STATE OF WISCONSIN

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

DISTRICT I

Case No. 2018AP1771-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT C. WASHINGTON,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and an Order Denying Postconviction Relief, Both Entered in the Milwaukee County Circuit Court, the Honorable Jeffrey A. Wagner Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

The State charged Robert Washington with first-degree reckless homicide for the shooting death of his son, R.W., and first-degree reckless injury for the shooting injuries to another son, W.W. According to W.W.'s statement to police, Mr. Washington retrieved a gun from their home after W.W. knocked him to the ground playing basketball. Mr. Washington then came back outside and starting shooting almost immediately.

Mr. Washington's account was quite different, however. According to Mr. Washington, he got the gun just to scare W.W. After he came back outside, Mr. Washington held the gun down by his side and did not point it at anyone. W.W., however, threw a basketball in his direction, causing the gun to go off accidentally.

Mr. Washington ultimately pled guilty to the charges of first-degree reckless homicide and first-degree reckless injury.

1. Was defense counsel ineffective for failing to advise Mr. Washington about the possibility of requesting jury instructions at trial for lesser-included offenses for the charge of first-degree reckless homicide?

   The circuit court answered no.

2. Is Mr. Washington entitled to plea withdrawal on the grounds of newly discovered evidence consisting of W.W.'s statement acknowledging that he did, in fact, throw a basketball at Mr. Washington right before the gun went off?

   The circuit court answered no.

3. Did defense counsel's failure to advocate on Mr. Washington's behalf in any meaningful way at sentencing constitute constructive denial of counsel? If not, did it otherwise constitute ineffective assistance of counsel?

   The circuit court answered both questions no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The briefs will fully address the issues presented, so Mr. Washington does not request oral argument. *See* Wis. Stat. § 809.22(2)(b). Publication is appropriate because the case involves a factual situation significantly different from other published Wisconsin cases involving ineffective assistance

claims concerning lesser-included offense instructions. *See id.* § 809.23(1)(a)2. While several cases have addressed whether an attorney may be ineffective for failing to request lesser-included offense instructions at trial, *see, e.g., State v. Kimbrough*, 2001 WI App 138, ¶24-36, 246 Wis. 2d 648, 630 N.W.2d 752; *State v. Ambuehl*, 145 Wis. 2d 343, 353-60, 425 N.W.2d 649 (Ct. App. 1988), there are no published cases addressing whether an attorney may be ineffective for failing to *advise* a client about this possibility before the client enters a guilty plea. Publication is also appropriate because further development of the law regarding constructive denial of counsel would be useful. *See* Wis. Stat. § 809.23(1)(a)1.

STATEMENT OF CASE AND FACTS

A. The allegations of the criminal complaint.

On June 30, 2014, the State filed a criminal complaint charging Mr. Washington with one count of first-degree reckless homicide and one count of first-degree reckless injury, both while using a dangerous weapon. (1:1). The complaint alleged that on June 26, 2014, police were dispatched to Mr. Washington's home in the City of Glendale. There, they observed Mr. Washington's sons, R.W. and W.W., lying in the driveway. W.W., who was

fifteen at the time, had been shot in the leg,[1] and R.W., who was twenty, had been shot in the chest. R.W. died as a result of his injury. (1:2-3; 76:1).

W.W. later told police that Mr. Washington shot him and his brother, R.W. W.W. said he was playing basketball with R.W. when Mr. Washington came out of the house and got in the way of their game. W.W. knocked Mr. Washington to the ground in response. According to W.W., Mr. Washington then got up and went back in the house. A short time later, he came back out with a gun and fired two or three shots, striking W.W. in the leg. R.W., who was cutting the grass at that point, ran over to Mr. Washington, and W.W. heard another shot. W.W. then went into the house and called 911. (1:2; 48:23).

The police reports upon which the complaint was based reflect that W.W. gave two statements to police. In both statements, W.W. told police that Mr. Washington started shooting almost immediately after he came back out with the gun. He also never

[1] The complaint alleges that W.W. was shot twice, once in the thigh and once in the calf. (1:2). It actually appears, however, that W.W. was only shot once. The surgeon at Children's Hospital who treated W.W. "stated that it could have been one shot that went in through the front of the thigh, out the back, then into the calf." (77:3). Also, police recovered only two shell casings at the scene. (48:33, 39).

said that he threw a basketball at Mr. Washington before the gun going off. (76:1; 77:3).[2]

The complaint further alleged that after his arrest, Mr. Washington gave a statement to police, which the State asserted was reliable because it was against his penal interest. (1:2). Mr. Washington said that he was playing basketball with his sons, when W.W. knocked him down "like a football player." (1:3). He further stated that he was being bullied and disrespected in his own house by his wife and children. He said he did not know what to do about the bullying, and this incident "was the last straw." (1:2). After getting knocked down, Mr. Washington got up, went in the house, and got a .45 caliber pistol from his bedroom. He then went back outside. (1:3).

According to the complaint, Mr. Washington said that after he went back outside, W.W. "threw the basketball at R.W. He stated that the gun then went off." (1:3). The police report summarizing Mr. Washington's statement reflects that he gave the following account of what happened after he went back outside:

> Washington said he went outside with the gun in his hand, but held down to his side. He said that he then told [W.W.], "Look. I'm tired of you

[2] These police reports were later admitted into evidence at the hearing on Mr. Washington's postconviction motion. (76; 77; 103:45;).

> talking to me like that. But I didn't point the gun." . . . .
>
> Washington stated that [W.W.] is so strong, that he took the basketball and threw it at R.W.'s back, causing R.W. to be pushed forward into Washington. Washington stated that he was facing [R.W.] and [W.W.] and that [R.W.] was directly between him and [W.W.] Washington told me that after [R.W.] was struck in the back with the basketball he was thrown forward into Washington causing them both to fall backward. While falling, Washington stated the gun went off.

(76:3-4).

B. The plea and sentencing hearings.

On October 27, 2014, Mr. Washington pled guilty to first-degree reckless homicide and first-degree reckless injury. (101:11). Pursuant to the parties' plea agreement, the State agreed to dismiss the weapon enhancers for both counts. The agreement also provided that both sides would be free to argue for any sentence they deemed appropriate at sentencing.[3] (101:2-3). The Honorable

[3] At the plea hearing, the Assistant District Attorney explained that he had originally offered to recommend either twenty years of initial confinement or "substantial confinement." However, Mr. Washington's trial attorney, Robert L. Taylor, told the prosecutor that he and Mr. Washington preferred that the plea deal simply provide that both sides be free to argue. (101:3-4). Undersigned (continued)

Jeffrey A. Wagner presided over the plea hearing. (101).

On December 2, 2014, Judge Wagner conducted Mr. Washington's sentencing hearing. The State recommended substantial confinement without specifying an exact duration. (102:9; App. 109). The prosecutor described the events leading up to shooting consistently with W.W.'s statements to police, asserting that Mr. Washington had started shooting almost immediately after he came back outside with the gun. (102:4; App. 104). The prosecutor also asserted that Mr. Washington's account of the shooting was not credible, stating that "[g]uns just don't go off." (102:5; App. 105).

The sentencing argument of defense counsel, Robert L. Taylor, consisted of only three pages of the sentencing transcript. (102:20-23; App. 120-23). Mr. Taylor began his argument by noting that R.W. "was an extremely, extremely, very pleasant young man. . . . He was just a good person." (102:21; App. 121). After that, Mr. Taylor highlighted the tragic nature of the offense, as well as Mr. Washington's culpability, stating:

> This is a very, very, very tragic incident. And Mr. Washington is responsible for that. There's no two ways about it. I don't care what the hell he says why he did it. It's totally unacceptable.

