WISCONSIN COURT OF APPEALS
DISTRICT I

Appeal No. 2018AP000802 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

VICTOR YANCEY, JR.,

Defendant-Appellant.

Appeal from a Judgment of Conviction and Order Denying Postconviction Relief of the Circuit Court of Milwaukee County, the Honorable William S. Pocan Presiding, Circuit Court Case No. 2014CF003831

VICTOR YANCEY, JR.'S INITIAL BRIEF AND APPENDIX

Todd G. Smith
State Bar No. 1022380
Bryan J. Cahill
State Bar No. 1055439

Attorneys for Victor Yancey, Jr.

GODFREY & KAHN, S.C.
One East Main Street, Suite 500
P.O. Box 2719
Madison, WI 53701-2719
Phone: 608-257-3911
Fax: 608-257-0609

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ISSUE PRESENTED FOR REVIEW 2

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 2

STATEMENT OF THE CASE 2

Procedural Background 2

The Plea Hearing 4

The Sentencing Hearing 5

Yancey's Postconviction Motion 7

The Circuit Court Order Denying Yancey Postconviction Relief 8

STANDARD OF REVIEW 9

ARGUMENT 11

I. Yancey's postconviction motion alleged facts sufficient to require an evidentiary hearing before deciding whether his guilty plea may be withdrawn because of ineffective assistance of counsel. 12

A. Yancey's postconviction motion makes a *prima facie* showing that his attorney performed deficiently. 14

B. Yancey's postconviction motion makes a *prima facie* showing of prejudice. 20

II. Even if Yancey's postconviction motion did not allege sufficient facts, the circuit court erroneously exercised its discretion by applying the incorrect legal standard for prejudice. 24

CONCLUSION 26

RULE 809.19(8)(d) FORM AND LENGTH CERTIFICATION 29

RULE 809.19(2)(b) APPENDIX CERTIFICATION 30

RULE 809.19(12)(f) AND (13)(f) CERTIFICATION 31

APPENDIX TABLE OF CONTENTS 32

TABLE OF AUTHORITIES

Page

CASES

Garmon v. Lockhart,
938 F.2d 120 (8th Cir. 1991) 15, 21

Hill v. Lockhart,
474 U.S. 52 (1985) 20

Pidgeon v. Smith,
785 F.3d 1165 (7th Cir. 2015) 21, 22

State ex rel. Reimann v. Cir. Ct. for Dane Cty.,
214 Wis. 2d 605, 571 N.W.2d 385 (1997) 19

State v. Allen,
2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433 ..... 10-14, 24

State v. Bangert,
131 Wis. 2d 246, 389 N.W.2d 12 (1986) 16

State v. Bentley,
201 Wis. 2d 303, 548 N.W.2d 50 (1996) 10-13, 20, 25

State v. Burton,
2013 WI 61, 349 Wis. 2d 1, 832 N.W.2d 611 25

State v. Dillard,
2014 WI 123, 358 Wis. 2d 543, 859 N.W.2d 44 ..... 15, 22-23, 25

State v. Green,
2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298 17

State v. Hudson,
2013 WI App 120, 351 Wis. 2d 73, 839 N.W.2d 147 ..... 11, 13

State v. James,
176 Wis. 2d 230, 500 N.W.2d 345 (Ct. App. 1993) 11

State v. Muldrow,
2018 WI 52, 381 Wis. 2d 492, 912 N.W.2d 74 16

State v. Ortiz-Mondragon,
2015 WI 73, 364 Wis. 2d 1, 866 N.W.2d 717 15

State v. Wesley,
2009 WI App 118, 321 Wis. 2d 151, 772 N.W.2d
232 ..... 10-11, 14

STATUTES

Wis. Stat. § 905.10(3)(b) 17

Wis. Stat. § 971.08(1)(b) 19

INTRODUCTION

This is not a garden-variety appeal seeking to withdraw a guilty plea. Postconviction motions to withdraw guilty pleas typically spring from buyer's remorse. That is, a defendant, unhappy with the sentence imposed, seeks a redo to avoid harsher than expected consequences. Not so, here.

