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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP266-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL JAMES BREHM,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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MICHAEL JAMES BREHM,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

Brehm, Petitioner, hereby petitions the Supreme Court of the State of Wisconsin, pursuant to Wis. Stats. §§ 808.10 and 809.62, to review the Court of Appeals Decision, dated June 29, 2021, in State of Wisconsin v. Michael James Brehm, Case No. 2020AP266-CR, based on the grounds contained within this Petition and Appendix in Support of the Petition for Review submitted herewith.

TABLE OF AUTHORITIES

CASES CITED

Wisconsin Cases:

STATUTES CITED

STATEMENT OF ISSUES

I. Did the court of appeals err in holding that the three-year initial confinement was mandatory, not optional?

Trial Court answered:	"No."
Appellant argued:	"Yes."
Respondent argued:	"No."
Court of Appeals ordered:	"No."
Appellant-Petitioner argues:	"Yes."
Respondent would argue:	"No."

II. Did the court of appeals err in holding that the rule of lenity does not apply to Wis. Stat. § 941.29(4m)(a)?

Trial Court answered:	"No."
Appellant argued:	"Yes."
Respondent argued:	"No."
Court of Appeals ordered:	"No."
Appellant-Petitioner argues:	"Yes."
Respondent would argue:	"No."

III. Did the court of appeals err in holding that Wis. Stat. § 941.(4m)(a) is not unconstitutionally overbroad?

Trial Court answered:	"No."
Appellant argued:	"Yes."

Respondent argued: "No."

Court of Appeals ordered: "No."

Appellant-Petitioner argues: "Yes."

Respondent would argue: "No."

IV. Did the court of appeals err in holding that Brehm was not sentenced based on improper or inaccurate information?

Trial Court answered: "No."

Appellant argued: "Yes."

Respondent argued: "No."

Court of Appeals ordered: "No."

Appellant-Petitioner argues: "Yes."

Respondent would argue: "No."

V. Did the court of appeals err in holding that trial counsel was not ineffective when failing to request a presentence investigation report (PSI)?

Trial Court answered: "No."

Appellant argued: "Yes."

Respondent argued: "No."

Court of Appeals ordered: "No."

Appellant-Petitioner argues: "Yes."

Respondent would argue: "No."

VI. Did the court of appeals err in holding that trial counsel was not ineffective when failing to offer evidence of Brehm's alleged non-possession of the firearm?

Trial Court answered:	"No."
Appellant argued:	"Yes."
Respondent argued:	"No."
Court of Appeals ordered:	"No."
Appellant-Petitioner argues:	"Yes."
Respondent would argue:	"No."

VII. Did the court of appeals err in holding that trial counsel was not ineffective when failing to advise Brehm not to make statements to his detriment?

Trial Court answered:	"No."
Appellant argued:	"Yes."
Respondent argued:	"No."
Court of Appeals ordered:	"No."
Appellant-Petitioner argues:	"Yes."
Respondent would argue:	"No."

CONCISE STATEMENT OF CRITERIA FOR REVIEW SET FORTH IN WIS. STAT. § 809.62(1r)

This case raises questions related to sentence modification, plea withdrawal, and ineffective assistance of counsel which impact a significant portion of defendants statewide and their appellate proceedings.

A decision by the Supreme Court will help develop, clarify or harmonize the law, and the question presented is a novel one, the resolution of which will have statewide impact. Wis. Stat. § 809.62(1r)(c)(2).

STATEMENT OF THE CASE

This petition stems from the following:

- Court of Appeals Decision, dated June 29, 2021;
- Decision and Order Denying Motion for Postconviction Relief, filed February 4, 2020;
- Judgment of Conviction, dated July 26, 2019; and
- Written Explanation of Determinate Sentence, filed July 25, 2019.

Brehm now files this Petition to the Supreme Court of the State of Wisconsin.

For purposes of this petition, Defendant-Appellant-Petitioner, Michael James Brehm, will hereinafter be referred to as "Brehm" and the State of Wisconsin will hereinafter be referred to as "State."

ARGUMENT

I. The court of appeals erred in holding that the three-year initial confinement was mandatory, not optional.

The court of appeals erred in holding that the three-year initial confinement was mandatory, not optional. Brehm argued that the circuit court could have imposed and stayed a bifurcated sentence with three years of initial confinement and placed Brehm on probation because Wis. Stat. § 941.29(4m)(a) is silent as to whether the mandatory minimum could be stayed. The court of appeals rejected Brehm's argument and reasoned that the plain language of Wis. Stat. §941.29(4m)(a) imposing a bifurcated sentence with a three-year period of initial confinement was mandatory, not optional.