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counsel can conceive of no possible strategic or rational reason why Mr. Taylor would advise his client to agree to such a deal.

> This Court's not going to accept it. Our community won't accept it. And I don't accept it.
>
> The point is, you don't bring a damn gun to a family dispute, period. Period. That's something Mr. Washington is going to have to live with.

(102:21; App. 121).

Mr. Taylor then briefly noted that his client, who was fifty-eight years old at the time, had "a number of physical and mental ailments"; however, he provided no context or details about those ailments during his argument.[4] (102:21; App. 121) Instead, he returned to emphasizing the tragic nature of the offense:

> It's a very, very tragic event that's going to last forever. And I don't know how the heck [Mr. Washington's wife is] going to get over it and get through it, but I'm sure she will.

(102:21-22; App. 121-22).

Next, after briefly describing some of the general sentencing goals a court must consider, Mr. Taylor said, "for a just sentence, there's a message that needs to be sent." (102:22; App. 122). He then emphasized the misguided nature of

[4] Prior to sentencing, Mr. Taylor submitted Mr. Washington's medical records from the local jail. (15; 16). At sentencing, the circuit court noted that it had reviewed these materials, which reflected "the physical condition of [Mr. Washington]." (102:24-25; App. 124-25).

Mr. Washington's actions again:

> Had he not made that one—probably several, but one specifically bad, bad choice of going to get that damn gun, we wouldn't be here today.
>
> . . . .
>
> I do understand that kids can sometimes get on your nerve. It's very challenging. But nothing raises [sic] to the occasion to bring a weapon into the equation here. And I regret that happening. My client regrets that happened.

(102:22-23; App. 122-23).

Mr. Taylor then gave the following concluding remarks:

> With respect to a sentencing recommendation, Judge, I think the PSI writer tried to document it as best she could with respect to the factors that the Court must use that would help the Court consider.
>
> Like the assistant district attorney, I'm going to punt. I think this Court, this assistant district attorney and myself, represent over a hundred years of legal experience. Thank you.

(102:23; App. 123).

During his allocution, Mr. Washington apologized to his family, and especially to his sons R.W. and W.W., for his poor judgment. He also expressed how truly sorry he was and emphasized that he had loved R.W. from the moment he was

born. (102:23-24; App. 123-24).

The circuit court began its sentencing explanation by noting that this was a particularly aggravated offense that warranted a significant prison sentence. (102:26-27; App. 126-27). The court said it was taking into account Mr. Washington's culpability and remorse, as well as his age, educational and employment history, and prior criminal record. (102:27-28; App. 127-28). Regarding the facts of the case, the court stated:

> [T]he facts are pretty well known. That there's this basketball game going on. Words exchanged. You made a choice. You thought your kids were disrespecting you. And you went in and tried to stop that.
>
> And there are just numerous things through that presentence report which indicate to the Court that, you know, bullying was involved or something of that nature. And that you just couldn't take it anymore. And decided that you were going to just end it. For what reason?

(102:28; App. 128). The court further noted that Mr. Washington's social and family history, prior criminal record, and medical history were described in the presentence investigation report (PSI). (102:28-29; App. 128-29).

Shortly thereafter, the court made the following concluding remarks and imposed sentence:

> So taking everything into consideration and based upon those factors the Court must take

> into consideration upon sentencing you—and I know that you're 58 years old. And, you know, quite frankly, you're going to have to serve a significant amount of time incarcerated in the state institution because of the—of what occurred. It did shock the community. Any act like that would. It's an incredible set of facts, as the state says.

(102:30; App. 130).

On the charge of first-degree reckless homicide, the court sentenced Mr. Washington to thirty-two years of initial confinement and eight years of extended supervision. On the first-degree reckless injury charge, the court imposed a consecutive sentence of nine years of initial confinement and three years of extended supervision. (102:30-31; App. 130-31).

C. The postconviction proceedings.

Mr. Washington filed a Rule 809.30 postconviction motion seeking plea withdrawal on the grounds that Mr. Taylor was ineffective for failing to advise him about the possibility of requesting jury instructions at trial for lesser-included offenses with respect to the charge of first-degree reckless homicide. (48:1, 9-14). In the alternative, he asked for a resentencing hearing on the grounds that Mr. Taylor was ineffective for failing to advocate for him in any meaningful way at sentencing. (48:1, 14-20). The State filed a response brief in opposition (50), and Mr. Washington filed a reply brief (70).

Mr. Washington later filed a supplement to his postconviction motion alleging that Mr. Taylor was also ineffective for failing to interview W.W. and thus discover that he did, in fact, acknowledge throwing a basketball at Mr. Washington just before the gun went off. (73:1, 4-8). In the alternative, Mr. Washington asserted that W.W.'s statement about throwing the basketball constituted newly discovered evidence warranting plea withdrawal. (73:1, 8-9).

At a hearing on the postconviction motion, Mr. Washington testified about the events of June 26, 2014. He explained that R.W. and W.W. were playing basketball outside their home, and he went outside to join them. After he took the basketball from W.W., however, "[W.W.] charged [him] like a football player, knocking [him] down very hard to the ground." (104:32). After getting knocked down, Mr. Washington initially could not get up. (104:32). He stated that "[W.W.] wasn't playing with [him]." He was "trying to really hurt [him]," he said. (104:33).

After that, Mr. Washington went back in the house and got his handgun. (104:34). He explained that W.W. had been physically and verbally bullying him for approximately six months. He also explained that he could not physically stand up for himself because of his frail condition. (104:33-34). Mr. Washington felt ashamed about this and did not know how to deal with the problem. (103:33). As he stated, "How do you tell someone that your son is

bullying you?" (82:3). Mr. Washington therefore got the gun because he wanted to get W.W. to stop. (104:29, 33-34). It was not his intent to use the gun, however. He simply wanted to scare him. (104:34).

Mr. Washington further testified that after he went back outside, he never pointed the gun at anyone. Rather, he held it down by his side. (104:35). Upon seeing the gun, W.W. turned and ran away. (104:35). Mr. Washington then went over to talk to R.W. W.W., however, suddenly came back and threw a basketball at Mr. Washington. (104:35-36). The ball hit R.W. in the back, causing him to fall into Mr. Washington. At that point, Mr. Washington fell and the gun accidentally went off. (104:35-37).

At the time of the shooting, Mr. Washington's blood alcohol content was 0.154. (80; 104:4).

Mr. Washington also stated that he had explained these facts to Mr. Taylor during the pendency of the case. (104:37-38). Mr. Taylor, however, never informed him about the possibility of requesting instructions at trial for lesser-included offenses for the charge of first-degree reckless homicide. Mr. Washington was thus completely unaware of this possibility at the time he entered his pleas. (104:38-39). In fact, he testified that at the time of his pleas, he did not know even know what a lesser-included offense was. (104:38).

Accordingly, Mr. Washington did not know that based on the expected evidence at a trial, he could have asked the court to instruct the jury to also

consider whether he was guilty of the following lesser-included offenses: (1) second-degree reckless homicide, contrary to Wis. Stat. § 940.06(1); (2) homicide by intoxicated use of a firearm, contrary to Wis. Stat. § 940.09(1g)(a) or (b); and (3) homicide by negligent handling of a dangerous weapon, contrary to Wis. Stat. § 940.08(1). (104:41-44). Nor did he know what the maximum potential sentences were for these lesser-included offenses. (104:41-44). Instead, he thought a jury's only options at a trial would have been to either find him guilty or not guilty of the charged offenses. (104:41-42).

