plea under the terms of a different offer, the defendant must show:

1) A reasonable probability the defendant would have accepted the earlier plea offer had they been afforded the effective assistance of counsel;

2) A reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, and;

3) A reasonable probability that the end result of the criminal process would have been more favorable to the defendant by reason of a plea to a lesser charge or a sentence of less prison time.

Frye, 566 U.S. at 147.

With regard to the third prong of the *Frye* prejudice test, the U.S. Supreme Court has made clear that "any amount of [additional] jail time has Sixth Amendment significance." *Frye*, 566 U.S. at 147 (*quoting Glover v. United States*, 531 U.S. 198, 203 (2001)).

B. Under the August offer, a reasonable probability exists that Mr. Kyles would have been sentenced to less prison time.

Here, the circuit court found that Mr. Kyles satisfied the first two prongs of *Frye's* prejudice test. However, it determined that Mr. Kyles did not prove that the earlier offer created a reasonable probability of a better sentence or less convictions. (112:128-132; App. 176-180).

Mr. Kyles concedes that there is no reasonable probability that the August offer would have resulted in a plea to a lesser charge, because it contemplated a plea to not only the count Mr. Kyles ultimately pled to, but also to a second count of possession of a firearm by a felon. Under the August

offer Mr. Kyles' total prison exposure was 70 years, while under the September 13th offer, it was 65 years.

However, that does not mean that the earlier plea offer does not create a reasonable probability of a different outcome—a sentence less than the 32 years of initial confinement he received. Here, the August offer created a reasonable probability of less prison time for Mr. Kyles for at least two reasons.

First, the August offer restricted the State from recommending to the court a specific number of years in prison, instead asking the court simply to impose a "substantial" prison term. Second, under the August offer, defense counsel for Mr. Kyles was free to argue for any length of sentence. Under the specific facts of this case, these provisions were significant features that create a reasonable probability that the court would have imposed less than the 32 years of initial confinement Mr. Kyles received under the September 13th plea offer.

Under the August plea offer, the State would have been required to simply request a "substantial" prison term, rather than a specific number of years, or decades, in prison. Further, the State could not have further defined the word "substantial," even if they strenuously disagreed with Mr. Kyles' specific numeric recommendation.

"Substantial" is a vague and imprecise word that can mean different things to different listeners. *See State v. Curiel*, 227 Wis. 2d 389, 406, 597 N.W.2d 697 (1999)("A word which commonly denotes this sense of "substantially" is the term "much," defined as "[g]reat in quantity, degree, or extent."). In this case, counsel for Mr. Kyles would have the power to define and defend his understanding of "substantial prison" with reference to a number less than 32 years. This is

the second major benefit—it allows defense counsel to argue on behalf of a lesser sentence than that which was ultimately imposed under the September 13th joint plea agreement.

It cannot be denied that there is real value to the defense in being free to argue for what the defense thinks is the most appropriate sentence. (*See Spiller v. United States*, 855 F.3d 751, 756 (7th Cir. 2017)(Where the plea offer from the government provided little benefit to the defendant and required the defense to stipulate to the government's sentence guideline calculations, the 7th Circuit Court of Appeals approved trial counsel's strategy to enter a blind plea as a valid strategic decision because it *preserved the defendant's freedom to argue* for a sentence outside of the guideline range).

Under the terms of the August plea agreement, Mr. Kyles' trial counsel would have been permitted to argue that some lesser confinement term—*e.g*., 25, 28, or 30 years - was appropriate under the State's "substantial prison" recommendation.

While it is true that the sentencing court could have still chosen to sentence Mr. Kyles to 32 years or more, the ability of defense counsel to freely argue the sentence was valuable, as it would have offered the opportunity to obtain a lesser sentence. It is important to remember that Mr. Kyles is not required to show that the August offer was more likely than not to result in less prison time. *Strickland*, 466 U.S. at 693.

With a joint recommendation for a specific number of years in prison, Mr. Kyles was practically guaranteed to obtain that lengthy sentence: in fact, the sentencing court indicated that it felt bound by the recommendation of the parties. (108:19; App. 126). Without that recommendation,

however, the sentencing court indicated it was "in that neighborhood"—meaning that the court may well have been persuaded to impose a somewhat lower sentence – even by just a year or two or three. (108:19; App. 126).

Had defense counsel made an argument for less than 32 years at the sentencing hearing, there is ample evidence in the record to support a finding that it is reasonably probable the circuit court would have imposed a lesser sentence.