Victor Yancey received a seven month sentence. His sentence was time-served; by the time of the sentencing hearing, he had been in custody for more than one year. R.63:22, 25; App. 68, 71.[1]

And, yet, Yancey seeks to set aside his guilty plea. Why? Yancey believes the police committed misconduct by falsifying records and by testifying falsely, but he understood wrongly—based on faulty advice from his defense attorney—that he could plead guilty and still receive a hearing to ferret out this police corruption.

Through this appeal, Victor Yancey presents a narrow issue and requests very modest relief: the right to an evidentiary hearing

[1] Citations to the record use the format, R.__:__. The number before the colon designates the record number and the number after the colon the page number. The citation, App.__, refers to the page number in the accompanying appendix.

so that he may present evidence that his appointed defense attorney provided ineffective assistance of counsel, thereby wrongly inducing him to plead guilty.

ISSUE PRESENTED FOR REVIEW

> Is Victor Yancey entitled to an evidentiary hearing to prove that he was denied effective assistance of counsel before entering his guilty plea, such that he should be allowed to withdraw his guilty plea?
>
> **Circuit Court Answer:** No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is necessary: this appeal asks the Court to apply well-settled law to undisputed facts. If the Court believes oral argument would be helpful, Yancey's counsel would be pleased to present argument.

STATEMENT OF THE CASE

Procedural Background

On August 29, 2014, the State filed a criminal complaint charging Victor Yancey with one count of misdemeanor battery as party to a crime and two counts of felony bail jumping, contrary to Wis. Stat. §§ 940.19(1) and 946.49(1)(b), respectively. R.1.

At the time the complaint was filed, Yancey was also facing felony drug charges in a separate case. R.34:5; App. 5. Subsequently, Yancey was charged with serious felonies in three additional cases. *Id.* When Yancey entered his plea in this case, these four other cases were pending. *Id.* Yancey went to trial in all four of these other cases. *Id.* In these other cases, Yancey was sentenced to a total of 21 years confinement—sentences that substantially exceeded any potential sentence for battery and bail jumping. *Id.*

Attorney Peter Kovac represented Yancey initially. In July 2015, at the request of Yancey and Kovac, the circuit court allowed Kovac to withdraw. R.58:4. Attorney Richard Poulson was then appointed to represent Yancey. R.12. Despite moving to withdraw as Yancey's counsel on November 16, 2015 (R.60:2), the circuit court required Poulson to continue representing Yancey. R.60:4. Poulson represented Yancey up to and through the plea hearing and sentencing hearing. R.62 (plea hearing transcript); R.63 (sentencing transcript).

The Plea Hearing

On December 14, 2015, the circuit court accepted Yancey's guilty plea. R.62; App. 44. Based on advice from Poulson, Yancey pled guilty to misdemeanor battery and the State dismissed the bail jumping charges. R.62:22; App. 44. During the hearing, Yancey responded, "yes," he understood the rights he was waiving by pleading guilty, including the rights to present and cross-examine witnesses at trial. R.62:16-18; App. 38-40.

In response to a question about the factual basis of the complaint, Yancey hesitated. R.62:21; App. 43. He and Poulson had to confer before Yancey acknowledged that the allegations in the complaint were true. *Id.* After Yancey's reluctant acknowledgement, Poulson clarified:

> Can I just add one thing. In talking over the Complaint with my client as to the facts of this case, I believe that the facts that are in the Complaint are substantially true and correct.
>
> They are not all accurate, but the ones that are necessary for this particular offense are.

R.62:21; App. 43. Yancey was not allowed to address the court further at the plea hearing. R.62:24; App. 46.

The Sentencing Hearing

On December 23, 2015, the circuit court sentenced Yancey. R.63; App. 48. At the sentencing hearing, Poulson hinted at the police misconduct that was troubling Yancey:

> And I think [Yancey] also had some problems with the way the police looked at it, and approached it, and developed this—
>
> It's the same police officer that's involved in all of the cases that are before him. And he believes that this officer is doing things that are not being done the way they should be done, and it's leading the district attorney's office to charge him with all of these various offenses.

R.63:11; App. 57.

The Court provided Yancey an opportunity to elaborate. R.63:12-15; App. 58-61. Yancey raised his concerns with the State's evidence, noting:

1. The complaint and police report concerned an entirely different incident with which Yancey was uninvolved: the complaint and police report stated a different location, a different date, and an entirely different group of people from the events to which Yancey understood he was pleading guilty. R.63:12-13; App. 58-59.

