FILED
08-03-2020
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT

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Appeal No. 2019AP90-CR
(Milwaukee County Case No. 2016CF3498)

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STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

GEORGE E. SAVAGE,

Defendant-Appellant-Respondent.

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# NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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**On Review From a Decision of the Court of Appeals, District I, Affirming the Judgment of Conviction and Order Denying Postconviction Motion, Entered In The Circuit Court For Milwaukee County, Mark S. Sanders Presiding**

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GEORGE E. SAVAGE,

Defendant-Appellant-Respondent.

# NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The Wisconsin Association of Criminal Defense Lawyers ("WACDL") submits this non-party brief concerning the establishment of prejudice in ineffective assistance of counsel claims when a defendant has entered a guilty or no contest plea. In such cases, defendants must allege and prove that there is a reasonable probability that they would not have entered their guilty or no-contest plea but for counsel's deficient performance. ***Hill v. Lockhart***, 474 U.S. 52, 58 (1985).

Consistent with ***Lee v. United States***, __ U.S. __, 137 S.Ct. 1958 (2017), WACDL requests that this Court clarify that courts deciding these ineffectiveness claims should focus on the decision-making process, instead of on whether the defendant likely would have won at trial. This Court should explain that the law does not require defendants alleging such ineffective assistance of counsel to use any particular type of

contemporaneous evidence to establish the effect of trial counsel's mistake on that defendant's decision. Instead, defendants should be free to present a wide range of evidence relevant to their reasons at the time for entering a plea to establish under the totality of the circumstances that they would not have pled guilty or no contest but for counsel's error.

## ARGUMENT[1]

### Courts Evaluating Whether Counsel's Deficient Performance Prejudiced a Defendant Who Pled Guilty Are Required to Focus Their Inquiry on the Decision-Making Process Rather than the Likelihood of Conviction

A defendant's decision whether to plead guilty or go to trial is generally the most important decision in a criminal case. ***State v. Dillard***, 2014 WI 123, ¶90, 358 Wis. 2d 543, 859 N.W.2d 44. A defendant pleading guilty waives all non-jurisdictional defects, all defenses in the case, all prior constitutional violations, and all constitutional trial rights. ***State v. Kelty*****,** 2006 WI 101, ¶¶14, 88, 294 Wis.2d 62 716 N.W.2d 886. Because the decision is crucial, a defendant should have the competent advice of counsel in making this decision. *See* ***id***.

Unsurprisingly, the United States and Wisconsin Constitutions guarantee a defendant the effective assistant of counsel in making the important decision whether to accept a plea offer. ***State v. Burton***, 2013 WI 61, ¶47, 349 Wis. 2d 1, 832 N.W.2d 611 (citing ***Strickland v. Washington***, 466 U.S. 668, 686 (1984)). Furthermore, at this key stage of the litigation, the Constitution protects the decision-making

[1] WACDL thanks Suffolk University law student Andrew Semelsberger for his assistance with this brief.

process more than the ultimate determination of guilt or innocence. *See* ***Lee***, 137 S. Ct. at 1965-66.

To demonstrate that counsel was constitutionally ineffective, the United States Supreme Court in ***Strickland*** has established a two-prong test: first, a defendant must show that counsel's performance was deficient; second, a defendant also must show that counsel's deficient performance was prejudicial to the defendant. ***Burton***, 2013 WI 61, ¶47 (citing ***Strickland***, 466 U.S. at 687).[2]

The United States Supreme Court held in ***Hill v. Lockhart***, 474 U.S. 52, 58 (1985), that this two-pronged standard applies to challenges to guilty pleas based on ineffective assistance of counsel. There, the Court first established that the proper inquiry for prejudice in plea cases was that 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." ***State v. Cooper***, 2019 WI 73, ¶29, 387 Wis. 2d 439, 929 N.W.2d 192 (quoting ***Hill***, 474 U.S. at 59).

In ***Lee,*** 137 S. Ct. at 1965-66, the Court reiterated its prescription: the inquiry focuses on the defendant's decision-making, "which may not turn solely on the likelihood of conviction after trial," rather than an inquiry focused on the results of the proceeding that never happened.

[2] The standard for determining ineffective assistance of counsel claims under the federal Constitution is identical to that under the Wisconsin Constitution. ***State v. Thiel***, 2003 WI 111, ¶18, n.7, 264 Wis. 2d 571, 665 N.W.2d 305.

### A. The Focus on the Decision-making Process in Pleas Requires Courts to Focus on Rational Reasons for Rejecting a Plea Under the Totality of the Defendant's Circumstances and Not on Whether the Defendant Likely Would Have Won at Trial

***Lee*** stands for the proposition that, in the context of ineffective assistance of counsel claims arising from the plea process, the inquiry involves a determination by the court of whether it could have been rational for the individual defendant to have rejected the plea and instead insist on going to trial, but for counsel's deficient performance, and not whether the defendant would have succeeded at trial. 137 S. Ct. at 1969; *see* ***Padilla v. Kentucky***, 559 U.S. 356, 372 (2010). Whether there is a likelihood of a better outcome from that plea is not the correct question because courts "cannot accord any 'presumption of reliability' to judicial proceedings that never took place." ***Roe v. Flores-Ortega***, 528 US. 470, 483 (2000) (citing ***Smith v. Robbins***, 528 U.S. 259, 286 (2000).