Mr. Washington testified that had he known about the possibility of going to trial and requesting instructions for these lesser-included offenses, he would not have pled guilty and would have insisted on going to trial. (104:42-45). He also stated that he would have testified at trial to explain what had happened. He also would have instructed his attorney to request instructions for any available lesser-included offenses. He explained that he would have done this because he wanted to limit his exposure to potential incarceration as much as possible. (104:42-45).

At the hearing, Mr. Taylor testified that he had, in fact, advised Mr. Washington about the possibility of requesting lesser-included offense instructions at trial. (103:12-20). As he explained it, he visited Mr. Washington nineteen times in the jail and discussed "every aspect of going to trial in this particular case, which included lesser-includeds."

(103:13). Mr. Taylor was less than 100% certain, however, about which specific lesser-included offenses he had actually discussed with Mr. Washington. When asked if he had discussed the lesser-included offense of second-degree reckless homicide, Mr. Taylor stated, "I do not recall, but probably so. I mean, I can't recall every detail, but probably so." (103:17). Regarding homicide by intoxicated use of a firearm, he stated that he had discussed that with Mr. Washington; however, "Mr. Washington stated to me he was not intoxicated and that was not what he wanted to do." (103:18-19). Finally, regarding the lesser-included offense of homicide by negligent handling of a dangerous weapon, Mr. Taylor stated, "we discussed every possibility. I can't recall exactly specifically." (103:19).

Mr. Taylor also testified that Mr. Washington was adamant about not wanting to go to trial because he wanted to accept responsibility, adding that Mr. Washington's "whole focus was on trying to explain why he did what he did." (103:14).

After the hearing, however, Mr. Taylor sent a letter to the court explaining that he did *not* actually recall discussing the option of requesting lesser-included offense instructions at trial with Mr. Washington. (84; App. 141-43). Specifically, Mr. Taylor stated that after the hearing, he had reviewed his file for this case and "do[es] not have any specific notes regarding this subject," i.e., discussions with Mr. Washington about lesser-

included instructions. (84:1; App. 141). He also stated, "I do not recall if I specifically, addressed the issue of proposed lessor included Wisconsin Jury Instructions after a Jury Trial proceedings with Mr. Washington." (84:1; App. 141). This letter was admitted into evidence as Exhibit 6 pursuant to a stipulation by the parties. (87).

W.W. also testified at the hearing. He admitted that he intentionally knocked his father over playing basketball, stating: "I ran over my father, like, really hard." (104:11-12). W.W. testified that Mr. Washington then went in the house and came back out a short time later with a gun. (104:13-15). He said that Mr. Washington walked up to him and pointed the gun in his direction. (104:14-15). W.W. also said that when he saw the gun, he threw the basketball at his father and turned around and ran to their neighbor's house. (104:15-16, 18). He then heard the gun go off multiple times. (104:16).

W.W. explained that he did not know if the ball actually hit Mr. Washington or the gun, thereby causing it to go off. (104:18-19). He said, however, that after he threw the ball the gun went off "almost instantly." (104:19). After that, W.W. fell to the ground because he had been shot in the leg. He then turned around and saw his brother tackle Mr. Washington and throw the gun away from him. (104:19-20). R.W. then told him to call 911 because he had been shot. (104:19). As he was running to the house, W.W. heard Mr. Washington say, "Oh, my boy. I shot my boy." (104:19).

Finally, W.W. testified that neither Mr. Taylor nor any defense investigator ever interviewed him about this incident while the case was pending. (104:6-8; *see also* 103:23). As he explained, during the pendency of the case, his mother would not allow Mr. Taylor or anyone working on his behalf to speak with him, as he was only fifteen at the time. (104:22-23; *see also* 103:24-26). He therefore did not tell anyone working on behalf of Mr. Washington at the time that he had, in fact, thrown the basketball at Mr. Washington right before the gun went off. It was not until postconviction/appellate counsel's investigator interviewed him in 2018 that he made such a statement. (104:7).

Following the hearing, the circuit court instructed the parties to submit proposed findings of fact and conclusions of law. The court later issued a written decision adopting the State's proposed findings and conclusions, and denying Mr. Washington's motion in its entirety. (90; 92; App. 134-40). The court found credible Mr. Taylor's testimony that he discussed the possibility "of proceeding to trial and requesting lesser-included crimes" with Mr. Washington. (92:2; 90:2-3; App. 135, 138-39). The court therefore concluded that Mr. Taylor was not ineffective in this respect. (92:2; 90:3; App. 135, 139). In doing so, the court did not acknowledge that Mr. Taylor had submitted a letter after the hearing stating that he did not, in fact, recall discussing the issue of lesser-included offenses with Mr. Washington.

Regarding Mr. Washington's newly discovered evidence claim, the court stated that it was "not persuaded that a reasonable jury would find, based on the circumstances of this case and the multiple versions that were presented as to how the shooting occurred, that the defendant was guilty of a lesser included offense." (92:2; App. 135). The court also concluded that W.W.'s post-sentencing statement, in which he acknowledged throwing the basketball, "does *not* constitute newly discovered evidence . . . because he was present at the time and gave the police a statement." (92:2 n.5; App. 135 n.5) (emphasis in original). The court stated that "[s]imply because he says something different now to support his father's argument does not make it 'new.'" (92:2 n.5; App. 135 n.5). The court further stated that Mr. Taylor was not ineffective for failing to interview W.W. because he "was not permitted to speak to W.W. during the pendency of the proceedings." (92:2 n.5; App. 135 n.5).

Finally, with respect to Mr. Washington's claim of ineffectiveness at sentencing, the court concluded that Mr. Taylor's representation was not deficient and that Mr. Washington was not prejudiced by Mr. Taylor's sentencing arguments. (92:2; 90:3; App. 135, 139). The court stated:

> [E]ven if a more supportive sentencing argument would have been made by counsel, the court nevertheless had the material facts concerning both the incident, the defendant's character, and the various accounts of how the shooting happened. The court read the presentence report

> how and why the defendant labeled the shooting an accident and how he never intended to shoot his sons. The court also listened to the defendant's statement prior to imposing sentence as well as his wife's. The defendant told the court how much he loved his sons and that he was completely remorseful for his extremely poor judgment in bringing a gun to the scene. There are no other mitigating factors set forth in the defendant's motion that he is claiming should have been raised and that the court did not consider.

(92:3; App. 136).

ARGUMENT

I. Defense counsel was ineffective for failing to advise Mr. Washington about the possibility of requesting instructions at trial for lesser-included offenses.

A. General legal principles and standard of review.

After sentencing, a defendant who seeks to withdraw a guilty plea must show that plea withdrawal is necessary to correct a manifest injustice. *State v. Thomas*, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. One example of a manifest injustice is where a defendant is denied effective assistance of counsel. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996).

Both the United States and Wisconsin Constitutions guarantee a criminal defendant the right to counsel. U.S. Const. amends. VI, XIV; Wis. Const. art. 1, § 7. "This right includes the right to effective assistance of counsel." *State v. Roberson*, 2006 WI 80, ¶23, 292 Wis. 2d 280, 717 N.W.2d 111.

