STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP404-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SKYLARD R. GRANT,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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PETITION FOR REVIEW

Grant, 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 July 20, 2021, in State of Wisconsin v. Skylard R. Grant, Case No. 2020AP404-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:

Wisconsin Statutes:

STATEMENT OF ISSUES

I. Should the Supreme Court accept this petition to harmonize case law between *State v. Villegas*, 2018 WI App. 9 and *State v. Bentley*, 201 Wis. 2d 303 by affirming the court of appeals that the Plea Waiver Rule set forth in *Villegas* does not apply for ineffective assistance claims brought under *Bentley*?

Court of Appeals ordered: Issue raised in COA decision

Appellant-Petitioner argues: "Yes."

Respondent would argue: "No."

II. Did the court of appeals err in holding that Grant did not allege facts sufficient to support his claim and failed to demonstrate that he was prejudiced by any potential error of counsel relating to filing a *Denny* motion?

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 Grant has not demonstrated how his alibi evidence is material to the issue of whether he shot the victim?

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 denying Grant's other claims of ineffective assistance of counsel, such as failing to provide a witness list, failing to give opening statements, and failing to adequately review case material?

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 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 July 20, 2021;
- Decision and Order Denying Motion for Postconviction Relief, dated February 18, 2020; and
- Judgment of Conviction, dated April 26, 2019.

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

For purposes of this petition, Defendant-Appellant-Petitioner, Skylard R. Grant, will hereinafter be referred to as "Grant" and the State of Wisconsin will hereinafter be referred to as "State."

ARGUMENT

I. The Supreme Court should accept this petition to explicitly harmonize case law between *State v. Villegas*, 2018 WI App. 9 and *State v. Bentley*, 201 Wis. 2d 303 by affirming the court of appeals that the Plea Waiver Rule set forth in *Villegas* does not apply for ineffective assistance claims brought under *Bentley*.

The Supreme Court should accept this petition to harmonize case law between *State v. Villegas*, 2018 WI App. 9, 380 Wis. 2d 246, 908 N.W. 2d 198 and *State v. Bentley*, 201 Wis. 2d 303, 548 N.W. 2d 50 (1996) by affirming the court of appeals that the Plea Waiver Rule set forth in *Villegas* does not apply for ineffective assistance claims brought under *Bentley*. The court of appeals was correct when it rejected the State's assertion that in the context of a request for plea withdrawal, ineffective assistance claims are limited to allegations related strictly to counsel's performance during the plea procedure.

The State incorrectly asserted that *Villegas* prohibited Grant from raising claims based on trial counsel's ineffective assistance of counsel under the Guilty Plea Waiver Rule. The Guilty Plea Waiver Rule refers to the "black letter law" that "[a] valid guilty or no contest plea waives all non[-]jurisdictional defenses to a conviction, including constitutional violations." *Villegas,* 2018 WI App. 9, ¶ 45. However, there is an exception to the rule. A claim for ineffective assistance of counsel has been viewed as an exception the Guilty Plea Waiver Rule. *State v. Milanes,* 2006 WI App. 259, ¶ 13, 297 Wis. 2d, 684,727 N.W. 2d 94.

In this case, the court of appeals rejected the State's narrow interpretation of the exception. COA Decision at 6-7. The court of appeals reasoned that "the State's argument overstates the limitations of the ineffective assistance exception as set forth in *Villegas*." COA Decision at 7 (bold removed).

In *Vilegas*, the court recognized that a "valid guilty plea 'represents a break in the chain of events which has preceded it in the criminal process,'" and that "[a]fter admitting guilt in open court, a defendant 'may not thereafter raise independent claims relating to the deprivation of constitutional rights' outside of an attack on the plea itself." *Id*., 47 (citation omitted). However, the *Villegas* court distinguished the ineffective assistance claim relating to the waiver hearing because it was not raised as a plea withdrawal claim under *State v. Bentley*, 201 Wis. 2d 303. COA Decision at 7.

In summary, the court held that the Guilty Plea Waiver Rule applies to an ineffective assistance claims when it is <u>not</u> brought under *Bentley*. Inversely, the Guilty Plea Waiver Rule does not apply to an ineffective assistance claim when it is brought under *Bentley*.

This issue appears in the vast majority of criminal appeals. Ineffective assistance claims related to plea withdraws are commonly asserted by defendants statewide. Defendants and the State would benefit from the Supreme Court explicitly harmonizing case law between *Villegas* and *Bentley* by affirming the court of appeals that the Plea Waiver Rule set forth in *Villegas* does not apply for ineffective assistance claims brought under *Bentley*.

II. The court of appeals erred in holding that Grant did not allege facts sufficient to support his claim and failed to demonstrate that he was prejudiced by any potential error of counsel relating to filing a *Denny* motion.

The court of appeals erred in holding that Grant did not allege facts sufficient to support his claim and failed to demonstrate that he was prejudiced by any potential error of counsel relating to filing a *Denny*[1] motion. Grant did allege facts sufficient to support his claim and that he was prejudiced by trial counsel's errors.