2. The medical records concerned treatment on a date (August 20, 2014) that was four days before Yancey's involvement with the alleged victim. R.63:17. And, because Yancey and the alleged victim "shook hands"

after their altercation, Yancey knew that he did not seek medical treatment and that the medical records were falsified: the alleged victim's patient information was inserted over the information of another patient and the medical records included the same misspelled word as the police report. R.63:13-15; App. 59-61.

3. At the preliminary hearing (R.52), the police officer falsely testified that the alleged victim identified Yancey in the photo array, but this was not true: the alleged victim identified someone other than Yancey. R.63:14, 18; App. 60, 64 (Yancey asserting: "He basically lied under oath.").

4. The same police officer was involved in all five of Yancey's cases, and was improperly implicating Yancey in crimes he did not commit. R.63:14-15; App. 60-61.

In sum, Yancey concluded that police errors and fabrication of evidence was "a crime, and it should be investigated." R.63:17; App. 63.

Yancey's comments at the sentencing hearing demonstrate both a substantial concern over the State's evidence and a genuine belief, cemented by Poulson's advice, that the circuit court would conduct some type of evidentiary or investigatory hearing. Indeed, Yancey stated his understanding that the judge, "if a crime [has] been committed, [is] supposed to act on it[,]" and he demanded:

"there needs to be a John Doe investigation" into the police misconduct. R.63:16, 18; App. 62, 64.

Yancey's Postconviction Motion

On March 20, 2017, Yancey's appointed counsel filed a postconviction motion seeking to withdraw his guilty plea based upon Poulson's ineffective assistance.[2] R.33; App. 8. Specifically, Yancey maintained that Poulson misadvised him of his ability to challenge the State's evidence and the likelihood of an evidentiary hearing into his allegations of police misconduct once he pled guilty. R.33:7-9; App. 14-16.

The postconviction motion made clear the source of Yancey's misunderstanding of the effects of his guilty plea. Before entering his plea, in the bullpen outside the courtroom, Yancey spoke with Poulson, who misadvised him that he would be able to "raise these concerns [with the State's evidence] to the judge and that the judge could either order a John Doe hearing or conduct an *in camera* inspection of the records." R.33:7; App. 14. Yancey understood,

[2] Yancey's postconviction motion originally sought withdrawal of his guilty plea on a second ground: that the circuit court misadvised him that he would not have to pay a DNA surcharge. R. 33; App. 8. Yancey later withdrew this argument and is not pursuing it on appeal.

therefore, that by raising his concerns at the sentencing hearing, "some form of investigation" would occur. R.33:8; App. 15.

Yancey further maintained that if Poulson had accurately advised him that he would not be able to challenge the evidence through a John Doe proceeding or *in camera* hearing, he would not have pled guilty. R.33:8; App. 15. The motion explained:

> Further, even though the offer was to plead to the single misdemeanor count, which carried a maximum sentence of nine months, and he had already served over one year in jail awaiting resolution of this case, ***he still would not have wanted to enter this plea if he knew he was giving up his ability to address and challenge the State's evidence, because he believed that challenges to the evidence in this case were connected to the other, more serious, charges he was facing***.

R.33:9; App. 16 (emphasis added).

The Circuit Court Order Denying Yancey Postconviction Relief

On March 28, 2017, the circuit court denied Yancey's motion for postconviction relief, holding that he had not "made a sufficient showing of deficient performance [by Poulson] or prejudice." R.34:4; App. 4. The court concluded that Poulson's representation was not deficient because his advice regarding the prospects for an *in camera* hearing or John Doe proceeding were "at best unrealistic"

and did not "amount[] to a promise" that a hearing would be held. R.34:4; App. 4. Later the court stated: "Counsel may have been deficient for leading the defendant to believe that he could have those concerns [with police misconduct] addressed in this case even if he entered a guilty plea," but then, employing the wrong standard, dismissed this concern because of a lack of prejudice. R.34:5; App. 5.

Ultimately, the court concluded that Yancey was not prejudiced "because he has not shown that there is a reasonable probability that he would have been able to mount a successful challenge to the State's evidence at trial." R.34:5; App. 5; *see also id.* (stating that Yancey's "allegations are insufficient to demonstrate prejudice without a showing that there is a reasonable probability that his trial strategy would have been successful").