Wisconsin courts apply the two-part test outlined in *Strickland v. Washington*, 466 U.S. 668 (1984), to determine whether trial counsel was ineffective. A defendant raising ineffectiveness must show first "that counsel's performance was deficient" and second that "the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. Deficient performance occurs when "'counsel's representation fell below an objective standard of reasonableness.'" *State v. Johnson*, 133 Wis. 2d 207, 217, 395 N.W.2d 176 (1986) (quoting *Strickland*, 466 U.S. at 688). Although the court must presume that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," *Strickland*, 466 U.S. at 690, the defendant overcomes that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) (citing *Strickland*, 466 U.S. at 688-89). The deficiency prong of the *Strickland* test is met when counsel's failures resulted from oversight rather than a reasoned defense strategy. *See Wiggins v. Smith*, 539 U.S. 510, 534 (2003); *State v. Thiel*, 2003 WI 111, ¶51, 264 Wis. 2d 571, 665 N.W.2d 305;

State v. Moffett, 147 Wis. 2d 343, 353, 433 N.W.2d 572 (1989).

Second, a defendant must show that counsel's deficient performance prejudiced his defense. The defendant need not show "that counsel's deficient conduct more likely than not altered the outcome of the case." *Strickland*, 466 U.S. at 693. Rather, to establish prejudice, the defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Smith*, 207 Wis. 2d 258, 276, 558 N.W.2d 379 (1997) (citing *Strickland*, 466 U.S. at 694). "Reasonable probability" under this standard is defined as "'probability sufficient to undermine confidence in the outcome.'" *Moffett*, 147 Wis. 2d at 357, (quoting *Strickland*, 466 U.S. at 694). In other words, the defendant need only demonstrate that the outcome is suspect, not that the final result would have been different. *Smith*, 207 Wis. 2d at 275. In plea withdrawal cases, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Appellate review of a trial court's conclusions regarding ineffectiveness claims involves a mixed question of law and fact. Appellate courts generally owe deference to a trial court's findings of fact. As a general matter, therefore, factual findings will not be overturned unless clearly erroneous. *State v. Maday*,

2017 WI 28, ¶66, 374 Wis. 2d 164, 892 N.W.2d 611. Where the evidence is documentary, however, an appellate court owes no deference to the trial court, as the appellate court is just as capable of determining the facts in that instance. Factual findings regarding documentary evidence are therefore reviewed *de novo*. *See McCauley v. Tropic of Cancer*, 20 Wis. 2d 134, 148, 121 N.W.2d 545 (1963). Similarly, the legal questions of whether counsel's performance was deficient and prejudicial are also reviewed *de novo*. *Maday*, 374 Wis. 2d 164, ¶66.

B. The trial court's finding that defense counsel discussed the possibility of requesting lesser-included offense instructions with Mr. Washington was erroneous and should be reversed.

This court should reverse the circuit court's finding that Mr. Taylor advised Mr. Washington about the possibility of requesting instructions at trial for lesser-included offenses. That finding is incompatible with a record that is effectively uncontradicted on this point.

Again, Mr. Washington plainly testified that Mr. Taylor never informed him about the possibility of requesting lesser-included offense instructions at a trial. (104:38-44). Mr. Taylor also stated in writing that he did not recall discussing this possibility with Mr. Washington. (84).

It is true that Mr. Taylor originally testified that he discussed the issue of lesser-included offenses with Mr. Washington (although he was not 100% certain if he actually discussed certain lesser-included offenses with him). (103:13, 17-19). But after the hearing, he wrote the court and corrected his testimony. His letter speaks for itself, and its meaning is clear. In that letter, Mr. Taylor explained that he did "not have any specific notes regarding this subject to provide to counsel or the court." (84:1; App. 141). He also stated, "I do not recall if I specifically, addressed the issue of proposed lessor included Wisconsin Jury Instructions after a Jury Trial proceeding with Mr. Washington." (84:1; App. 141).

These statements were Mr. Taylor's final word on the subject, and they came after he had the opportunity to review his notes and reflect on the matter. Thus, for all intents and purposes, his written statements withdrew and superseded his earlier testimony asserting that he discussed the issue of lesser-included offenses with Mr. Washington.

The circuit court made no specific factual findings about Mr. Taylor's statement in this letter indicating that he did not, in fact, recall discussing the issue of lesser-included offenses with Mr. Washington. The court did not say why it thought Mr. Taylor's in-court testimony should trump his later written statements. Nor did it offer any alternative interpretation about the letter's meaning.

Instead, it acted as if these statements in the letter just didn't exist. (*See* 92; 90; App. 134-40). A factual finding like this—which ignores a witness's final written word on a subject—is inherently flawed and erroneous. This court should give no deference to that type of hollow factual finding.

This is especially true where the finding turns on the meaning of a written letter. Again, this court owes no deference to any implicit factual finding by the circuit court concerning Mr. Taylor's letter, as this court is just as capable of determining the letter's meaning as the circuit court. *See McCauley*, 20 Wis. 2d at 148. The letter is clear that Mr. Taylor has no recollection of ever specifically discussing the issue of lesser-included offenses with Mr. Washington, and that is wholly consistent with Mr. Washington's testimony.

On this record, the facts permit only one reasonable finding—that Mr. Taylor never discussed the possibility of requesting lesser-included offense instructions at trial with Mr. Washington. This court should therefore reverse the circuit court's finding on this issue and affirmatively find that Mr. Taylor did not discuss this possibility with Mr. Washington.

Moreover, even if this court determines that it does owe deference to the circuit court's factual findings, it should still reverse. "A finding of fact is clearly erroneous if 'it is against the great weight and clear preponderance of the evidence.'" *State v. Arias*, 2008 WI 84, ¶12, 311 Wis. 2d 358, 752 N.W.2d 849,

(quoting *State v. Sykes*, 2005 WI 48, ¶21 n.7, 279 Wis. 2d 742, 695 N.W.2d 277), *abrogation on other grounds recognized in State v. Downer Jossi*, No. 2016AP618-CR, unpublished slip op., ¶¶9-10 (Wis. Ct. App. Aug. 24, 2016) (App. 144-45).

Here, the great weight and clear preponderance of the evidence conclusively demonstrates that Mr. Taylor did not discuss the possibility of requesting lesser-included offense instructions with Mr. Washington. Again, the evidence on this point was effectively uncontradicted in light of Mr. Taylor's letter clarifying that he had no recollection of discussing this possibility with Mr. Washington. It was thus simply unreasonably and clearly erroneous for the circuit court to ignore these statements in his letter and issue a decision as if they had never been made. This court should therefore reverse the circuit court's findings on this issue as clearly erroneous.

C. Defense counsel was deficient in failing to advise Mr. Washington about lesser-included offenses and his deficiency prejudiced Mr. Washington.

1. Mr. Taylor's failure to advise Mr. Washington about the possibility of requesting instructions for lesser-included offenses constituted deficient performance. With respect to the charge of first-degree reckless homicide, there were three lesser-included offense instructions that the defense could have requested at trial based on the expected evidence: (1) second-degree reckless homicide; (2)

homicide by negligent handling of a dangerous weapon; and (3) homicide by intoxicated use of a firearm.

According to Mr. Washington's testimony, he retrieved the gun after W.W. knocked him to the ground because he wanted to scare W.W. It was not his intent to use the gun. (104:34). As he told the PSI writer, the shooting "was an accident," "a bluff that went bad." (13:3). Mr. Washington also testified that after he went back outside with the gun, he held the gun down by his side and did not point it at anyone. W.W., however, threw a basketball at him, which hit R.W. in the back, causing him to fall into Mr. Washington. That in turn caused Mr. Washington to fall to the ground, and the gun went off unintentionally. (104:35-37). During this fall, R.W. was accidentally shot and mortally wounded. (104:19-20).

