STATE OF WISCONSIN

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

DISTRICT III

Case No. 2018AP0001810-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TOBY J. VANDENBERG,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and
Order Denying Postconviction Relief,
Entered in the Door County Circuit Court,
the Honorable David L. Weber Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Whether trial-level defense counsel rendered ineffective assistance of counsel at Mr. Vandenberg's sentencing hearing when defense counsel argued for an illegal sentence and failed to argue mitigating factors or positive attributes to the sentencing court.

The circuit court found that trial counsel's sentencing argument was not deficient and also even if it were deficient, Mr. Vandenberg was not prejudiced by the argument.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Vandenberg asks this court to presume prejudice pursuant to *United States v. Cronic*, 466 U.S. 648 (1984). Thus, publication and oral argument may be warranted as counsel is not aware of Wisconsin precedent presuming prejudice in this specific context.

STATEMENT OF THE CASE AND FACTS

On January 3, 2018, Mr. Vandenberg entered a guilty plea to operating a motor vehicle while intoxicated, 7th offense; a second count, operating after revocation, was dismissed and read-in. (21). At the plea hearing, the state also moved to dismiss and read-in a bail jumping case, Door County Case No. 17CF130. (38:4). The state recommended an eight year prison sentence, with four years in and four years out and a Pre-Sentence Investigation ("PSI") was ordered. (38:4). The PSI recommended a five-six year sentence, with three years in followed by two-three years extended supervision. (18:27). On March 9, 2018, however, the court adopted the state's recommendation and Mr. Vandenberg was sentenced to eight years in the state prison system, with four years of initial confinement followed by four years of extended supervision. (21).

At the sentencing hearing, defense counsel, Attorney Brett Reetz, argued for an illegal sentence. Despite the three year mandatory minimum required by Wis. Stat. § 346.65(2)(am)6, defense counsel requested the court place Mr. Vandenberg on probation and impose and stay "a lengthy, lengthy period of revocation, six, eight years of ES, if he would violate probation." (34:11; App. 103). When the court reminded defense counsel it did not have authority to sentence Mr. Vandenberg to probation, defense counsel clarified he was instead requesting the court impose and stay a lengthy sentence and release Mr. Vandenberg "subject to certain conditions" but not place him directly on probation. (34:11-12; App. 103-04).

At one point during the argument defense counsel did acknowledge the mandatory minimum: "I know you're bound by the law, Your Honor, and if to the extent that the law prevails I'd ask for three years rather than four." (34:11; App. 103) However, the illegal probation disposition was the "main thing" argued by the defense. (40:66; App. 124). Defense counsel never actually asked the court to impose the mandatory minimum and he acknowledged postconviction that nothing he said supported the imposition of the mandatory minimum. (40:34-37).

Defense counsel began his sentencing argument with: "This is a difficult case to argue in some respects because of the past history of my client. But it brings to mind an Alcoholics Anonymous saying, the definition of insanity is doing the same thing over and over again." (34:9; App. 101). Defense counsel went on to emphasize that Mr. Vandenberg had failed "over and over and over again" in prison and other treatment programs. (34:9 (two times), 10; App. 101, 102). At the postconviction hearing, defense counsel explained he believed highlighting Mr. Vandenberg's past failures in prison would support a probation sentence. (40:22).

Defense counsel also discussed, in detail, the potential serious results of Mr. Vandenberg's behavior – "drunk drivers on the road are an extreme danger…just the most awful type of tragedy when a drunk driver kills an innocent person or injures an innocent person. It's a shocking, unexpected bolt of lightening in somebody's life" – although this case did not involve any death, injuries or accident. (34:9-10; App. 101-102).

Defense counsel said his client was a "great guy" when he was not drinking but this was immediately followed with "…he keeps going back to the use of alcohol…over and over and over, despite all the efforts by the State and the system to get him into a long-established, accepted recovery." (34:10; App. 102).

Mr. Vandenberg moved the court for postconviction relief, claiming he was denied effective assistance of counsel at sentencing. (28). The court held a hearing on the motion and heard testimony from defense counsel and Mr. Vandenberg. (40). Defense counsel testified he requested probation because his client wanted it and he explained the reasons why he believed it was an appropriate and possible outcome. (40:14, 21, 23, 24, 32). He also said it was an attempt to get the court to "split the baby." (40:36).