Yancey timely appealed. R.48.

STANDARD OF REVIEW

An appellate court determines *de novo* whether a postconviction motion alleges sufficient material facts that, if true, entitle the defendant to a hearing. *State v. Allen*, 2004 WI 106, ¶ 9,

274 Wis. 2d 568, 682 N.W.2d 433. "If the motion raises such facts, the circuit court must hold an evidentiary hearing" unless the motion "does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," in which case "the circuit court has the discretion to grant or deny a hearing." *Id.* This second question—whether a hearing should have been granted even though the motion failed to allege sufficient facts—is reviewed under the erroneous exercise of discretion standard. *Id.*

Where a defendant seeks an evidentiary hearing on an allegation of ineffective assistance of counsel in connection with a guilty plea, the postconviction motion must allege a *prima facie* claim that defense counsel performed deficiently and that counsel's deficient performance prejudiced the defendant by affecting his decision to plead guilty. *State v. Bentley*, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996); *State v. Wesley*, 2009 WI App 118, ¶ 23, 321 Wis. 2d 151, 772 N.W.2d 232. This is because plea withdrawal after sentencing requires proof "by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice." *State v.*

James, 176 Wis. 2d 230, 236–37, 500 N.W.2d 345 (Ct. App. 1993). The manifest-injustice standard is satisfied if the defendant's plea was the result of constitutionally ineffective assistance of counsel. *See, e.g.*, *State v. Hudson*, 2013 WI App 120, ¶ 11, 351 Wis. 2d 73, 839 N.W.2d 147 ("To establish constitutionally ineffective legal representation, a defendant must show: (1) deficient representation; and (2) prejudice."). Whether a postconviction motion alleges sufficient facts to require an evidentiary hearing is a question of law that is reviewed *de novo*. *Wesley*, 321 Wis. 2d 151, ¶ 23.

ARGUMENT

The circuit court prematurely decided that Yancey did not receive ineffective assistance of counsel. The four corners of Yancey's postconviction motion alleged material facts—the who, what, where, when, why, and how of ineffective assistance of counsel—sufficient to establish a *prima facie* claim of ineffectiveness and thus *require* an evidentiary hearing. The court therefore erred by denying Yancey's postconviction motion without a hearing. *See Allen*, 274 Wis. 2d 568, ¶¶ 9, 23. Accordingly, the circuit court should not—indeed, could not—have reached the

ultimate question without a hearing: Was Poulson's representation deficient and did it prejudice Yancey?

The circuit court's error in denying Yancey a hearing is compounded by its application of the wrong standard for prejudice in the context of plea withdrawal.[3] Yancey's postconviction motion alleged sufficient facts to entitle him to an evidentiary hearing. And, contrary to the circuit court's decision, the evidence at such a hearing will show that Yancey must be allowed to withdraw his guilty plea because he received ineffective assistance of counsel.

I. Yancey's postconviction motion alleged facts sufficient to require an evidentiary hearing before deciding whether his guilty plea may be withdrawn because of ineffective assistance of counsel.

A "circuit court must hold a hearing when the defendant has made a legally sufficient postconviction motion, and has the discretion to grant or deny an evidentiary hearing even when the postconviction motion is legally insufficient." *Allen*, 274 Wis. 2d 568, ¶ 12. In the context of an ineffectiveness claim, a

[3] The circuit court's application of the wrong standard necessitates reversal under the "abuse of discretion" standard applicable to discretionary decisions, as argued below. *See Bentley*, 201 Wis. 2d at 318. The circuit court's application of the incorrect substantive law prevented it from correctly analyzing whether the four corners of Yancey's postconviction motion adequately set forth an ineffectiveness claim.

postconviction motion must "allege the five 'w's' and one 'h'; that is, who, what, where, when, why, and how" of counsel's deficient performance and prejudice to the defendant. *Id.* ¶ 23 (citing *Bentley*, 201 Wis. 2d at 310); *Hudson*, 351 Wis. 2d 73, ¶ 11.

