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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP1699-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NAKYTA V.T. CHENTIS,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUES PRESENTED

1. Whether there was a factual basis for the defendant's plea where caselaw holds the evidence would have been insufficient to sustain a conviction had there been a trial.

The circuit court and court of appeals ruled that there was a factual basis for the plea.

2. Whether trial counsel was ineffective for failing to seek dismissal of the charge for which there was insufficient evidence for a conviction.

Neither the circuit court nor the court of appeals reached this issue because each court concluded there was a factual basis for the defendant's plea.

CRITERIA FOR REVIEW

This court should grant review because the court of appeals' opinion—which is recommended for publication—conflicts with this court's earlier decision in *Kabat v. State*, 76 Wis. 2d 224, 251 N.W.2d 38 (1977). *Kabat* held that possessing drug paraphernalia was insufficient to infer that a defendant *knowingly* possessed trace amounts of a controlled substance that remained on the paraphernalia. *Id.* at 227. But here, the court of appeals focuses on Mr. Chentis' possession of drug paraphernalia as proof that he knew he possessed a controlled substance where the crime lab—only by use of a special rinsing solution—was

able to extract an immeasurable quantity of the substance from a tin cup in Mr. Chentis' car.

The court of appeals' decision suggests that knowledge of possession of a trace amount of a drug can be inferred from possession of drug paraphernalia. But trace amounts of controlled substances could probably be detected on most drug paraphernalia, and this holding directly conflicts with *Kabat*, where the defendant possessed trace amounts of a controlled substance in a pipe, but the court found the evidence insufficient to support knowing possession. This court should grant review to address the conflict in published caselaw.

STATEMENT OF FACTS

Nakyta V.T. Chentis was charged with possessing a narcotic and possessing drug paraphernalia after police searched his car during a traffic stop and found a white powder in a bag, needles, a pipe, and a metal "cooking cap." (1:2.) A field test of the powder was positive for oxycodone. (1:2.)

At a pretrial hearing on December 4, 2018, Chentis' counsel asked to schedule the case for trial, explaining "I don't believe the substance has been tested by the State lab, at least I don't have any results and I don't think that the State would do that unless it gets scheduled for trial. I am requesting the substance be tested and we are taking the position that it wasn't what the State states it is." (63:2.) The prosecutor agreed that "setting it for trial could probably assist in getting this moved along." (63:3.)

The case was scheduled for trial three months later in March 2019.

The crime lab had actually already tested the white powder eight months earlier, and concluded it was not a controlled substance. (33:13; App. 13.) The record does not reflect why the prosecutor did not mention this in court, or why the exculpatory result was not disclosed to the defense.

When submitting the white powder to the crime lab, the Brookfield Police Department also submitted a metal cup for testing.[1] (33:11; App. 51.) The crime lab was not able to collect a sample from the cup, so it used a "menthol rinse" to determine whether it could extract a residue of a controlled substance from the cup. (33:13; App. 53.) The menthol rinse tested positive for heroin and cocaine, but there was not a measurable quantity of either substance. (33:13; App. 53.)

At the final pretrial hearing, Mr. Chentis agreed to plead no contest to Count 1, possessing a narcotic, in exchange for the dismissal of Count 2, possessing drug paraphernalia. (64:2-3; App. 20-21.) The prosecutor also agreed to recommend probation. (64:2-3; App. 20-21.)

Neither party told the court about the crime lab result until the court sought to determine whether there was a factual basis for Mr. Chentis' plea.

[1] The metal "cooking cap" described in the complaint is interchangeably referred to as both a cup and a cap (and the court of appeals chose to use the term "tin cooker"). This brief uses cup to describe the object.

The Court: Listen carefully, Mr. Chentis. Given the fact that you've plead [sic] no contest, are there still sufficient facts alleged in the information and complaint upon which this Court could conclude that you were, in fact, guilty of possessing oxycodone on Thursday, July 20, 2017?

Trial counsel: Your Honor, the reason for the—the substance that they tested is not what he ultimately would have been convicted on if the case went to trial. There's been some lab testing of some of the paraphernalia that found trace amounts of heroin, and that's the basis. So I just want to put that on the record, that that's the basis for his no contest plea today.

The Court: It was a controlled substance, just not that one?