The court of appeals is incorrect because the plain language of Wis. Stat. § 941.29(4m)(a) does not state the three-year minimum cannot be stayed. It simply states that a sentencing court "shall impose a bifurcated sentence" and the confinement portion "shall not be less than [three] years[.]" Wis. Stat. § 941.29(4m)(a). Nowhere in the statute does it state that the court is not permitted to stay the three years of initial confinement.

Pursuant to Wis. Stat. § 973.09(1)(a) the legislature has granted the circuit court the authority to impose probation. *State v. Dowdy*, 2012 WI 12 at ¶28. "If a person is convicted of a crime, a court may, by order, impose and

stay a sentence and "place the person on probation to the [DOC] for a stated period, stating in the order the reasons therefor." *Id*. The court may impose any conditions which appear to be reasonable and appropriate. *Id*.

Therefore, the trial court and court of appeals erred when it incorrectly asserted that the three-year sentence could not be stayed.

II. The court of appeals erred in holding that the rule of lenity does not apply to Wis. Stat. § 941.29(4m)(a).

The court of appeals erred in holding that the rule of lenity does not apply to Wis. Stat. § 941.29(4m)(a). When there is doubt as to the application of a statute, a court should apply the rule of lenity and interpret the statute in favor of the accused. *State v. Morris*, 108 Wis.2d 282, 289 (1977).

The court of appeals reasoned that it did not believe Wis. Stat. § 941.29(4m)(a) is ambiguous, thus, the rule of lenity does not apply.

The court of appeals is incorrect because the statute is ambiguous. The statute is ambiguous because it does not state that the trial court is prohibited from staying the sentence, but the court of appeals held that the statute forbids the trial court from staying the sentence.

Further, the Supreme Court should take this case to harmonize Wis. Stat. § 941.29(4m)(a) and Wis. Stat. § 973.09(1)(a). Pursuant to the court of appeals, the trial

court cannot stay the sentence. However, pursuant to Wis. Stat. § 973.09(1)(a), the trial court is permitted to stay the sentence.

III. The court of appeals erred in holding that Wis. Stat. § 941.(4m)(a) is not unconstitutionally overbroad.

The court of appeals erred in holding that Wis. Stat. § 941.(4m)(a) is not unconstitutionally overbroad. The court of appeals concluded that Brehm has failed to meet his burden to show that Wis. Stat. § 941.29(4m)(a) is unconstitutionally overbroad.

The court of appeals is incorrect because the language of the statute is so sweeping that it applies to constitutionally protected conduct which the state is not permitted to regulate.

In *Thomas*, the defendant was charged with possession of a gun by a felon in violation of Wis. Stat. § 941.29. *State v. Thomas*, 2004 WI App 15 at ¶ 1. The defendant challenged Wis. Stat. § 941.29 as unconstitutional after he had pulled out an illegally concealed gun on a police officer. *Id*. at ¶1, ¶3. The court in *Thomas* ruled that Wis. Stat. § 941.29 was constitutional. *Id*. at ¶39. The court reasoned that the statute was not unconstitutionally over broad because "The restriction on a convicted felon's ability to possess firearms comes about incident to firearm regulation out of concerns of public safety. *Id*. at ¶23. Thus, the reason was based public safety.

Like in *Thomas*, Brehm has been charged with possession of a firearm by a felon in violation of Wis. Stat. § 941.29. [R. 1:1]. However, upon information and belief, the gun did not belong to Brehm. Unlike *Thomas*, Brehm did not pull the gun out with intention to harm anyone, Brehm did not illegally conceal the firearm, and Brehm was not in public with any gun. [R. 1:1]. Brehm grabbed his roommate's gun in the safety of his own home. [R. 1:1]. The Court's reasoning of public safety is less applicable for Brehm as it was in *Thomas*. Wis. Stat. § 941.29 is unconstitutionally over broad to include a mandatory minimum for Brehm's actions. Because Wis. Stat. § 941.29 is unconstitutionally over broad, Brehm is entitled to a sentence modification or re-sentencing hearing.

IV. The court of appeals erred in holding that Brehm was not sentenced based on improper or inaccurate information.

The court of appeals erred in holding that Brehm was not sentenced based on improper or inaccurate information. The court of appeals reasoned that they rejected Brehm's argument that the circuit court had the authority to impose and stay the mandatory minimum.

In this case, inaccurate information is provided to the court that the court did not have the authority to impose and stay a sentence under Wis. Stat. § 941.29. [R. 46: 12-13]. Because the court actually did have the authority to impose and stay Brehm's sentence, the accepted fact that

the court could not impose and stay the sentence was inaccurate information. The inaccurate information that the court could not impose and stay Brehm's sentence was an improper factor relied upon by the court at sentencing.

V. The court of appeals erred in holding that trial counsel was not ineffective when failing to request a presentence investigation report (PSI).