The inquiry "demands a 'case-by-case examination' of the 'totality of the evidence,'" ***Lee***, 137 S. Ct. at 1966 (quoting ***Williams v. Taylor***, 529 U. S. 362, 391 (2000)), and turns on "what an *individual* defendant would have done," not what hypothetical defendants would do in similar situations, ***id***. at 1967 (emphasis added). What one defendant considers a good reason may differ from what another defendant considers so. *See* ***Bobadilla v. State***, 117 N.E.3d 1272, 1286 (Ind. Sup. Ct. 2019). Courts therefore must decide whether the *individual* defendant's decision to have rejected the plea and insist on trial would have been rational under *his* circumstances. *See* ***Lee***, 137 S. Ct. at 1966, 1969.

The ***Lee*** Court specifically rejected the notion that counsel's errors cannot prejudice defendants with no viable

defense or a very strong case against them. ***Id***. at 1966. As the Court recognized, in some circumstances, defendants' reasons for choosing to go to trial will not rest on the likelihood of an acquittal. ***Id***. at 1966-67. Counsel erroneously advised Lee that he would not be deported if he pled guilty. ***Id***. at 1966. Yet the "determinative issue" in those plea discussions was deportation because Lee had strong connections only to the United States. ***Id***. at 1968-9.

Sometimes, as in Lee's situation, "common sense" and precedent both "recognize[] that there is more to consider than simply the likelihood of success at trial." ***Id***. at 1966. If a defendant views the consequences of pleading and the consequences of going to trial as "similarly dire" then "even the smallest chances of success at trial may look attractive. ***Id***. at 1966-67. Lee was in such a situation because accepting the plea agreement would "*certainly* lead to deportation" whereas going to trial would be "*almost* certain[]" deportation. ***Id***. at 1968 (emphasis in original). The Court therefore found counsel's deficient performance prejudiced him even though "[n]ot everyone in Lee's position would make the choice to reject the plea." ***Id***. at 1969.

### B. Defendants May Use Any Relevant Evidence of the Totality of the Circumstances to Demonstrate a Reasonable Probability that They Would Not Have Pled But For Counsel's Mistake

Defendants who assert that the deficient performance of their attorneys during the plea process prejudiced them must state that they would not have pled guilty but for counsel's error. *See* ***Dillard***, 2014 WI 123, ¶¶99-100. But merely asserting in a motion to withdraw the plea that they would not have pled guilty but for the mistake is not sufficient. ***Id***. Even before the ***Lee*** decision, *see* 137 S. Ct. at 1967,

this Court was suspicious of mere "*post hoc* assertions from a defendant about how he would have pleaded." *See* ***Dillard***, 2014 WI 123, ¶¶99-100. A defendant therefore should present some evidence contemporaneous to the plea that supports the but-for claim. *See* ***id***.; *see also* ***Lee***, 137 S. Ct. at 1967.

In all circumstances, a defendant should "detail[] why his plea…was a direct consequence of" the trial attorney's mistake. *See* ***Dillard,*** 2014 WI 123, ¶100. Defendants should explain their reasoning when they pled and how the mistake impacted that reasoning. *See* ***id***. ¶101. The potential consequences of a particular plea and of a trial reasonably affect the decision whether to plead guilty or go to trial. *See* ***INS v. St. Cyr***, 533 U.S. 289, 322-323 (2001).

For example, a 60-year-old defendant should explain that her goal was to be out of prison someday and that her attorney's mistaken statement that she could be out of prison at 10 years of a 40-year initial confinement sentence[3] instead of serving the entire time would cause her to enter a plea she would not otherwise take. In such a circumstance, it would not be "irrational" for her to hope "something unexpected and unpredictable might occur" at trial. *See* ***Lee***, 137 S. Ct. at 1966 (speaking of a situation in which deportation would occur after either a plea or a conviction by trial). The very rationality of it supports her claim that she would not have pled but for the attorney's mistake.

Beyond those details, the additional evidence available will vary because the facts and circumstances of each case and each plea differ. Different cases involve different crimes and different plea offers. Some pleas occur well in advance of trial, while others occur on the day of trial. Some pleas involve a

[3] This mistake would result from confusing old law sentencing with Truth-in-Sentencing.

reduction in the seriousness or number of charges, while others involve sentencing recommendations from a prosecutor. Even among pleas involving sentencing recommendations, some will involve a recommendation for a specific term of years, while others will involve a more generalized recommendation, such as a recommendation for "substantial time."