At the end of the hearing, the court issued an oral ruling denying resentencing. (40:73; App. 131). The court stated it understood the "illegal sentence argument … to be really trying to get me into the three years" (40:68, 70; App. 126, 128). The court therefore concluded the argument for probation, although "certainly pushing the edge" was strategic and not deficient. (40:75; App. 133). The court also concluded counsel's failure to argue positive attributes or mitigating factors was not deficient because "it was so clear I had read the PSI" and therefore "knew the sort of good facts about Mr. Vandenberg." (40:69; App. 127).

The court held, even if defense counsel were deficient, there was no prejudice as a matter of law and no actual prejudice because "I have been presented with no facts here today that I was unaware of, and I can think of no reason why I would not have done either what I did or something lengthier in terms of a prison sentence." (40:70-71; App. 128-29). The court went on to say, "I don't believe that Mr. Reetz, you know, whatever he would have done, would have changed my overall impression of this case." (40:71; App. 129).

This appeal follows.

ARGUMENT

Mr. Vandenberg Was Denied His Sixth Amendment Right to Effective Representation of Counsel at Sentencing When Trial Counsel Argued for an Illegal Sentence and Failed to Advocate for His Client

A. Introduction, legal principles, and standard of review.

At a sentencing, the defense attorney's words matter. They affect the tenor of the hearing, and in an adversary system, they should affect the result. Under the constitution, a criminal defendant has the right to an attorney who advocates for him at sentencing. U.S. Const. amends. VI, XIV; Wis. Const. art. I, § 7; *State v. Smith,* 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). "The right to counsel is more than the right to nominal representation. Representation must be effective." *State v. Felton*, 110 Wis. 2d 485,

499, 329 N.W.2d 161 (1983). This court has made clear "[i]neffectiveness is neither a judgment of the motives or abilities of lawyers nor an inquiry into culpability. The concern is simply whether the adversary system has functioned properly." *Id.* at 499.

A defendant claiming ineffective assistance of counsel must prove deficient performance and prejudice. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). An attorney performs deficiently when the attorney's actions or omissions, in light of all the circumstances, fall outside the wide range of professionally competent representation. *State v. Pote*, 2003 WI App 31, ¶¶13-16, 60 Wis. 2d 436, 659 N.W.2d 82 (citing *Strickland*, 466 U.S. at 690). This is an objective standard, measuring the attorney's performance against what a reasonable prudent attorney would do under the circumstances. *State v. Pitsch,* 124 Wis. 2d 628, 633-36, 369 N.W.2d 711 (1985). Strategic decisions rationally based on facts and law do not support a claim of ineffective assistance of counsel. *State v. Elm*, 201 Wis. 2d 452, 549 N.W.2d 471 (Ct. App. 1996). However, it is firmly established that merely labeling a decision or tactic "strategy" does not defeat an ineffective assistance of counsel claim. *Felton*, 110 Wis. 2d at 502-03; *State v. Coleman*, 2015 WI App 38, ¶20, 362 Wis. 2d 447, 865 N.W.2d 190.

Generally, to establish prejudice under the *Strickland* standard, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Pote*, 260 Wis. 2d 426,

¶¶13-16. However, when a complete denial of counsel occurs, or when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing ... the adversarial process itself presumptively unreliable" and prejudice is presumed. *United States v. Cronic*, 466 U.S. 648, 659 (1984). In this case, Mr. Vandenberg was placed in a worse place than if he had had no counsel at all. The *Cronic* standard, rather than *Strickland,* should therefore apply when assessing prejudice.

A claim of ineffective assistance of counsel presents a mixed question of law and fact. *State v. Thiel*, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. This court has ruled "we grant deference only to the circuit court's findings of historical fact. We review *de novo* the legal questions of whether deficient performance has been established and whether it led to prejudice…." *Id.* at ¶24.

B. Defense counsel performed deficiently at Mr. Vandenberg's sentencing when he argued for an illegal sentence and also when he failed to meaningfully advocate for his client.

1. Defense counsel was deficient when he argued for an illegal sentence.

The law governing sentencing in OWI 7 is clear and settled: if the number of prior OWI convictions equals 7, 8, or 9, "[t]he court shall impose a bifurcated sentence under s. 973.01 and the confinement portion of the bifurcated sentence imposed on the person shall be not less than 3 years."

Wis. Stat. § 346.65(2)(am)6; *State v. Williams*, 2014 WI 64, ¶47, 355 Wis. 2d 581, 852 N.W.2d 467.