Those facts are a better fit with a less serious type of homicide than first-degree reckless. Accordingly, based on this testimony, a reasonable jury could have found that Mr. Washington was guilty not of first-degree reckless homicide, but of one of the less serious types of homicide noted above. All this would have required was for one or more members of the jury to have a reasonable doubt regarding any of the elements of first-degree reckless homicide.

First-degree reckless homicide has three elements: (1) the defendant caused the death of

another human being; (2) the defendant caused the death by criminally reckless conduct; and (3) the circumstances of the defendant's conduct showed utter disregard for human life. Wis. Stat. § 940.02(1); *see also* Wis. JI-Criminal 1020. Given Mr. Washington's description of the events, there is a reasonable probability that a jury would have concluded that his conduct, while criminally reckless, did not show utter disregard for human life. At a minimum, there is a reasonable probability that one or more members of the jury would have had a reasonable doubt about whether his conduct showed utter disregard for human life. A lesser-included instruction for second-degree reckless homicide would therefore have been appropriate at trial if requested, as second-degree reckless homicide is identical to first-degree reckless homicide with the exception that it lacks the utter disregard elements. *See* Wis. Stat. § 940.06; Wis. JI-Criminal 1022, 1060; *see also State v. Miller*, 2009 WI App 111, ¶48, 320 Wis. 2d 724, 772 N.W.2d 188 ("A criminal defendant is entitled to a lesser-included offense instruction if requested when reasonable grounds exist in the evidence both for acquittal on the greater offense and conviction on the lesser offense."); Wis. Stat. § 939.66(2) (stating that a crime that is a less serious type of homicide under Wis. Stat. ch. 940 is an included crime).

In addition, a reasonable jury might have had a reasonable doubt about whether Mr. Washington's conduct was even criminally reckless, and instead

concluded that it was merely criminally negligent.[5] A lesser-included instruction for homicide by negligent handling of a dangerous weapon would therefore also have been appropriate if requested at trial. *See* Wis. Stat. § 940.08(1).

Finally, as the evidence would have established that Mr. Washington was intoxicated at the time of the incident, a lesser-included instruction for homicide by intoxicated use of a firearm would have been appropriate, as well. *See* Wis. Stat. § 940.09(1g)(a), (b).

Consequently, had Mr. Washington gone to trial, he could have requested instructions for any one or all of the foregoing lesser-included offenses. Mr. Taylor's failure to advise him about this possibility constituted deficient performance that fell below an objective standard of reasonableness. Numerous courts have found that an attorney's failure to request a lesser-included instruction, when the evidence at trial supports the instruction and there is no strategic reason for not doing so,

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[5] Criminally reckless conduct requires, among other things, that the defendant was aware that his conduct created an unreasonable and substantial risk of death or great bodily harm. *See* Wis. Stat. § 939.24. Criminal negligence, on the other hand, only requires that the defendant *should have been aware* that his conduct (in this instance, the handling or operation of a dangerous weapon) created an unreasonable and substantial risk of death or great bodily harm. *See* Wis. Stat. §§ 940.08(1), 939.25(1); *see also* Wis. JI-Criminal 1175.

constitutes deficient performance. *See Breakiron v. Horn*, 642 F.3d 126, 136-141 (3d Cir. 2011); *Richards v. Quarterman*, 566 F.3d 553, 569-70 (5th Cir. 2009).

In like fashion, an attorney's failure to advise his client about the possibility of requesting lesser-included offense instructions at trial, when there is likely to be a reasonable basis in the expected evidence to support such a request, also constitutes deficient performance. If anything, an attorney's failure to advise his client about the possibility of requesting a lesser-included instruction is even more likely to constitute deficient performance. At a trial, there may be a strategic reason for not requesting a lesser-included instruction. For instance, a lawyer might to decide that the better approach is to "go for broke" and seek an outright acquittal for the greater offense. *See Kimbrough*, 246 Wis. 2d 648, ¶32; *Ambuehl*, 145 Wis. 2d at 353-60.

There is no possible strategic reason, however, for failing to advise a client about all his options at trial before he enters a plea. *See* American Bar Assoc. (ABA), *Criminal Justice Standards for the Defense Function*, § 4-5.1 (4th ed. 2015) ("Before significant decision-points, . . . defense counsel should advise the client with candor concerning *all aspects of the case*, including an assessment of possible strategies as well as likely possible outcomes.") (emphasis added). This case illustrates this point perfectly.

Here, it was simply unreasonable under prevailing professional norms for Mr. Taylor not to advise Mr. Washington about the possible strategy of going to trial and requesting instructions for appropriate lesser-included offenses. This advice was necessary so Mr. Washington would be aware of all his options before the pled, not just the basic choice between pleading guilty to the charged offenses and going to trial on those charges. Because Mr. Taylor failed to advise Mr. Washington about the possibility of requesting lesser-included offense instructions at trial, Mr. Washington did not know there was a third way—a potential middle ground that could have resulted, not in outright acquittal, but in a conviction for an offense with a substantially lower maximum potential penalty.

Mr. Taylor's failure in this respect clearly resulted from oversight rather than a reasoned defense strategy. As Mr. Taylor himself noted, "[t]he only issue Mr. Washington raised with [him] was whether [they] could get a less[e]r charge during the [plea] negotiation process." (84:2; App. 142). Given that Mr. Taylor knew Mr. Washington was interested in obtaining a conviction to a lesser charge, there was even more reason for him to advise Mr. Washington about the possibility of going to trial and requesting instructions for lesser-included offenses. Thus, Mr. Taylor should have informed Mr. Washington that if the prosecutor would not agree to reduce the charges as part of the plea negotiation process, an alternative way to attain the same result was to go

trial and request that the jury be instructed to consider lesser-included offenses.

Because he failed to do so, Mr. Taylor's representation fell below the minimum standard for professionally competent legal assistance.

2. Mr. Taylor's deficiency was also prejudicial. Mr. Washington specifically testified that, had Mr. Taylor advised him about the possibility of going to trial and requesting lesser-included offense instructions, he would have gone to trial and done so, because he wanted to limit his exposure to potential incarceration as much as possible. (104:42-45). A conviction for any one of the lesser-included offenses noted above would have substantially reduced Mr. Washington's potential exposure, making his reasoning logically sound. Whereas first-degree reckless homicide has a maximum potential term of imprisonment of sixty years, the maximum for both second-degree reckless homicide and homicide by intoxicated use of a firearm is only twenty-five years. Wis. Stat. §§ 940.02(1), 940.06(2), 940.09(1g)(a), (b), 939.50(3)(b), (d). The maximum for homicide by negligent handling of a dangerous weapon is only ten years. Wis. Stat. §§ 940.08(1), 939.50(3)(g).

Mr. Washington's claim is also supported by the facts in the record. Again, according to Mr. Taylor, "[t]he only issue Mr. Washington raised with [him] was whether [they] could get a less[e]r charge during the [plea] negotiation process." (84:2; App. 142). Mr. Taylor also stated that

Mr. Washington "admitted his guilt right away," and his "whole focus was on trying to explain why he did what he did." (103:14). As no plea deal reducing the charges was available, it is entirely plausible that Mr. Washington would have attempted to obtain a conviction for "a less[e]r charge" by going to trial to explain "why he did what he did" had he known that doing so was a possibility.