The court of appeals reasoned that the evidence against the alleged killer, J.R., set forth by Grant was Grant's own version of the events. Accordingly, the court of appeals stated that Grant would have had to testify himself. However, the court of appeals is incorrect. Grant would not have been required to testify because the evidence could have been presented by other sources. For example, the police found the twig (matching the crime scene) at J.R.'s house. The police would have been able to testify regarding the twig. The twig was found at J.R.'s house—not Grants. Further, other individuals would have been able to testify that the victim owed J.R. money for drug debts. In addition, other individuals would have been able to testify regarding who was at J.R.'s house the night of the shooting. Therefore, Grant would not have been required to testify himself because the evidence in his favor

[1] *State v. Denny*, 120 Wis. 2d 614, 624, 357 N.W.2d 12 (Ct. App. 1984).

could have been introduced through other testimony. Therefore, Grant did allege facts sufficient to support his claim

Further, Grant was prejudiced by trial counsel. It was prejudicial for trial counsel to not file the *Denny* motion because there was a reasonable probability that the result of the proceedings would have been different "but for" counsel's deficient performance. But for trial counsel's not filing the *Denny* motion, Grant's strongest argument—that J.R. shot the victim—was not even heard by the court. The ineffective assistance of counsel of trial counsel was a manifest injustice and prejudiced Grant as he was charged with murdering his best friend despite stating that J.R. was the shooter.

III. The court of appeals erred in holding that Grant has not demonstrated how his alibi evidence is material to the issue of whether he shot the victim.

The court of appeals erred in holding that Grant has not demonstrated how his alibi evidence is material to the issue of whether he shot the victim. The court of appeals reasoned that Grant does not provide information as to how his girlfriend's testimony regarding his alibi would be reconciled with her statements to the police regarding Grant being gone for over an hour on the night of the shooting.

Grant made it clear in his letters to both Attorneys Schwantes and Roth that he has an alibi. Grant's alibi was that after he left the Victim at J.R.'s house he dropped off his girlfriend at home, tried to find a parking spot but couldn't find one, then drove to the gas station and saw J.R., then drove to J.R.'s house, then tried to find the Victim but could not find him, and then drove home to open Christmas gifts. (R. 36:29-31).

IV. The court of appeals erred in denying Grant's other claims of ineffective assistance, such as failing to provide a witness list, failing to give opening statements, and failing to adequately review case material.

The court of appeals erred in denying Grant's other claims of ineffective assistance, such as failing to provide a witness list, failing to give opening statements, and failing to adequately review case material.

The court of appeals denied Grants claim for ineffective assistance of counsel when trial counsel failed to file a witness list. However, the court of appeals does not give any reasoning. It simply denied the claim.

Attorney Roth's failure to provide a witness before trial was both deficient and prejudicial. It was deficient representation for Attorney Roth to not provide a witness list before trial. Upon demand, the defendant or his or her attorney shall disclose a list of all witnesses before trial. Wis. Stat. § 971.23(2m)(a). The State provided Attorney

Roth with a long and thorough list of witnesses. However, Attorney Roth failed to provide a witness list or name a single witness for trial. Because Attorney Roth did not name any witnesses, the defense could not have called any witnesses of their own at trial.

It was prejudicial for Attorney Roth to not provide a witness list because there was a reasonable probability that the result of the proceedings would have been different "but for" counsel's deficient performance. But for Attorney Roth not providing a witness list, Grant would have been able to call several witnesses that may have supported his case. The ineffective assistance of counsel of Attorney Roth was a manifest injustice and prejudiced Grant as he could not call witnesses to defend himself at trial.

Further, the court of appeals denied Grant's claim for ineffective assistance of counsel when trial counsel failed to give opening statement. The court of appeals reasoned that it was trial counsel's decision to defer her opening statement.

Attorney Roth provided ineffective assistance when she failed to give an opening statement, file any pre-trial motions, or make any objections during trial. Attorney Roth's failure to perform before or during trial was both deficient and prejudicial. However, it was deficient representation for Attorney Roth to not give an opening statement. Attorney Roth did not give an opening statement, and reserved the right to make one later. (R. 72-

69). A failure of trial counsel to provide an opening statement is unusual and can be deficient performance of counsel unless there are specific circumstances.

Attorney Roth did not give an opening statement; however, Grant communicated with her and provided written statements to her. Grant wrote several letters to counsel to ensure that there was plenty of material for an opening statement. (R: 36:6-47). Attorney Roth should have given an opening statement. Otherwise, the inference of the jurors is that that defense has no counter argument to the accusations made in the State's opening argument.

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 Grant a plea withdrawal.

Dated this 12th day of August, 2021.

Respectfully submitted,

Electronically signed by
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 1,575 words.

Dated this 12th day of August, 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 12th day of August, 2021.

Respectfully submitted,

Electronically signed by
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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 12th day of August, 2021.

Respectfully submitted,
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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 12th day of August, 2021.

Respectfully submitted,

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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 12th day of August, 2021. I further certify that the petition was correctly addressed and postage was pre-paid.

Respectfully submitted,

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