To the extent there was ever any ambiguity under this statute, *State v. Williams*, 355 Wis. 2d 581, eliminated it. The defendant in *Williams,* convicted of OWI 7, had gone 12 years since his last OWI, had no other criminal convictions in those 12 years and was "as good a candidate for probation probably as [the court] would see." *Id.,* ¶13. However, the Wisconsin Supreme Court held that while the statute in effect at the time was arguably ambiguous, the "statutory history, context, structure and contextually manifest purposes of Wis. Stat. § 346.65(2)(am)6" prohibited sentencing courts from imposing probation and required courts to impose a bifurcated sentence with the mandatory three year minimum. *Id*., ¶6. Notably, during the pendency of *Williams,* the legislature revised Wis. Stat. § 346.65(2)(am)6 to clarify any purported ambiguity that had been present. *Id.,* ¶58 (J. Abrahamson, concurring); *see also* 2013 Wisconsin Act 224.

Therefore in this case probation was never an option and the court had no choice but to sentence Mr. Vandenberg to at least three years initial confinement. Yet, defense counsel testified at the postconviction hearing he believed probation was a possible outcome for Mr. Vandenberg:

- "My hope and desire, my intent was to get probation somehow." (40: 21).
- "I didn't have a definitive opinion whether he was going to prison or not." (40:16).

- "The judge would have had to withhold sentencing and just not sentence at all I think. And I think that in that slim margin he could have avoided the *Williams* case." (40:24).

- "I understood it was contrary to strong law, but I saw a sliver of a window there, a crack in the window there that something could happen." (40:32).

- "[J]udges makes [sic] decision contrary to [s]upreme [c]ourt rulings all the time." (40:14).

After *Williams,* defense counsel's belief that he could get probation for his client was patently incorrect. To the extent defense counsel was asking for some other, novel sentencing structure[1] not provided for by statute, this is also not permitted under the law. *See State v. Braun,* 100 Wis. 2d 77, 84, 301 N.W.2d 180 ("…courts have no inherent power to stay execution of a sentence in a criminal case in the absence of statutory authority except for the limited purpose of affording relief against the sentence itself."). Therefore, defense counsel's request for probation was based an incorrect interpretation of law and is therefore deficient as a matter of law. *See Thiel,* 264 Wis. 2d 571, ¶51.

[1] It is not entirely clear what defense counsel was asking the court to do if not asking for probation. (34:10-12). Withholding a sentence with a "huge anvil hanging over his head," subject to "certain conditions" is, as noted by the court, "effectively if not literally probation." (34:11-12, 23).

Secondly, the circuit court's legal conclusion that the illegal probation argument was a strategic attempt to get it to "split the baby" is unreasonable and not supported by the record. (40:66; App. 138). It would be against public policy to endorse strategies that involve asking the court to flagrantly disregard the law. An OWI 7 is among the small category of crimes in which the legislature has determined the conduct requires a prison sentence in all cases regardless of the circumstances. To sanction arguments in contravention of this directive undermines the legislative intent. Attorneys are expected to have "legal knowledge, skill, thoroughness and preparation" and many judges rely on attorneys' interpretations of the law. (SCR 21:1:1 Competence). To knowingly argue for dispositions that are specifically prohibited runs the risk, in the words of the circuit court, of "attorneys misleading [the court] … leading [courts] down a path … [causing them] to do something that's not called for." (40:67).

Lastly, the substance of defense counsel's argument does not reasonably support a probation disposition or even the mandatory minimum as a fall back. It is nonsensical to first enumerate repeated failures at achieving sobriety and then argue these past failures make Mr. Vandenberg appropriate for probation. If "history repeats itself" and Mr. Vandenberg is truly incorrigible, this fact would only suggest a lengthy prison sentence is the best way to meet his needs and keep the public safe. (34:10; App. 102). As established in the next section of the brief, there were numerous points defense counsel could have made in favor of mitigation.

Yet, defense counsel's argument undermined those points, in effect condemning Mr. Vandenberg, denying him at an appropriately lenient sentence.

Second, the risk involved in keeping Mr. Vandenberg in the community – as defense counsel put it, "the one risk being if he relapsed, drove again and injured somebody" – was a substantial risk. (40:23). Defense counsel offered no support for why the public should bear this risk and it is difficult to conceive of any, particularly in light of the legislature's prison directive that a prison term with institutionalize treatment was the only appropriate disposition in this case.

In sum, defense counsel's argument for probation, the "main thing" argued, was contrary to governing law, against public policy and served as an added basis for a longer confinement period. (40:66; App. 124). As such, it was not the argument a reasonable prudent attorney would make and is therefore deficient.