As to the gravity of the offense, Mr. Kyles acknowledges that any homicide is serious. However, the circuit court's sentencing comments indicate that it did not view this as a cold-blooded, premeditated "ambush." (108:23; App. 130). According to Mr. Kyles' version of events, the incident began during a drug deal where D.S. became aggressive with Mr. Kyles and then grabbed for Mr. Kyles' gun. (1:6). Mr. Kyles overreacted to this aggression and, rather than clinging stubbornly to a self-defense strategy, made an almost immediate decision upon being arrested to confess, cooperate with the authorities, and accept the consequences of his actions. (111:14; 108:20; App. 127).

To that end, Mr. Kyles was remorseful about what occurred and when arrested, he did not try to hide his guilt but instead cooperated with the police, giving a full statement implicating himself in the homicide. (1:6). After he was charged, Mr. Kyles expressed to his trial counsel that he would not take the case to trial, acknowledging that he had to "pay for what he had done." (108:20; App. 127). By all accounts, Mr. Kyles expressed an extreme amount of remorse for his actions. (11:12; 108:8, 20-24; App. 115, 127-131).

At least two other sources support a finding of a reasonable probability of less prison time in this case. First, the victim's family—which, under the terms of the plea

agreement, had a right to make their own sentencing recommendation—actually asked for a more lenient sentence. (108:39; App. 146). The family in this case encouraged the court to sentence Mr. Kyles to a period of incarceration that would allow him to get out of prison with enough time to do something productive with his life. (108:4, 7, 39; App. 111, 114, 146).

Second, the presentence investigation recommended a range of sentence that included a lower end that was less than what the court imposed under the joint 32-year confinement recommendation. The PSI writer recommended that Mr. Kyles be incarcerated for somewhere between 26 and 40 years. (10:13). Thus, had counsel argued for somewhere between 26 and 31 years, the presentence report would have provided support for that recommendation.

Finally, there are two remaining circumstantial pieces of evidence that this Court should consider. First, on the only relevant question that the September 13th plea offer left to the court's discretion—whether or not to run Mr. Kyles' homicide sentence concurrent or consecutive to his 5 year revocation sentence—the sentencing court chose to be more lenient and made the sentence concurrent. (108:40; App. 147).

Second, the parties originally agreed on a joint recommendation of 33 years initial confinement and 8 years extended supervision. (107:3; 108:13: App. 120). This was the "fair" recommendation which was accepted by the circuit court. (108:31; App. 138). However, when the circuit court noted a potential issue with the bifurcated nature of the sentence, and the parties thus made the decision to modify the joint recommendation to 32 years confinement during the circuit court's sentencing explication, the circuit court did not

hesitate to accept this downward deviation. (108:37; App. 144).

Given the court's willingness to impose 1 year less of confinement based on the parties' agreement amid bifurcation concerns, it is not unreasonable to think that, had defense counsel been free to argue and requested 30 or 31 years, or even some lesser amount, that the court might have imposed such a sentence. Such an outcome was supported by the PSI range and not contrary to the State's "substantial prison" recommendation. There is certainly a reasonable probability of that occurring and as such the August offer does create a reasonable probability of lesser prison time. Even the postconviction court implicitly acknowledges that such a reasonable probability exists when it said the August offer creates "favorable risk that [the sentence] could be lower than…41 years." (112:130-131; App. 178-179).

Mr. Kyles certainly agrees with that finding by the postconviction court. It is the existence of this "favorable risk" that would have led to Mr. Kyles accepting the August offer had trial counsel advised him of it. The existence of this "favorable risk" establishes a reasonable probability that Mr. Kyles would have received less prison time.

Mr. Kyles has therefore established a reasonable probability of a different outcome as require by *Strickland* and *Frye*.

CONCLUSION

Mr. Kyles respectfully requests that this Court reverse the postconviction court's decision, and find that he has established prejudice under *Frye*, and remand the case to the circuit court to enter findings regarding deficient performance.

Dated this 23rd day of April, 2018.

Respectfully submitted,

JAY PUCEK
Assistant State Public Defender
State Bar No. 1087882

CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
pucekj@opd.wi.gov
augustc@opd.wi.gov

Attorneys for Defendant-Appellant

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 6,279 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 23rd day of April, 2018.

Signed:

JAY PUCEK
Assistant State Public Defender
State Bar No. 1087882

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
pucekj@opd.wi.gov

Attorney for Defendant-Appellant

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 23rd day of April, 2018.

Signed:

JAY PUCEK
Assistant State Public Defender
State Bar No. 1087882

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
pucekj@opd.wi.gov

Attorney for Defendant-Appellant

APPENDIX

INDEX
TO
APPENDIX

Page

Judgment of Conviction 101-102

Order Denying Motion For Postconviction Relief.....103

August Offer Letter 104-105

September 13th Offer Letter.....106-107

November 12, 2002 Sentencing Transcript.....108-151

Transcript Of The Postconviction Court's
Oral Decision.....152-185