Furthermore, Mr. Washington has consistently maintained that he did not retrieve the gun with the intention of using it. Rather, he retrieved the gun as a bluff, in a misguided attempt to stop a pattern of bullying that W.W. had been subjecting him to. It was only after W.W. threw a basketball into R.W.'s back, causing him to fall into Mr. Washington, that the gun accidentally went off. Mr. Washington's account of the shooting is therefore not a post hoc story he invented just to support a postconviction motion. It is "contemporaneous evidence" that substantiates his claim that he would have insisted on going to trial had he known about the possibility of requesting lesser-included offense instructions at trial. *See Lee v. United States*, ___ U.S. ___, 137 S. Ct. 1958, 1965 (2017).

Consequently, there is a reasonable probability not only that Mr. Washington would have insisted on going to trial had he known about the possibility of requesting lesser-included offense instructions, but also that he would have actually been convicted of a less serious type of homicide. Again, the State conceded in the criminal complaint that

Mr. Washington's account of the shooting was "reliable because it was against his penal interest." (1:2).

It is true that Mr. Taylor testified that Mr. Washington never really wanted to go to trial. (103:14-15, 18, 47; 84:1-2; App. 141-42). But even if this true,[6] it is not particularly relevant. All Mr. Taylor's testimony means is that Mr. Washington did not want to go to trial based on the information he had at the time, which did not include any information about lesser-included offenses. It says nothing about whether there is a reasonable probability that Mr. Washington would have made a different choice had he had known about the

[6] It is also worth noting that Mr. Taylor's claim that Mr. Washington "never really wanted to go to trial" (103:47) appears to be contradicted by the procedural history of the case. At the initial scheduling conference on July 17, 2014, the case was set for a final pretrial conference on September 23, 2014 and a jury trial on October 27, 2014. (98:2-3). At that final pretrial conference on September 23, 2014, the attorneys informed the court that no settlement had been reached yet, although they were still hopeful that one might be. They therefore asked the court to schedule another final pretrial conference, which was set for October 9, 2014. (99:2-4). On October 9, 2014, however, the attorneys again informed the court that they still had not reached a resolution. They therefore informed the court that they were ready to try the case on October 27, 2014. (100:2-3). It was not until the day of trial, on October 27, 2014, that the parties finally reached a plea agreement. (101:2-4).

possibility of requesting lesser-included instructions at trial.

Indeed, given that Mr. Washington did not know about the possibility of requesting lesser-included offense instructions, his decision to plead guilty is unremarkable. Mr. Washington "wanted to accept responsibility," no doubt because he felt responsible for the death of his son and believed he was guilty of something. (103:18). It therefore would not have made sense for him to go to trial if he had no viable theory of defense. Given the choice between convicting him of first-degree reckless homicide and acquitting him outright, a jury would almost certainly have found him guilty.

Courts have recognized the logic of this reality. For example, in *Breakiron*, the Third Circuit held that defense counsel's failure to request an instruction for a lesser-included offense constituted ineffective assistance. In so holding, the court stated:

> Without a [lesser-included] theft instruction, the jury was left with only two choices—conviction of robbery or outright acquittal. In such all-or-nothing situations, "[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." Thus, even though juries are obligated "as a theoretical matter" to acquit if they do not find every element of a crime, there is a "substantial risk that the jury's practice will diverge from theory" when it is not presented

> with the option of convicting of a lesser offense instead of acquitting outright.

Breakiron, 642 F.3d at 138 (quoting *Beck v. Alabama*, 447 U.S. 625, 634 (1980)).

Mr. Washington has therefore demonstrated that Mr. Taylor was deficient in failing to advise him about the possibility of requesting lesser-included offense instructions for the charge of first-degree reckless homicide. He has also demonstrated that there is a reasonable probability he would have insisted on going to trial had he known about this possibility. Again, these are legal conclusions which this court reviews *de novo*. *Maday*, 374 Wis. 2d 164, ¶66. This court should therefore hold that Mr. Washington is entitled to plea withdrawal.[7]

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[7] Mr. Washington asserts that he should be entitled to plea withdrawal on both counts, notwithstanding the fact that his claim only directly impacts his plea to first-degree reckless homicide. Mr. Washington's plea to the charge of first-degree reckless homicide was part of a larger plea agreement, the purpose of which was to resolve the entire case. Allowing plea withdrawal for only this charge would frustrate the purpose of the entire agreement. *See State v. Robinson*, 2002 WI 9, ¶31, 249 Wis. 2d 553, 638 N.W.2d 564 *abrogated on other grounds*, *State v. Kelly*, 2006 WI 101, ¶39, 294 Wis. 2d 62, 716 N.W.2s 886; *see also State v. Briggs*, 218 Wis. 2d 61, 73-74, 579 N.W.2d 783 (Ct. App. 1998).

II. W.W.'s statement acknowledging that he threw the basketball at Mr. Washington constitutes newly discovered evidence warranting plea withdrawal.

Newly discovered evidence may also be sufficient to establish that a manifest injustice has occurred warranting plea withdrawal. *State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). For newly discovered evidence to constitute a manifest injustice and warrant plea withdrawal, the following criteria must be met. First, the defendant must prove, by clear and convincing evidence, that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. *Id.* Second, if the defendant proves these four criteria by clear and convincing evidence, the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial. *Id.*

The decision to grant or deny a motion for a new trial based on newly discovered evidence is committed to the circuit court's discretion. *State v. Avery*, 2013 WI 13, ¶22, 345 Wis. 2d 407, 826 N.W.2d 60. This court therefore reviews the circuit court's determination for an erroneous exercise of discretion. *Id.* A circuit court erroneously exercises its discretion when it applies the wrong legal standard or makes a decision not reasonably supported by the facts of record. *Id.*

W.W.'s new statement that he threw the basketball at Mr. Washington right before the gun went off warrants plea withdrawal under these criteria. First, the statement was discovered after Mr. Washington's convictions. During his initial statement to police on the day of the shooting, W.W. provided the following statement:

> [W.W.] stated that he then saw his father go into the house and return a few minutes later armed with a black semi-automatic pistol. [W.W.] stated, "I'm like you ain't going to shoot me bro." [W.W.] stated that his father then pulled the trigger and shot him in the leg.
>
> [W.W.] stated that he then saw his brother, [R.W.], tackle their father. [W.W.] said he heard a shot and saw the gun go flying into the grass next to the driveway.

(76:1; *see also* 103:45). Later that same day, W.W. gave police the following additional statement:

> [W.W.] said that [R.W.] told him he shouldn't have done that (knocking over their father.) [W.W.] said he went back to playing basketball and [R.W.] started cutting grass. [W.W.] stated that [R.W.] had been cutting grass for a few minutes when their father came out holding a gun. [W.W.] stated that he and Robert moved to "charge him" and then their father shot twice. [W.W.] said he turned to run, but turned back and heard a third shot. [W.W.] said his brother made a noise and he thought [R.W.] was shot. [W.W.] said R.W. told him he was shot and to call 911.

(77:3).

In neither of these statements did W.W. say that he threw a basketball at Mr. Washington before the gun went off. The absence of that important piece of information certainly suggested that W.W. was claiming that it did not happen. As the circuit noted, W.W.'s testimony "did not comport with what he originally told police." (92:2 n.5; App. 135 n.5).

Also, at the time of his plea and sentencing, Mr. Washington did not know that W.W. acknowledged throwing the basketball. Neither Mr. Taylor, nor anyone else, ever told Mr. Washington about this fact. (104:45). In fact, neither Mr. Taylor nor any trial-level defense investigator ever interviewed W.W. to find this out. (103:23; 104:6-8). The circuit court's assertion that W.W.'s statement about throwing the basketball was not really "new" (92:2; App. 135) is therefore plainly incorrect.