2. Defense counsel was deficient when he failed to meaningfully advocate for his client.

An attorney, as an advocate, is charged with zealously asserting his/her client's position. SCR Ch. 20 Preamble. Effective assistance of defense counsel requires that an attorney adhere to his or her duty of undivided loyalty to a client. *Strickland,* 466 U.S. at 692. Loyal defense advocacy is not just beneficial to the defendant; it is essential to the proper functioning of the adversarial justice system. *See Von Moltke v. Gilles,* 332 U.S. 708, 725 (1948)

(emphasizing the fundamental importance of the attorney's loyalty in the attorney-client relationship).

With respect to sentencing, the Honorable William C. Griesbach succinctly explained the importance of defense advocacy:

> Only if the defense attorney properly performs his or her role and zealously represents the client can . . . a judge impose a sentence in which we can have confidence. The role of a defense attorney in a criminal case is thus no less important for our system of justice than that of the prosecutor, the judge, or even the jury. All participants must perform their role properly for the system to work and for us to have good reason to believe that the outcome is just.

The Honorable William C. Griesbach, Defending Public Defenders, 81 Wisconsin Lawyer 5 (May, 2008). The ABA guidelines also provide appropriate minimal guidelines for defense counsel at sentencing. Fundamentally, a defense attorney should "present all arguments or evidence which will assist the court … in reaching a sentencing disposition favorable to the accused." ABA Standards for Criminal Justice: Prosecution Function and Defense Function § 4-8.3(c) (4th Ed.).

Defense counsel's failure to inform the trial court about the defendant's good character and positive social history in any meaningful way or present any "relevant mitigating argument legitimately available" constitutes deficient performance. *Pote*, 2003 WI App 31, ¶34*; State v. Jefferson*, No. 2011AP001778-CR, ¶17, unpublished slip op. (WI App June 26, 2012); *see also Williams v.*

Taylor, 529 U.S. 362 (2000) (counsel rendered ineffective assistance of counsel at sentencing by making negative comments about the defendant and by failing to present mitigating information to the court).

Contrary to defense counsel's assertion "this is a difficult case to argue," there were many favorable points and mitigating factors available to the defense. (34:9; App. 101). First, the PSI recommended the appropriate sentence of three in and two out. Counsel could have emphasized this recommendation and argued that it was formulated by a Department of Corrections professional who had reviewed records, conducted interviews of treatment providers and individuals in Mr. Vandenberg's community as well as employed well regarded, evidenced-based risk assessment tools (i.e. COMPAS). *See State v. Loomis*, 2016 WI 68, ¶39, 371 Wis. 2d 235, 881 N.W.2d 749. (The Wisconsin Supreme Court has expressed a preference for structured risk assessments rather than gut-level risk assessments). Competent counsel would have relied heavily on the DOC's appropriate recommendation.

In addition, a reasonable prudent attorney would have emphasized the positive attributes from Mr. Vandenberg's history. Despite defense counsel's insistence that Mr. Vandenberg was going to relapse "over and over and over again," another view of the facts is that he had made significant improvements over the years but "went off the rails" when experienced an understandably destabilizing event – the diagnoses of pancreatic cancer and eventual death of his live-in partner, Bethany Van Dreese.

(18:3). Competent counsel would have argued the relapses in 2017 were attributable to this tragedy and not to Mr. Vandenberg's inherent inability to conquer his alcoholism.

Indeed, prior to Ms. Van Dreese's illness and death, Mr. Vandenberg had been on an upward trajectory. He had gone 7 years without an OWI. He was in a sober living situation – choosing to live with Ms. Van Dreese, who had been sober since 2002. (40:45). For the last 6 years, he held a steady, skilled job, where he developed vocational skills and obtained various licenses and certifications. (18:16).

Above all, it was not reasonable to forgo presenting favorable information in favor of arguing for an illegal sentence. Despite having positive facts available to him, defense counsel admittedly did not mention one single positive attribute in his sentencing argument. (40:37, 38-39). At the postconviction hearing, defense counsel explained this was because there were some positive facts in the PSI and he had "presumed, and [he was] confident correctly, the judge was well aware of those things." (40:39). In doing so, counsel made an unreasonable decision not to "present all arguments or evidence which will assist the court in reaching a favorable disposition" and thus defense counsel failed to fulfill his role in the adversary system. ABA Standards § 4-8.3(c).