Yancey's postconviction motion met the *Bentley*/*Allen* standard:

Who:	Attorney Poulson gave Yancey bad advice.
Where:	Attorney Poulson gave Yancey bad advice in the bullpen outside the courtroom.
When:	Attorney Poulson gave Yancey bad advice immediately before the plea hearing on December 14, 2015.
What:	Attorney Poulson gave Yancey bad advice when he supplied a blindly optimistic assessment of the likelihood that the circuit court would order an *in camera* hearing or a John Doe proceeding.
How:	Attorney Poulson's bad advice caused Yancey to misunderstand the effects of pleading guilty and to believe that even though he was giving up his right to present and cross-examine witnesses at trial, he would still be able to present evidence at an *in camera* hearing or a John Doe proceeding.
Why:	Yancey would not have pled guilty but for Attorney Poulson's bad advice because he believed he needed to pursue the *in camera* hearing or John Doe proceeding to unravel the police corruption that he believed had occurred. Since this case was the first of Yancey's cases scheduled for trial and since the potential

> punishment in this case was relatively less severe, an evidentiary hearing would be important to defending himself in the other four cases.
>
> Two additional facts confirm the importance of Poulson's bad advice to Yancey's decision to plead guilty: (1) Yancey went to trial in all four of his other cases, demonstrating that he is willing to go to trial; and (2) Even though Yancey received a time-served sentence, Yancey is pursuing this appeal—despite the risk that, if successful, he may face up to 12 additional years imprisonment.

R.33:4-5, 7-9; App. 11-12, 14-16.

These allegations exceed the level of detail provided by the supreme court as a hypothetical example of a postconviction motion that meets the *Bentley*/*Allen* standard. *See Allen*, 274 Wis. 2d 568, ¶ 24. Accordingly, as shown below, Yancey is entitled to an evidentiary hearing because his motion makes a *prima facie* showing that Poulson's performance was deficient and that it prejudiced Yancey. *See Wesley*, 321 Wis. 2d 151, ¶ 23.

A. Yancey's postconviction motion makes a *prima facie* showing that his attorney performed deficiently.

Yancey's postconviction motion alleges Poulson's performance was deficient because he misstated established law by assuring Yancey that his concerns with the State's evidence could be addressed after pleading guilty through an *in camera* hearing or a

John Doe proceeding. R.33:7; App. 14. Yancey's motion fits the mold of many successful ineffective assistance claims:

> In numerous cases, the court has held that affirmative misinformation about the law provided by the prosecutor and defense counsel can support a holding that withdrawal of a plea of guilty or no contest must be permitted because the plea is uninformed and its voluntariness is compromised.

State v. Dillard, 2014 WI 123, ¶ 39, 358 Wis. 2d 543, 859 N.W.2d 44.

Here, Yancey's postconviction motion alleges that Poulson provided him "affirmative misinformation." Wrong advice about "succinct, clear, and explicit" law is constitutionally deficient performance. *See State v. Ortiz-Mondragon*, 2015 WI 73, ¶¶ 33, 60, 364 Wis. 2d 1, 866 N.W.2d 717; *see also Dillard*, 358 Wis. 2d 543, ¶ 93 (concluding that trial counsel "performed deficiently" by failing to advise the defendant accurately on law that was not "obscure or unsettled"); *see also Garmon v. Lockhart*, 938 F.2d 120, 121 (8th Cir. 1991) (providing that an attorney's misstatement as to defendant's parole eligibility was unreasonable because "[m]inimal

research would have alerted counsel to the correct parole eligibility date").

Clients do not hire attorneys for a Pollyanna-ish assessment of what might be possible. Clients expect and are entitled to receive legal advice that advises them of the risks and the likely outcomes of a case. For Yancey's attorney to tell him that an *in camera* hearing or a John Doe proceeding initiated by the judge was anything other than highly improbable or not likely falls below the standard of care. The circuit court acknowledged as much, deeming Poulson's advice "unrealistic," R.34:4; App. 4, and stating that the advice "may have been deficient". R.34:5; App. 5.

Wisconsin law regarding a defendant's ability to challenge the State's evidence after a guilty plea through either an *in camera* hearing or a John Doe proceeding is "succinct, clear, and explicit." "A defendant who enters a guilty plea waives numerous constitutional rights," including the right to challenge the State's evidence. *State v. Muldrow*, 2018 WI 52, ¶ 1, 381 Wis. 2d 492, 912 N.W.2d 74 (citing *State v. Bangert*, 131 Wis. 2d 246, 270, 389 N.W.2d 12 (1986)).