Trial counsel: Correct. I understand the State could have filed an amended information or done any number of things, but the fact—if the case were to proceed to trial, given what we know through discovery and through the complaint, there is sufficient evidence that Mr. Chentis understands that he could have been found guilty at trial.

The Court: Of possession of a controlled substance?

> Trial counsel: Correct.
>
> The Court: Is that your understanding as well, Mr. Chentis.
>
> Mr. Chentis: Yes.

(64:11-12; App. 29-30.) The court then accepted Mr. Chentis' plea. (64:12; App. 30.)

During his sentencing argument, trial counsel reiterated that Mr. Chentis' plea was based on the residue in the cup: "what was tested in this case and tested positive for the presence of heroin was a teacup—the metal tin that a teacup sits in, which was in Mr. Chentis' glove box that he wasn't even aware was in." (64:15; App. 33.)

The court sentenced Mr. Chentis to five months in jail, but stayed that sentence for two years of probation. (64:19; App. 37.)

Mr. Chentis filed a postconviction motion for plea withdrawal arguing: (1) the immeasurable residue would have been insufficient to sustain a conviction at trial, so it could not supply a factual basis for his plea, and (2) his counsel was ineffective for advising him to plead no contest to a charge for which he could not be convicted at trial. (33.) Mr. Chentis' motion relied on the Wisconsin Supreme Court's decision in *Kabat v. State*, 76 Wis. 2d 224, 251 N.W.2d 38 (1977), which held that a defendant cannot *knowingly* possess a controlled substance when the substance is present only in an immeasurably small quantity that can only be detected "by the skill of the forensic chemist in isolating a trace of the prohibited

narcotic in articles possessed by the defendant." *Id.* at 228.

The circuit court and court of appeals denied relief, finding that there was a factual basis for Mr. Chentis' plea based on the other circumstantial evidence of drug possession. (65:44-45; App. 13-14); *State v. Chentis*, No. 2020AP1699-CR, ¶13, unpublished (WI App Dec. 1, 2021); (App. 7-8).

ARGUMENT

I. This court should grant review because the court of appeals' decision conflicts with *Kabat*.

This court should grant review because the court of appeals' decision conflicts with this court's decision in *Kabat v. State*, 76 Wis. 2d 224, 251 N.W.2d 38 (1977). *Kabat* held that possession of drug paraphernalia was insufficient to support the knowing possession of a trace amount of a controlled substance on the paraphernalia. The court of appeals' decision in this (expected-to-be-published) case conflicts with *Kabat* by holding that the defendant's possession of drug paraphernalia meant that he knowingly possessed trace amounts of a controlled substance.

This court has decided two primary cases involving the possession of trace amounts of a controlled substance. *Kabat v. State*, 76 Wis. 2d 224, 251 N.W.2d 38 (1977); *State v. Poellinger*, 153 Wis. 2d 493, 451 N.W.2d 752 (1990). Those cases establish that "no minimum quantity of a controlled substance is

necessary to sustain a conviction for possession," but "the presence of the narcotic must be reflected in such form as reasonably imputes knowledge to the defendant." *Kabat*, 76 Wis. 2d at 227-28; *Poellinger*, 153 Wis. 2d at 508. Thus, while a defendant could be convicted for possessing a trace amount of a controlled substance, there must be a legitimate basis to conclude that the person actually knew that he or she was in possession of a controlled substance at the time, and not merely in possession of an object that happened to contain an unobservable amount of a controlled substance.

Kabat establishes that a defendant cannot *knowingly* possess an immeasurable residue of a controlled substance. There, the defendant was prosecuted for possessing marijuana after the ash in a pipe he possessed was found to contain the active ingredients for marijuana. 76 Wis. 2d 227-28. The defendant conceded that he possessed the pipe, and that he had used the pipe to smoke marijuana two weeks earlier. *Id.* at 226-27. But he argued the evidence was insufficient to find that he *knowingly* possessed marijuana based on the presence of a residue inside of the pipe. *Id.* at 227.

The Wisconsin Supreme Court agreed, holding that "the presence of the narcotic must be reflected in such form as reasonably imputes knowledge to the defendant." *Id.* at 228 (internal quotations and emphasis omitted). The court explained, "Guilt or innocence on a charge of illegally possession may not be determined solely by the skill of the forensic chemist in isolating a trace of the prohibited narcotic

in articles possessed by the defendant." *Id.* The court held that the small quantity of marijuana in the pipe's ashes could not be "sufficient to sustain a conviction of knowing possession of a narcotic." *Id.* at 229.