It was also unreasonable to highlight significantly negative features of Mr. Vandenberg's history. As discussed above, highlighting failures to support an illegal probation disposition was

unreasonable on many levels. Similarly, it was not a proficient strategy to describe the negative effects of an "awful type of tragedy" Mr. Vandenberg hypothetically could have caused. (34:9-10; App. 101-102). Defense counsel's explanation that he did that because "it's true" and he did not want to "sugarcoat[] the facts" is not reasonable. (40:26). Acknowledging bad facts to gain credibility is different from describing the emotional toll of horrific events that did not occur. A reasonable prudent attorney would not do this.

In this case, defense counsel failed to act as a meaningful adversary to the prosecution during Mr. Vandenberg's sentencing hearing. Instead of presenting favorable information, counsel performed more like a second prosecutor by making negative comments about Mr. Vandenberg, emphasizing his failures, and highlighting potential dangerous outcomes. As a whole, the defense argument put Mr. Vandenberg in a worse position than he would have been if he had no attorney at all. As such, defense counsel performed deficiently.

C. Prejudice should be presumed from defense counsel's deficient performance at Mr. Vandenberg's sentencing hearing.

In situations where counsel "entirely fails to subject the prosecutor's case to meaningful adversarial testing," prejudice is presumed. *Cronic,* 466 U.S. at 659. This court should hold, as other jurisdictions have, that *Cronic* applies in cases such as this one where a sentencing argument places the client in a worse position or is the equivalent to no

representation at all. *See e.g. Patrasso v. Nelson*, 121 F.3d 297, 304, (7th Cir. 1997) (applying *Cronic*'s presumptive prejudice standard where the defense attorney failed to present argument on behalf of the defendant); *Rickman v. Bell*, 131 F.3d 1159, 1156 (6th Cir. 1997) (applying *Cronic* where defense disparaged the defendant at the sentencing hearing); *Osborn v. Shillinger*, 861 F.2d 612, 629 (10th Cir. 1988) (applying *Cronic* when counsel's argument at sentencing hearing stressed the brutality of the crime, how difficult the defendant was, the overwhelming nature of evidence against him, and failed to uncover mitigating information and object to prejudicial information); *Davis g. Comm' of Corr.,* 126 A.3d 538, 561 (Conn. 2015) (applying *Cronic* where defense counsel agreed with everything the state said at sentencing).

Presumed prejudice is appropriate at sentencing because of the wide range of acceptable outcomes and the broad discretion courts have at sentencing. It is difficult, especially retrospectively, to attempt to quantify the impact of a proficient or deficient sentencing argument on the sentence imposed. Therefore, once it is determined the sentencing argument as a whole is deficient, prejudice should be presumed. To hold otherwise would mean that as long as the sentence imposed is legal, it does not matter how defense counsel advocates or if counsel advocates at all. This would render a criminal defendant's constitutional right to effective advocacy at sentencing meaningless.

Because of the inherent difficulty in reconstructing what a judge would have done had the sentencing hearing been devoid of errors, prejudice is presumed in an analogous context—a breach of the plea agreement. When defense counsel is found deficient for failing to object to a prosecutor's material and substantial beach of the plea deal during a sentencing hearing, courts presume prejudice. *See e.g. Smith,* 207 Wis. 2d at 278-82, (discussing the difficulty in retrospectively determining what the sentencing court might have done absent the error). In breach of plea cases, it is irrelevant whether the trial court was influenced by the state's alleged breach or chose to ignore the state's recommendation. *State v. Howard*, 2001 WI App. 137, ¶14, 246 Wis. 2d 475, 630 N.W.2d 244. This is because the errors during the sentencing hearing "deprive[]the defendant of a sentencing proceeding whose result is fair and reliable." *Smith,* 207 Wis. 2d at 281.

This court need not "indulge in calculation or speculation" about what might have happened had the court crafted a sentence with appropriate input from defense counsel. *Smith*, 207 Wis. 2d at 280. Rather, it should grant Mr. Vandenberg a new sentencing hearing at which he can be represented by an attorney who "properly performs his or her role and zealously represents [him]," so that the court "can impose a sentence in which we can have confidence." Griesbach, 81 Wis. Law. at 20.

D. Even if prejudice is not presumed, Mr. Vandenberg has affirmatively proven he was prejudiced by defense counsel's deficient performance.