There is nothing magical about *in camera* review or a John Doe proceeding such that either proceeding reverses the effects of a guilty plea. Neither procedure was likely to result in the investigatory hearing into the State's evidence that Yancey desired.

Indeed, any advice that Yancey would receive an *in camera* hearing to address his allegations of police corruption had no basis in Wisconsin law. Opportunities for *in camera* review are rare and confined to narrow circumstances. *In camera* review may be ordered in the context of confidential informants. *See* Wis. Stat. § 905.10(3)(b) (providing for *in camera* review to allow a determination of whether an informant has evidence pertaining to "the issue of guilt or innocence in a criminal case"). Additionally, a court may conduct an *in camera* review of privileged and confidential records (typically, psychological or counseling records) if the defendant has "set forth, in good faith, a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence …." *State v. Green*, 2002 WI 68, ¶ 34, 253 Wis. 2d 356, 646 N.W.2d 298.

Here, Yancey was not entitled to an *in camera* hearing for at least two reasons. First, the records Yancey would have asked the court to review *in camera* were neither privileged nor confidential: they were part of the police and prosecution files or in Yancey's possession. Second, the guilty plea erected an even more insurmountable hurdle to *in camera* review: by pleading guilty, no further information was necessary to a determination of guilt or innocence. Accordingly, any advice more optimistic than that an *in camera* hearing was unlikely lacks any basis in Wisconsin law.

The likelihood of a John Doe proceeding was similarly remote. The district attorney's office was certainly not going to request a John Doe proceeding under Wis. Stat. § 968.26(1m) into Yancey's allegations of police misconduct given that the district attorney was working with the police to prosecute Yancey. Likewise, it was improbable that Judge Pocan would accept Yancey's guilty plea and then, based on Yancey's allegations of police misconduct, conclude that Yancey had met the objective threshold for a John Doe proceeding under Wis. Stat. § 968.26(2)(am): Does the petition "allege objective, factual

assertions sufficient to support a reasonable belief that a crime has been committed[?]" *State ex rel. Reimann v. Cir. Ct. for Dane Cty.*, 214 Wis. 2d 605, 623, 571 N.W.2d 385 (1997). Having just accepted Yancey's guilty plea and satisfied himself that a factual basis existed for the crime charged, *see* Wis. Stat. § 971.08(1)(b), it would have been fanciful to believe that Judge Pocan would turn around and refer Yancey's complaint to the district attorney. Indeed, Judge Pocan declared such a belief, "unrealistic." R.34:4; App. 4.

Poulson's wrong advice is even more egregious because he represented Yancey in other cases, R.34:5; App. 5, and was aware that Yancey believed the police misconduct pervaded the evidence in each of his cases. Yancey asked Poulson whether he would be able to challenge the State's evidence in an *in camera* hearing or a John Doe proceeding if he pled guilty, to which Poulson responded "yes." R.33:7-8; App. 14-15. The correct answer was "no."

Especially knowing Yancey's focus on being able to challenge the State's evidence, Poulson should have advised Yancey that he would ***almost certainly*** be waiving the right to challenge the State's evidence—in any venue. Instead, he reassured Yancey that

his concerns would be addressed. R.33:7; App. 14. Relying on this constitutionally deficient advice, Yancey pled guilty.

B. Yancey's postconviction motion makes a *prima facie* showing of prejudice.

Yancey's postconviction motion adequately alleges prejudice: it makes a *prima facie* showing "that there is a reasonable probability that, but for [Poulson's] errors, [Yancey] would not have pleaded guilty and would have insisted on going to trial." *See Bentley*, 201 Wis. 2d at 312 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). In the context of a postconviction motion to withdraw a guilty plea, this is the standard of prejudice that must be applied. By contrast, the circuit court used the wrong standard, stating that Yancey could not establish prejudice because he had not alleged "a reasonable probability that his trial strategy would have been successful." R.34:5; App. 5.