The court considered a similar set of facts in *State v. Poellinger*, 153 Wis. 2d 493, 451 N.W.2d 752 (1990), a case where a defendant unsuccessfully sought to have her conviction overturned under *Kabat*. There, police searched the defendant's purse during a traffic stop. *Id.* at 498. Inside, they found a glass vial and a compact with two mirrors that "appeared to have been recently licked or wiped off wet, leaving a powdery residue." *Id.* A crime analyst found cocaine in the threads of the vial used to hold the cap. *Id.* At the ensuing trial, the defendant admitted that the vial previously contained cocaine, which she used with her boyfriend. *Id.* at 498-99.

On appeal, the defendant argued her conviction was void under *Kabat* because she was found with such a small quantity of cocaine. The Wisconsin Supreme Court disagreed, pointing out two reasonable theories that could have led to her conviction. First, the jury could reasonably conclude that she looked at the vial when replacing the cap—as many people do when putting caps on containers—and she would have been aware of the remaining cocaine. *Id.* at 508-09. Second, "[o]n the basis of [the common knowledge that a substance will often remain in a container unless vigorously cleaned], *together with the defendant's admission that she knew that the vial contained cocaine at one time*, the jury could reasonably infer that the defendant knew that the vial contained

residual amounts of cocaine at the time of her arrest." *Id.* at 509 (emphasis added). Thus, in the absence of an easily observable quantity of the drug, her confession was necessary for the conviction

Mr. Chentis' conviction could not be sustained under either theory from *Poellinger*. First, unlike *Poellinger*, this case does not involve a distinct quantity of drugs that could be observed, collected, and tested. The record before the trial court contained no allegation that a residue could be seen on the metal cup, as it was seen on the vial threads or the compact from *Poellinger*. Rather, the residue was only testable by the crime lab after extracting it from the metal cup with a rinsing solution. Second, the complaint did not include any allegation that Mr. Chentis admitted to knowingly possessing the narcotic like the defendant from *Poellinger* did. Rather, his attorney insisted at sentencing that Mr. Chentis did not even know about the metal cup in his car.

The court of appeals' decision in this case purports to apply *Kabat* and *Poellinger*, but it eviscerates *Kabat* by pointing to the presence of drug paraphernalia in Mr. Chentis' car as proof that he knew about the unobservable residue in the metal cup. The court of appeals holds that needles, cotton balls, and a constrictor band make up the "strong circumstantial evidence" of knowing possession by Mr. Chentis. *Chentis*, No. 2020AP1699-CR, ¶13. *Kabat* also involved drug paraphernalia—a pipe—but the court concluded that the evidence was insufficient. Thus, the court of appeals' emphasis on the drug paraphernalia in Mr. Chentis' car directly conflicts

with the holding in *Kabat* that possession of paraphernalia is insufficient to establish knowing possession of a trace amount of a controlled substance. Rather, to support Chentis' conviction—and avoid a conflict with *Kabat*—there needed to be other evidence that Mr. Chentis actually knew about the controlled substance, as in *Poellinger*, like an admission to possessing the substance, or an easily observable quantity of the substance.

The court of appeals also notes the fresh track marks on Mr. Chentis' arm as circumstantial evidence of knowing possession. But the court overemphasizes the relevance of the track marks. Even if they supported a finding that Mr. Chentis used a controlled substance, the recency of the use is not relevant. In *Kabat*, the defendant *confessed* to smoking marijuana two weeks earlier, so it is apparent that prior possession is not dispositive. Here, the court of appeals seems to use *Kabat* to mean that evidence of drug use *within* two weeks is evidence of knowing drug possession, but *Kabat* does not support this inferential leap. At what time—under two weeks—does potential substance use imply knowing possession of a narcotic residue? The court of appeals' opinion fails to provide any guidance on this subject, but concludes without explanation that Mr. Chentis' potential use was sufficiently recent to mean that he knew about the residue that could only be detected with a special rinsing solution at the crime lab. This is inconsistent with *Kabat*, where even the admission of prior drug use was insufficient to support a subsequent charge for possessing a residue.