"[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Strickland*, 466 U.S. at 696. "In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Id.*

Prejudice is not an outcome-determinative test. "A defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. Instead, "a reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Our state supreme court recently re-affirmed this distinction, after acknowledging a persistent misinterpretation of the standard in Wisconsin courts: "[w]e reiterate that the *Strickland* prejudice test is distinct from a sufficiency of the evidence test and we confirm that a defendant need not prove the outcome would 'more likely than not' be different in order to establish prejudice in ineffective assistance cases." *State v. Sholar*, 2018 WI 53, ¶44, 381 Wis. 2d 560, 912 N.W.2d 89.

The circuit court applied an outcome determinative standard. In determining there was no prejudice, the court described, at length, the factors

that justified the sentence imposed. (40:61-65, 71-73; App. 119-123, 129-131). Just as the existence of sufficient evidence does not determine whether the defendant is prejudiced by trial errors, the existence of facts supporting the sentence imposed does not mean that the defendant has not been prejudiced.

When there are numerous deficiencies, as in this case, they may viewed cumulatively in the prejudice analysis. *Thiel*, 264 Wis. 2d 571, ¶41. Arguing for an illegal sentence by highlighting negative facts combined with not offering a single piece of positive information about the defendant rendered the entire argument deficient. Indeed, defense counsel not only failed to offer a counter to the bleak portrait painted by the state, counsel embellished the negative picture.

An adversary system is by definition a contest between the prosecution and defense before a neutral judge. Courts are required to hear from both sides before pronouncing a sentence and sentencing decisions are inextricably influenced by the recommendations of the parties. Wis. Stat. § 972.14. In this case, there was the complete lack of effective advocacy and the adversary system broke down. Because the sentence was formulated without meaningful advocacy from the defense, we cannot have confidence in the sentence imposed.

The fact that the judge had read the PSI which contained certain positive information does not eliminate the prejudicial effects of counsel's errors. The PSI is a document produced and submitted by an agent of the state. It contained many, many facts

about Mr. Vandenberg's life and a significant number of them were not positive. Further, it is not an advocacy piece and did not present a narrative of an upward trajectory. If it were sufficient for the court to simply review the state's PSI and then pronounce a sentence, there would be no point to conducting a sentencing hearing at all. *See State v. Gudgeon,* 2006 WI App 143, ¶10, 295 Wis. 2d 189, 720 N.W.2d 114 ("the whole point of having counsel is to help the defendant present the facts and law to the tribunal in the light most favorable to the defendant. Such a presentation becomes worthless when the court has already made up its mind as to the outcome.")[2]

Lastly, the court's determination that prejudice was not established because no new facts were presented confuses the prejudice in an ineffective assistance of counsel claim with the analysis required for a resentencing claim based on a new factor or inaccurate information. (40:70-71). Mr. Vandenberg is claiming he was denied effective advocacy to which

[2] In the postconviction hearing, the circuit court suggested it prejudged Mr. Vandenberg: "I don't believe that Mr. Reetz, you know, whatever he would have done, would have changed my overall impression of this case." (40:71; App. 129). In other words, the court made its decision based its review of the PSI and it did not matter what the defense attorney said at the sentencing hearing. Prejudging is a structural error and this alone entitles Mr. Vandenberg to a resentencing hearing. *Gudgeon*, 295 Wis. 2d 189, ¶31. ("This structural defect offends due process at least as much as the lack of counsel; unless the tribunal listens disinterestedly to what both parties have to say, defense counsel becomes little more than courtroom décor.")

he is entitled under the constitution. Effective assistance of counsel at sentencing includes an attorney who understands and correctly interprets the law and presents favorable information and argument to the court; Mr. Vandenberg was denied this advocacy. Although it is difficult to quantify the precise impact of an effective advocate, it is reasonably possible that meaningful advocacy can and does impact the range of the sentence imposed. Therefore, because Mr. Vandenberg was denied that meaningful advocacy at sentencing, because he was placed in a worse position than he would have been with no counsel at all, there can be no confidence in the outcome and prejudice is established.

CONCLUSION

This sentence was imposed in the absence of meaningful advocacy by defense counsel. Justice requires a resentencing wherein Mr. Vandenberg has an attorney who will advocate for him, not against him and a tribunal that will consider that advocacy before pronouncing the sentence. He respectfully asks this Court to reverse the circuit court and remand for a new sentencing hearing.

Dated this 10th 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 4,599 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 10th day of December, 2018.

Signed:

FRANCES REYNOLDS COLBERT
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 10th day of December, 2018.

Signed:

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APPENDIX

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