Second, Mr. Washington was not negligent in discovering this evidence. During the pendency of the case, Mr. Washington was incarcerated and prohibited by court order from having any contact with W.W. (96:6). Also, Mr. Taylor was not negligent in failing to discover this evidence, as W.W.'s mother would not permit him to speak with her son.[8] (103:24-26; 104:22-23).

[8] To the extent this court concludes that Mr. Taylor was negligent in failing to discover this evidence, then Mr. Washington asserts that Mr. Taylor was deficient in this respect and that his deficiency prejudiced his defense. (continued)

W.W.'s statement about throwing the basketball is also material and not merely cumulative. The statement corroborates the most important aspect of Mr. Washington's account—that he shot R.W. accidently because W.W. threw a basketball in his direction. By contrast, W.W.'s prior statements to police—which did not mention the basketball—appeared to contradict Mr. Washington's account.

W.W.'s corroborating testimony would thus have made it more likely that a jury would have believed Mr. Washington's account and concluded that he was guilty, not of first-degree reckless homicide, but of a lesser-included form of homicide, because the shooting was ultimately accidental. While there are inconsistencies in their accounts—particularly regarding whether Mr. Washington pointed the gun at W.W. and R.W.'s location right before the shooting—both nevertheless agree that W.W. threw the ball at Mr. Washington right before the gun went off. This was the key point to Mr. Washington's assertion that the shooting was an accident. Thus, even if a jury were to conclude that W.W.'s account was more credible (and there is no guarantee that they would), there would still be a reasonable probability that Mr. Washington would

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Mr. Washington testified that had Mr. Taylor advised him that W.W. acknowledged throwing the basketball (in addition to advising him about the possibility of requesting lesser-included offense instructions), this would have reinforced and strengthened his desire to go to trial. (104:45-46).

have been convicted of a less-serious type of homicide had he gone to trial. The circuit court's contrary conclusion is simply not reasonably supported by the facts of record. It therefore constitutes an erroneous exercise of discretion.

Moreover, the circuit court applied an erroneous legal standard in denying Mr. Washington's claim. The circuit court stated that it was "not persuaded that a reasonable jury would find, based on the circumstances of this case and the multiple versions that were presented as to how the shooting occurred, that the defendant was guilty of a lesser included offense." (92:2; App. 135). However, the standard does not require that a jury affirmatively conclude that a lesser-included offense is more appropriate than the charged offense, as the circuit court's decision suggests. Nor does it require that the newly discovered evidence would more likely than not alter the outcome, as the court's decision also suggests. Rather, the standard requires Mr. Washington to show that "there is a reasonable probability that a jury, looking at both [W.W.'s initial statements to police and his later statement acknowledging that he threw the basketball], would have had a reasonable doubt" that Mr. Washington was guilty of first-degree reckless homicide, and thus concluded that he was guilty of a less-serious form of homicide. *See McCallum*, 208 Wis. 2d 463, ¶18.

Furthermore, the circuit court concluded that a reasonable jury would not find that Mr. Washington was guilty of a lesser-include offense due to "the

multiple versions that were presented as to how the shooting occurred." (92:2; App. 135). "One does not necessarily follow from the other," however. *See McCallum*, 208 Wis. 2d 463, ¶19. A reasonable jury hearing multiple different accounts "could, nonetheless, have a reasonable doubt as to whether" Mr. Washington was guilty of first-degree reckless homicide. *See id.* In fact, multiple different accounts are exactly the sort of thing that might cause a jury to have reasonable doubts about how the events unfolded. It therefore would be entirely appropriate for a reasonable jury to give Mr. Washington the benefits of those reasonable doubts.

Because there is a reasonable probability of a different outcome under the proper legal standard, this court should reverse the trial court's postconviction order, affirmatively conclude that Mr. Washington is entitled to plea withdrawal on the grounds of newly discovered evidence, and remand the case for a new trial. *See Libke v. State*, 60 Wis. 2d 121, 129, 208 N.W.2d 331 (1973) (noting that appellate courts have the authority to independently review the record and conclude that a defendant is entitled to plea withdrawal).

III. If this court determines that plea withdrawal is not warranted, then resentencing is necessary because Mr. Washington was denied an effective advocate at sentencing.

An attorney's failure to effectively advocate on his client's behalf at sentencing can constitute ineffective assistance of counsel. *See State v. Jefferson*, No. 2011AP1778-CR, unpublished slip op. (Wis. Ct. App. June 26, 2014) (holding that trial counsel was ineffective for failing to present character evidence on his client's behalf at sentencing) (App. 127-38)[9]; *see also* ABA, *Criminal Justice Standards for the Defense Function*, § 4-8.3(c) ("Defense counsel should present all arguments or evidence which will assist the court or its agents in reaching a sentencing disposition favorable to the accused.").

1. In this case, Mr. Taylor's performance at sentencing was utterly deficient. The only remotely positive things that Mr. Taylor said about Mr. Washington were that he had "a number of physical and mental ailments," that he "is a threat to no one but himself," and that he "regrets" "bring[ing]

[9] Indeed, Mr. Taylor was also the trial attorney deemed to have provided ineffective assistance for failing to make an adequate sentencing argument in *Jefferson*. *See* Wisconsin Circuit Court Access website, results for *State v. Jefferson*, Milwaukee County Case No. 09-CF-1786, *available at* https://wcca.wicourts.gov.

a weapon into the equation here." (102:21-23; App. 121-23). But Mr. Taylor provided no additional context or details for these assertions. And he offered no other positive or mitigating information related to any of the three primary sentencing factors—nothing about the nature of the offense, nothing about Mr. Washington's character and background, and nothing about the need to protect the public.

While Mr. Taylor submitted Mr. Washington's jail medical records prior to sentencing (15; 16), he made no arguments at the sentencing hearing involving Mr. Washington's health concerns. The jail records showed that Mr. Washington suffered from poor health due to a variety of issues stemming primarily from diabetes and high blood pressure. (*See* 15; 16; *see also* 82:3-4). Mr. Taylor, however, did not emphasize this fact at sentencing. Nor did he make any plea for leniency based on the fact that any sentence of twenty years or more would almost certainly be a life sentence given Mr. Washington's age and poor health.

Moreover, the very limited positive comments that Mr. Taylor made were completely overshadowed by the antagonistic stance he took against his own client. For the most part, Mr. Taylor's remarks were hostile to the point where a person reading the transcript might be inclined to double-check to be sure the remarks were those of defense counsel and not the prosecutor. Mr. Taylor needlessly expressed his own moral outrage in an attempt to distance himself from his client. (*See* 102:21; App. 121) ("I

don't care what the hell he says why he did it. It's totally unacceptable. This Court's not going to accept it. Our community won't accept it. And I don't accept. The point is, you don't bring a damn gun to a family dispute, period."). He deliberately and repeatedly stressed—in a prosecutorial-like fashion—the tragic nature of the offense. (*See* 102:21; App. 121). ("This is a very, very, very tragic incident"; "It's a very, very tragic event that's going to last forever."). He even said he did not know how Mr. Washington's wife was ever "going to get over it." (102:21; App. 121).

Even further, Mr. Taylor failed to make any sentencing recommendation to counter the State's recommendation for substantial confinement, stating that he was "going to punt" instead. (102:23; App. 123). If anything, Mr. Taylor's comments actually suggested that he agreed a relatively lengthy sentence, if not a near-maximum one, was appropriate given the aggravated nature of the offense. (102:22; App. 122) ("I think for a just sentence, there's a message that needs to be sent.").