Because the type of evidence available varies, no formula exists as to what particular evidence is required. Instead, the matter is one of evidence allowing the court to consider the totality of the circumstances. ***Lee***, 137 S. Ct. at 1966; ***Dillard***, 2014 WI 123, ¶51. Nonetheless, some common types of evidence are likely to be available in many situations.

Evidence of contemporaneous discussions between defendants and trial counsel at the time of the plea can support defense assertions about the reasons for the entry of the plea. *See* ***People v. Boyd***, 103 N.E.2d 486, ¶26 (Il. App. Ct. 2018) (defendant established prejudice from counsel's mistake as to good time credit where testimony of trial counsel and defendant established that good time was important to the decision to plead). It could be testimony from either trial counsel, the defendant, or both, *see* ***Dillard***, 2014 WI 123, ¶91, especially as the testimony of trial counsel generally is required at an evidentiary hearing on an ineffectiveness claim, *see* ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979). For example, in ***Dillard***, 2014 WI 123, ¶47-49, ¶91, both trial counsel and Dillard testified that Dillard expressed a great concern about a "persistent repeater enhancer," supporting the defendant's assertion that trial counsel's mistake concerning the applicability of the enhancer mattered to the plea decision. Similarly, in ***Lee***, 137 S. Ct. at 1967-68, both Lee and counsel testified that Lee would not have pled but for counsel's mistake as to deporta-

tion as Lee's questions to his attorney whether he risked deportation reflected.

The testimony from others with whom the defendant discussed his decision also can establish the defendant's thinking at the time of the plea. Sometimes a defendant will consult family members or close friends about the decision. If a defendant has done so, that family member or friend should be able to provide testimony about the defendant's thinking at the time of the plea.

Various documents or recordings may provide evidence of the defendant's thinking around the time of the plea. Defendants may have written letters to trial counsel, family, or friends about the decision, especially if they are communicating from custody. These letters may reflect the defendant's thinking, even if they are *to* the defendant. Jail recordings of telephone calls to family and friends, when available, also might provide evidence of a defendant's thinking.

Similarly, letters from counsel to the defendant, especially those in answer to questions from defendants, can demonstrate the defendant's reasons for taking a plea. In ***Dillard***, 2014 WI 123, ¶48, for example, a letter from trial counsel to Dillard reflected her understanding that the repeater enhancer was crucial to her client. In addition, counsel may have notes of meetings or telephone calls that can reflect the reasons for a defendant's decision to enter a plea.

Moreover, in some cases, what a defendant or a judge said at the plea colloquy may provide evidence of the importance of the attorney's mistake to the defendant. For example, at the plea colloquy in ***Lee***, 137 S. Ct. at 1968, the judge asked Lee how the consequence of a conviction which could result in

deportation affects his decision about whether to accept the guilty plea. Lee then responded, "I don't understand" and turned to his attorney for advice, indicating his contemporaneous interest in the effect of the plea on deportation.

Sometimes the circumstances surrounding the plea themselves will evidence the defendant's claim that he would not have pled but for trial counsel's mistake. If a defendant has resisted entering a guilty plea but agrees to do so immediately after receiving incorrect information, the timing allows the inference that the incorrect information was a key factor in his decision. If the state has made other, rejected plea offers, those offers may provide a window into the defendant's thinking also. In ***Parsons v. State***, 574 S.W.3d 810, 818 (Mo. Ct. App. 2019), for example, the court used plea offers previously made to the defendant and his rejection of them demonstrated what the defendant was thinking at the time of his plea decision.

The possibilities are many and this Court should allow defendants to use any other relevant proof to establish prejudice. This Court therefore should not suggest that this Court requires a defendant to use any particular way of establishing the effect of an attorney's mistake on that defendant.

## CONCLUSION

In determining whether an attorney's deficient performance has prejudiced a defendant who entered a guilty plea, this Court should clarify that courts should focus on the decision-making process, rather than concentrating on whether the defendant likely would have won at trial. This Court should not require a defendant alleging such ineffective

assistance of counsel to use any particular way of establishing the effect of an attorney's mistake on that defendant. Instead, a defendant at an evidentiary hearing on this issue should be free to present a wide range of evidence relevant to the defendant's reasons at the time for entering a plea and any evidence that demonstrates a likely probability that the defendant would not have entered that plea but for the attorney's deficient performance.

Dated at Milwaukee, Wisconsin, July 29, 2020.

Respectfully submitted,

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## WIS. STAT. (RULE) 809.19(8)(d) CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. (Rules) 809.19(8)(b) and (c) for a nonparty brief produced with a proportional serif font. The length of this brief is 2,448 words.

_____
Ellen Henak

## WIS. STAT. (RULE) 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this petition is identical to the text of the paper copy of the brief.

_____
Ellen Henak

## CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 29th day of July, 2020, I caused 22 copies of the Nonparty Brief of Wisconsin Association of Criminal Defense Lawyers to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688.

_____
Ellen Henak

Savage Amicus Brief.wpd