Upon learning that Mr. Chentis intended to plead guilty to possessing a trace amount of a controlled substance, the circuit court needed to conduct a further inquiry into the factual basis for Mr. Chentis' plea, and ensure that the conviction would not be barred by *Kabat*. The record in this case says almost nothing about the circumstances of Mr. Chentis' possession because the parties "amended" the facts underlying the charge without informing the court until it began asking Mr. Chentis about oxycodone. The criminal complaint does not indicate that there was an observable residue in the metal cup. The only statement of the factual basis came from Mr. Chentis' trial counsel, who stated that Mr. Chentis was admitting to possessing "trace amounts" of heroin. But as discussed at length, possessing a "trace amount" of a substance does not necessarily support a conviction. In light of *Kabat*, the circuit court needed to inquire further to ensure that Mr. Chentis' conviction was proper. And in light of the evidence that he possessed an immeasurable and seemingly unobservable quantity of heroin, had the court made that further inquiry, it would have had no basis to accept Mr. Chentis' plea. Therefore, this court should reverse and allow Mr. Chentis to withdraw his plea.

This court should grant review to address the conflict between the court of appeals' decision in this case and its earlier decision in *Kabat*. Review is further warranted to clarify the relationship between *Poellinger* and *Kabat*, the two primary cases governing the prosecution of possession of trace amounts of controlled substances. This court should further hold that there was an insufficient factual basis for Mr.

Chentis' plea and reverse and remand to allow him to withdraw his plea.

II. If the court grants review, it should remand for a *Machner* hearing to determine whether trial counsel had a strategic reason for failing to seek dismissal of the charge.

As Mr. Chentis has acknowledged below, resolution of this issue largely turns on the court's resolution of the primary issue in this appeal. If the court finds that there was no basis for Mr. Chentis' plea because the evidence would have been insufficient for a conviction, then counsel was almost certainly ineffective for failing to seek dismissal of the charge. On the other hand, if the court finds a factual basis existed for the plea, counsel would not be ineffective.

If this court grants review to determine whether there was a factual basis for Mr. Chentis' plea, it should also address whether Mr. Chentis' trial counsel was ineffective for failing to seek dismissal of the charge.

Here, counsel performed deficiently by failing to seek dismissal of the felony narcotic charge after receiving the exculpatory crime lab report. Counsel's failure to seek dismissal suggested that he was unfamiliar with *Kabat* and its applicability to this case. Constitutionally effective counsel would have sought dismissal of the felony charge because the crime lab report was completely exonerating. The white powder which formed the basis for the felony charge was not a controlled substance. And the only

controlled substance—an unobservable amount of heroin in a metal cup—was so miniscule that its presence was "determined solely by the skill of the forensic chemist in isolating a trace of the prohibited narcotic in articles possessed by the defendant." *Kabat*, 76 Wis. 2d at 228.

Instead of seeking dismissal of the charged narcotics offense, counsel compounded his ineffectiveness by counseling Mr. Chentis to plead no contest to the residue in the metal cup. But, as argued above, that residue was insufficient as a matter of law to sustain Mr. Chentis' conviction. Counsel performed deficiently by failing to seek dismissal of a charge and instead counseling his client to plead no contest to a charge with no factual basis.

Mr. Chentis was prejudiced by counsel's deficiency because there was a reasonable probability he would not have pleaded no contest to the felony count had his counsel properly had it dismissed. Mr. Chentis' postconviction motion alleged that he would testify that his attorney did not offer to seek dismissal of the felony charge after receiving the crime lab report. The motion further alleged that Mr. Chentis would not have pleaded guilty had his counsel successfully had the charge dismissed.

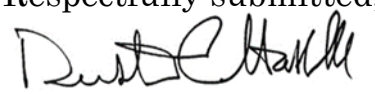
Although there could be no reasonable strategic basis for counsel to fail to seek dismissal of a meritless charge, this court should reverse for an evidentiary hearing to take testimony from trial counsel and determine whether the charge against Mr. Chentis must be dismissed for a lack of evidence.

CONCLUSION

For the reasons stated above, this Court should grant review of the court of appeals' decision.

Dated this 20th day of December, 2021.

Respectfully submitted,



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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 3,168 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, including 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 20th day of December, 2021.

Signed:

DUSTIN C. HASKELL
Assistant State Public Defender