Mr. Taylor's sentencing argument was objectively unreasonable and far below the minimum standard for a reasonably competent attorney in any criminal case, much less a homicide case. As Mr. Taylor himself acknowledged, "sentencing was the whole ball of wax" at that point. (103:28). Mr. Taylor's performance at sentencing was therefore deficient under the first prong of the *Strickland* test.

2. As noted in Section I, a defendant who shows deficient performance must also, as a general matter, affirmatively demonstrate prejudice. *See Strickland*, 466 U.S. at 687. There is an exception to this general rule, however. "Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." *Id.* at 692. Constructive denial of counsel occurs where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Moss v. Hofbauer*, 286 F.3d 851, 860 (6th Cir. 2002). Constructive denial of counsel constitutes a structural error requiring no further showing of prejudice. *Id.*

Courts have found constructive denial of the right to counsel where counsel acted as a mere spectator at the defendant's sentencing hearing, *see Tucker v. Day*, 969 F.2d 155, 159 (5th Cir. 1992), and where counsel, among other things, deliberately stressed the brutality of his client's crime at sentencing, *see Osborn v. Shillinger*, 861 F.2d 612, 628-29 (10th Cir. 1988).

Here, Mr. Washington did not have an effective advocate in the room when he was sentenced. Mr. Taylor did not argue on his behalf in any meaningful way. Instead, he deliberately and repeatedly stressed the tragic nature of the offense and expressed his own personal outrage at Mr. Washington's actions. Mr. Taylor totally failed to subject the prosecution's sentencing case to any sort of meaningful adversarial testing. This constitutes

constructive denial of counsel at sentencing. Prejudice should therefore be presumed.

3. However, even assuming that a showing of prejudice is required, Mr. Washington is still entitled to resentencing because Mr. Taylor's failure to advocate for him at sentencing undermines confidence in the outcome of the sentencing proceeding. Had Mr. Taylor given a competent sentencing argument, there is a reasonable probability that Mr. Washington would have received a more favorable sentence.

Admittedly, this was not an easy case to argue for sentencing purposes. The death of R.W. at the hands of his father was indeed tragic. However, instead of "punting" and actively undermining his client's sentencing prospects, there were many points that Mr. Taylor could have made to increase Mr. Washington's chances of receiving a more favorable sentence.

For starters, an effective advocate would not have punted with respect to a sentencing recommendation. Mr. Taylor said he did not make a specific recommendation because he "wanted to give the Court as wide a latitude as possible." (103:31). That is simply absurd. An effective advocate should have pointed back at the State's original offer to recommend twenty years of initial confinement and used that as a baseline to argue that twenty years was the outer limit of what the court should even consider. Counsel then could have argued that there

were a number of mitigating factors and positive aspects of Mr. Washington's character that warranted a lesser sentence—perhaps in the range of ten to fifteen years.

For example, regarding the nature of the offense, counsel could have argued that Mr. Washington's statement to law enforcement, which the complaint said was reliable, demonstrated that this incident was not the result of a premeditated or intentional act, as the State suggested at sentencing. It was an accident that occurred only after W.W. threw a basketball at Mr. Washington, causing the gun to go off unintentionally.

Counsel also could have emphasized that this incident did not occur in a vacuum, but rather had a larger context. While the immediate trigger was the fact that W.W. knocked Mr. Washington to the ground playing basketball, this was part of a pattern of W.W. bullying Mr. Washington. W.W. had been bullying Mr. Washington for some time, and Mr. Washington could not physically stand up for himself due to his frail condition. (104:33-34; 82:3). Mr. Washington felt ashamed of this harassment and did not know how to deal with the problem. (82:3; 104:33). He therefore acted impulsively by getting a gun in a misguided attempt to try to stop the abuse. Mr. Taylor did not point any of that out, however. Instead, he claimed that doing so was Mr. Washington's job, stating, "Mr. Washington was

going to take that prong of the sentencing presentation." (103:39-40).

Additionally, counsel could have noted that Mr. Washington was intoxicated at the time, which likely contributed to him acting impulsively and doing something out his character. (80). It was also worth noting that, at the time of the offense, Mr. Washington was likely suffering from alcohol dependence. (82:3).

Also, there were a number of points about Mr. Washington's character and positive social traits that any reasonably competent attorney would have pointed out. For instance, counsel should have noted that Mr. Washington has no other criminal convictions and no history of violence. (*See* 13:5-7). He also worked for twenty years building tractors for Omniquip in Port Washington. (82:2). After his employment ended due to work-related back and neck injuries, Mr. Washington's primary duty for many years was to take care of the household. (82:2). In this respect, he managed the house and family duties while his wife worked full time as a manager at BMO Harris Bank. (82:2). While the kids were at school, Mr. Washington would clean the house and go grocery shopping. (82:2). He would pick up the kids from school, cook dinner, and spend time with the children. (82:2). He routinely took the kids to the park to play football and basketball. (82:2). He also coached t-ball when the boys were younger. (82:2).

An effective advocate would have also emphasized that Mr. Washington was extremely remorseful and heartbroken about his son's death. (82:4). Jail records indicated that Mr. Washington was "tearful and very remorseful of [the] situation." (82:4). In fact, when the detective finally told Mr. Washington at the end of his interrogation that R.W. had died, Mr. Washington broke down and started crying. (76:5; 103:41-42).

Mr. Taylor did not make any of these points at sentencing, however. Instead, he punted and effectively advocated *against* his client.

In spite of this, the circuit court concluded "that even if a more supportive sentencing argument would have been made," the result would have been the same because the court already had "the material facts concerning both the incident, the defendant's character, and the various accounts of how the shooting happened" from the PSI. (*See* 92:3; App. 136). Boiled down, that is nothing more than an assertion that nothing defense counsel could have said would have mattered to the outcome of the sentencing hearing. But that is inconsistent with the court's prior assertion at sentencing that it "never approaches a sentencing with the inflexibility that bespeak[s] a made-up mind." (102:26; App. 126).

It is also incompatible with the basic foundations of our criminal justice system. What makes criminal proceedings fair and just is the fact that defendants have lawyers who go into the

courtroom and fight for them. That did not happen in this case. And even if the circuit court believed it was familiar with all the relevant facts, that was no substitute for Mr. Washington having an effective advocate to fight for him. Effective and persuasive arguments can change judges' minds and can alter the outcomes of court proceedings. This is true even where all the facts are supposedly already known.

Here, where the circuit court imposed a total sentence of forty-one years' confinement—effectively a life sentence for Mr. Washington—defense counsel's failure to advocate in any meaningful way on his client's behalf undermines confidence in the outcome of the sentencing proceeding.[10]

[10] As a final matter, it should be noted that in addition to all the other unreasonable and deficient actions in this case, Mr. Taylor also failed to timely file a notice of intent to pursue postconviction relief. (*See* 27).

CONCLUSION

For these reasons, Mr. Washington respectfully requests that this court reverse the judgment of the circuit court, as well as its postconviction order denying his request for plea withdrawal, and remand the case to the circuit court for purposes of a new trial. Should the court conclude that Mr. Washington is not entitled to plea withdrawal, then he requests that the court reverse the circuit court's postconviction order denying his claim for resentencing and remand the case for a resentencing hearing.

Dated this 27th day of December 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 10,882 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 December 2018.

Signed:

LEON W. TODD
Assistant State Public Defender

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 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 this 27th day of December 2018.

Signed:

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APPENDIX

INDE X
TO
APPENDIX