Under the correct standard, as stated in *Bentley*, Poulson's performance was prejudicial. Courts recognize that defendants may have legitimate interests other than sentencing when deciding to plead, and that these competing interests mean that a defendant may establish prejudice even if he receives a favorable sentence. *See*

Pidgeon v. Smith, 785 F.3d 1165, 1173 (7th Cir. 2015) ("a defendant who foregoes trial in favor of a plea deal based on incorrect advice can still show prejudice even if the terms of the plea are highly favorable"); *Garmon*, 938 F.2d at 122 (holding that a defendant adequately alleges prejudice by stating he would not have pled guilty but for his attorney's faulty advice, even though the favorable sentence imposed after the plea was considerably less than his potential punishment).

Much like the defendants in *Pidgeon* and *Garmon*, Yancey's allegation that he would not have pled guilty but for Poulson's faulty advice is credible, plausible, and supported by objective facts.

First, Yancey actually went to trial in his four other cases. By going to trial, Yancey demonstrated the lengths he was willing to go to prove his innocence.

Second, by filing the postconviction motion and pursuing this appeal, Yancey faces the same decision today as when he accepted the plea agreement: to receive a time-served sentence of no more than nine months or to go to trial and face up to twelve years. The risk Yancey now faces makes his statement that he would have gone

to trial credible. *See Pidgeon*, 785 F.3d at 1174 (employing this same reasoning to conclude that the defendant had established prejudice and could withdraw his guilty plea).

Third, Yancey's postconviction motion and the circuit court's order establish "special circumstances," *Dillard*, 358 Wis. 2d 543, ¶ 100, that support Yancey's contention that he would not have pled guilty if he had known an investigation into the alleged police misconduct was unlikely. At the time he pled guilty, Yancey was charged with one misdemeanor and two Class H felonies in this case. In his four other pending cases, Yancey faced serious felonies, ranging from Class B to Class I felonies. Yancey understood the potential punishments in the other pending cases (more than 100 years) far exceeded the most severe punishment in this case (12 years and 9 months). It is understandable that Yancey would be willing to risk a sentence of up to 12 years for bail jumping if it meant an opportunity to establish that officer Foth—who was involved in all of Yancey's other, more serious charges—had tampered with evidence, testified falsely, and conspired against him. R. 33:9; App. 16. These four other felony cases solidified Yancey's

belief that he needed a hearing or investigation to defend himself against the accusations in all of the cases—not just this case.

Yancey's postconviction motion and the decision denying it show that, for Yancey, the risk of a longer sentence if he was convicted at trial of bail jumping was outweighed by these other interests. Yancey is convinced that the State falsified documents and tampered with evidence, misconduct that infected all of the cases against him. R.63:11; App. 57 (Poulson explained: "It's the same police officer that's involved in all of the cases that are before him. And he believes that this officer is doing things that are not being done the way they should be done, and it's leading the district attorney's office to charge him with all of these various offenses."); *see also* R.33:9; App. 16.

Yancey's paramount concern in entering the plea deal—the relevant inquiry here—was not to receive a lighter sentence; rather, it was to also ensure that he could still prove his allegations that Milwaukee police officers conspired to frame him for multiple crimes. *See Dillard*, 358 Wis. 2d 543, ¶ 67 (providing that the

appropriate inquiry is into defendant's motivation when entering into the guilty plea).

Applying the correct standard on appeal, the record establishes a *prima facie* case that Yancey would not have pled guilty had he been accurately advised that he would not receive an *in camera* hearing or a John Doe proceeding. Yancey's guilty plea was a direct result of Poulson's incorrect advice that he would still have an opportunity to challenge the validity, reliability, and strength of the State's evidence. Accordingly, Yancey's postconviction motion establishes a *prima facie* case of prejudice, entitling Yancey to an evidentiary hearing.

II. Even if Yancey's postconviction motion did not allege sufficient facts, the circuit court erroneously exercised its discretion by applying the incorrect legal standard for prejudice.

Even if Yancey's postconviction motion did not allege sufficient material facts to entitle him to an evidentiary hearing as a matter of right, the circuit court still erroneously exercised its discretion by denying him a hearing. *See Allen*, 274 Wis. 2d 568, ¶ 12 (a court "has the discretion to grant or deny an evidentiary hearing even when the postconviction motion is legally

insufficient"). "A circuit court properly exercises its discretion when it has examined the relevant facts, applied the proper legal standards, and engaged in a rational decision-making process." *Bentley*, 201 Wis. 2d at 318. Here, the circuit court erroneously exercised its discretion because it applied the incorrect legal standard for prejudice.