The court of appeals erred in holding that trial counsel was not ineffective when failing to request a presentence investigation report (PSI). The court of appeals reasoned that Brehm did not specify what a PSI would have stated and why it would have provided a basis for him to withdraw his plea.

Trial counsel was ineffective because he did not request a Presentence Investigation Report (PSI). Trial counsel's performance was deficient because a reasonable attorney would order a PSI for a felony case where the defendant is facing substantial prison time. Trial counsel was prejudicial because but for the trial counsel's failure to order a PSI, the defendant could have received a more favorable sentence.

Not requesting a PSI for a felony conviction of a defendant who is facing substantial prison time is outside the range of professional competent assistance. A PSI is free to public defender clients and trial counsel had nothing to lose by requesting it.

Trial counsel was prejudicial because but for the trial counsel's inaction to order a PSI, the defendant could have received a more favorable sentence that reflected his mental health and other mitigating factors highlighted in the PSI.

VI. The court of appeals erred in holding that trial counsel was not ineffective when failing to offer evidence of Brehm's alleged non-possession of the firearm.

The court of appeals erred in holding that trial counsel was not ineffective when failing to offer evidence of Brehm's alleged non-possession of the firearm. The court of appeals reasoned that Brehm did not explain why his lack of ownership is relevant to whether he possessed a firearm in violation of Wis. Stat. § 941.29.

Trial counsel failed to enter evidence of non-possession. Upon all information and belief, Brehm is not the owner of the gun that fired, and trial counsel was aware of that. Brehm has admitted to shooting a gun into the air in an interview. Brehm stated that he did not fully remember everything that happened that day because he was drinking. [R. 46: 21]. Despite this information that Brehm may not have possessed a firearm, trial counsel failed to provide any evidence to the court showing non-possession. Because trial counsel failed to enter evidence of non-possession, trial counsel was ineffective. Brehm is

entitled to an evidentiary hearing for plea withdrawal because of ineffective assistance of counsel.

VII. The court of appeals erred in holding that trial counsel was not ineffective when failing to advise Brehm not to make statements to his detriment.

The court of appeals erred in holding that trial counsel was not ineffective when failing to advise Brehm not to make statements to his detriment. Trial counsel failed to advise Brehm to not make statements to his detriment. Brehm did admit immediately to all actions he was accused of. [R. 1:1]. However, Brehm stated at sentencing that he did not fully remember everything that happened the day of the incident because he was drinking. [R. 46: 21]. Brehm then made statements to his detriment afterwards including at sentencing. [R. 46: 21]. Trial counsel should have advised him against every statement after the initial interview. Because trial counsel failed to advise Brehm of his rights and to not make a statement to his detriment, trial counsel was ineffective. Because trial counsel was ineffective, Brehm is entitled to an evidentiary hearing for plea withdrawal.

CONCLUSION

WHEREFORE, for the reasons stated above, the Supreme Court should grant this petition because the Court of Appeals and Trial Court erred in denying Brehm sentence modification and a plea withdrawal.

Dated this 26th day of July, 2021.

Respectfully submitted,

Electronically signed
TIMOTHY T. KAY

_____

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CERTIFICATION OF FORM AND LENGTH OF PETITION

I certify that this petition conforms to the rules contained in Rule 809.19(8)(b) and (c) for a petition produced with a proportional serif font. The length of the petition is 1,581 words.

Dated this 26th day of July, 2021.

Respectfully submitted,

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CERTIFICATION OF ELECTRONIC FILING OF PETITION

I hereby certify that:

I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 26th day of July, 2021.

Respectfully submitted,

Electronically signed
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Attorney for Defendant

CERTIFICATION OF APPENDIX

I hereby certify that filed with this petition, either as a separate document or as a part of this petition, is an appendix that complies with § 809.62(2)(f) and that contains, at a minimum: (1) the decision of the court of appeals, (2) relevant judgments, orders, findings of fact, conclusions of law and memorandum decisions of the circuit court, and (3) any other portions of the records which are needed to understand this petition.

I further certify that if this petition 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 first names and last initials 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 26th day of July, 2021.

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CERTIFICATION OF ELECTRONIC FILING OF APPENDIX

I hereby certify that I submitted and electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13).

I further certify that this electronic appendix is identical in content and format to the printed form of the appendix field as of this date.

Dated this 26th day of July, 2021.

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CERTIFICATION OF MAILING OF PETITION

I certify this petition was deposited in the U.S. mail for delivery to the Clerk of the Supreme Court by first-class mail, or other class of mail that is at least as expeditious, on July 26, 2021. I further certify that the petition was correctly addressed and postage was pre-paid.

Respectfully submitted,

Electronically signed
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