The circuit court repeatedly stated that Yancey could not have been prejudiced, as a matter of law, because he did not show "a reasonable probability that he would have been able to mount a successful challenge to the State's evidence at trial." R.34:5; App. 5. This is not the standard. Rather, the governing standard is: Did Yancey establish "a reasonable probability that he would not have pled [guilty] and would instead have gone to trial" had he not received faulty advice. *See Dillard*, 358 Wis. 2d 543, ¶ 104; *see also State v. Burton*, 2013 WI 61, ¶ 50, 349 Wis. 2d 1, 832 N.W.2d 611.

In basing its decision to deny Yancey's postconviction motion on the perceived strength of his trial strategy, the circuit court applied the incorrect substantive law and engrafted an

additional requirement onto the claim for ineffectiveness of counsel. The significance of this error cannot be overstated: because the circuit court deemed Poulson's advice "unrealistic" and suggested that his performance "may have been deficient," R.34:4-5; App. 4-5, it is evident that the circuit court's decision rested heavily on its determination that Yancey was not prejudiced by Poulson's bad advice. By removing the flawed foundation for the court's prejudice determination, the entirety of its decision on Yancey's ineffective assistance claim necessarily falls in this case. Accordingly, the circuit court's application of the incorrect legal standard was an erroneous exercise of discretion. Yancey should have received an evidentiary hearing.

CONCLUSION

Victor Yancey did not enter a plea agreement, receive an unexpected sentence, and search for post-hoc ways to back out of it. Rather, the record shows that from the inception of this case, Yancey has been motivated by a desire to expose police corruption. That he received a sentence of seven months, yet is willing to risk 12 years

imprisonment should he be allowed to withdraw his guilty plea, speaks strongly to that.

Because Poulson provided him faulty advice, Yancey misunderstood the effects of his guilty plea. Yancey's postconviction motion alleged the "five w's" and "one h" within its four corners, establishing a *prima facie* case of Poulson's constitutionally deficient performance and prejudice. Accordingly, Yancey is entitled to an evidentiary hearing, and the circuit court's determination that he did not receive ineffective assistance of counsel was premature.

For all these reasons, the circuit court's decision should be reversed and this case should be remanded with directions to the circuit court to conduct an evidentiary hearing on Yancey's postconviction motion.

Dated this 29th day of August, 2018.

GODFREY & KAHN, S.C.

By: *s/Bryan J. Cahill*
Todd G. Smith
Bar No. 1022380
Bryan J. Cahill
State Bar No. 1055439

Attorneys for Defendant-Appellant Victor Yancey, Jr.

P.O. ADDRESS:
One East Main Street, Suite 500
P.O. Box 2719
Madison, WI 53701-2719
Phone: 608-257-3911
Fax: 608-257-0609
tsmith@gklaw.com
bcahill@gklaw.com

RULE 809.19(8)(d) FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief referred to in s. 809.19(1)(d), (e), and (f) is 4,996 words.

Dated: August 29, 2018.

s/Bryan J. Cahill
Bryan J. Cahill
State Bar No. 1055439

RULE 809.19(2)(b) APPENDIX CERTIFICATION

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 s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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

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

Dated: August 29, 2018.

s/Bryan J. Cahill
Bryan J. Cahill
State Bar No. 1055439

RULE 809.19(12)(f) AND (13)(f) CERTIFICATION

I hereby certify that I have submitted an electronic copy of this brief and of this appendix, each of which complies with the requirements of Wis. Stat. § 809.19(12) and (13), respectively. I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this brief and appendix filed with the Court and served on all opposing parties.

Dated: August 29, 2018.

s/Bryan J. Cahill
Bryan J. Cahill
State Bar No. 1055439

APPENDIX TABLE OF CONTENTS

Record No.	Description	Appendix Page
34	Decision and Order Partially Denying Motion for Postconviction Relief	1
33	Rule 809.30 Post-Conviction Motion	8
62	Plea Hearing Transcript, 12/14/2015	24
63	Sentencing Transcript, 12/23/2015	48

19412622.1