STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2021AP1834 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ETTER L. HUGHES,

Defendant-Appellant.

On Review from a Judgment of Conviction and from an Order Denying Postconviction Motion, Entered in Milwaukee County Circuit Court, the Honorable J.D. Watts Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Did the trial court error in accepting an amended criminal complaint adding three additional charges against Ms. Hughes when there was no independent factual basis for those charges either in the criminal complaint or on the record?

The circuit court concluded that the amendment of the charges in this matter was permissible because there was no need for an independent factual basis because "the amended charges flowed directly from the additional investigation that was conducted."

2. Did the trial court error in accepting an amended criminal complaint adding two counts of physical abuse of a child, repeated acts causing bodily harm, as party to a crime, in that a multiplicity issue and violation of section 948.03(5)(c), *Stats.*, were created by the new filing?

The circuit court briefly concluded that the amendment was proper without specific detail because "[c]ounts three and four were based on the defendant's knowledge that Martinez was abusing TW and JW and her failure to act to prevent the abuse, and counts five and six were based on the defendant's repeated abuse of TW and JW, either directly or as a party to a crime." Therefore, the court held there was no multiplicity issue.

The argument regarding the legislative provision charging the case as it was not addressed by the postconviction court.

3. Was trial counsel ineffective as a matter of law for failing to object to the offering and acceptance of the amended information?

The circuit court held that because there was no prejudice caused by the filing of the amended information (as the court had already concluded its filing was proper), trial counsel could not have been ineffective for failing to raise an objection.

POSITION ON ORAL ARGUMENT & PUBLICATION

Ms. Hughes welcomes oral argument on this issue if the court would find it helpful to deciding the questions posed by this appeal. This matter involves the application of well-established legal principles, and therefore, publication is not necessary.

STATEMENT OF THE CASE & FACTS

On December 3, 2016, Ms. Hughes was charged in the instant case in the original criminal complaint with four counts, as follows:

> Count One: Neglecting a Child, Causing Death, Party to a Crime, contrary to Wis. Stat. §§948.21(1)(d), 939.05;
>
> Count Two: Neglecting a Child, Causing Great Bodily Harm, Party to a Crime, contrary to Wis. Stat. §§948.21(1)(c), 939.05;
>
> Count Five: Child Abuse, Failing to Prevent Harm, contrary to Wis. Stat. §948.03(4)(b);

> Count Six: Child Abuse, Failing to Prevent Harm, contrary to Wis. Stat. §948.03(4)(b).

(1).

In support of the charges, the probable cause section of the criminal complaint in this case asserts that on the morning of November 29, 2016, Ms. Hughes, J.W. and L.F. awoke to find T.W., who was seven years old, struggling to breathe and in and out of consciousness. (1:6-8). At the time, Ms. Hughes, her son, L.F., and her two young cousins, J.W. and T.W., were residing at the home of the co-defendant, Mary Martinez. The complaint details the forensic interviews of child witnesses L.F. and J.W., which stated that Ms. Martinez had physically assaulted T.W. the night prior, November 28, 2016, before they went to bed and while Ms. Hughes was not present. (1:7-8).

In the morning upon waking, it was discovered that T.W. was in a medical crisis and unresponsive. Ms. Hughes begged Ms. Martinez to call 911, but Ms. Martinez refused to do so, telling Ms. Hughes to go dump T.W.'s body in the woods. (1:6-8). Ms. Hughes, who had planned to move out of the residence that day with the children, was all packed to go. When Ms. Martinez prevented her from calling 911, Ms. Hughes loaded the children into the car to take T.W. to St. Luke's Hospital. (1:6-8). T.W. was unresponsive upon arrival and after transport to Children's Hospital, succumbed to his injuries inflicted upon him by Ms. Martinez that same day.

Ms. Hughes was taken into custody and interviewed about T.W.'s death. She denied causing the

injuries to T.W. J.W. and L.T. were both subject to forensic interviews as well. During the forensic interviews of J.W. and L.F., neither child alleged that Ms. Hughes had harmed T.W. or J.W. and both stated that it was Ms. Martinez would both physically assault the two brothers and withhold food from them and not Ms. Hughes. (1:6-8). As a result of the reports from J.W. and L.F., Ms. Martinez was also arrested within days of T.W.'s death and interviewed by police.

On December 12, 2016, after the filing of only the original four-count complaint, Ms. Hughes waived her right to a preliminary hearing. As a result, no testimony was taken and the bindover determination was made based solely upon the probable cause section of the criminal complaint. (42). That same day, the State filed an information reflecting the identical four counts as those charged in the original criminal complaint. (106).

The case remained in a trial posture throughout the litigation, with a final pretrial and trial date set for May 26, 2017 and June 5, 2017, respectively. Throughout the process, it was clear that Ms. Hughes intended to dispute the allegations and go to trial on the matter. (93). At the final pretrial hearing one week before the jury trial was set to begin, the State filed a new information with the court, amending the charges as follows:

> Count One: First Degree Reckless Homicide, Party to a Crime, Wis. Stat. §§940.02(1), 939.05;
>
> Count Two: Neglecting a Child, Causing Great Bodily Harm, contrary to Wis. Stat. §948.21(1)(c);

> Count Three: Child Abuse, Failing to Prevent Harm, contrary to Wis. Stat. §948.03(4)(b);
>
> Count Four: Child Abuse, Failing to Prevent Harm, contrary to Wis. Stat. §948.03(4)(b);
>
> Count Five: Physical Abuse of a Child, Repeated Acts Causing Bodily Harm, Party to a Crime, contrary to Wis. Stat. §948.03(5)(a), 939.05.
>
> Count Six: Physical Abuse of a Child, Repeated Acts Causing Bodily Harm, Party to a Crime, contrary to Wis. Stat. §948.03(5)(a), 939.05.

(12).

The amendment increased Ms. Hughes' prison exposure by more than one hundred years. Additionally, at that hearing, the State filed a notice of expert testimony, a notice of intent to use J.W. and L.F.'s forensic interviews and its witness list.

The court accepted the amended information and permitted the addition of the new homicide charge and upgrading of the remaining charges without any argument or supplementing of the factual basis from either party. (43). There was no objection by the defense at that time to the filing of the amended information. (43). The case continued in a trial posture at that time and the matter was set over for trial, which was scheduled to begin on June 6, 2017. (43).

The day before the trial was to start, Ms. Hughes' entered pleas of "no contest" to the four initial charges

found in the original complaint and information, though the State moved to strike all party to a crime modifiers on those four counts. (40). The matter was set out for sentencing, and a presentence investigation report ordered by the court. (20; 32). On July 20, 2017, the Honorable M. Joseph Donald sentenced Ms. Hughes to a total sentence between all counts of 20 years initial confinement and 15 years of extended supervision. (30; 32).

On June 1, 2021, Ms. Hughes filed a postconviction motion asserting several claims related to the filing of the amended information, its timing and counsel's failure to object to the filing of the three additional charges. (87). Ms. Hughes alleged the following errors had occurred:

1. The amended information was filed by the State and accepted by the court in error because the complaint and the record at the time of filing contained no factual basis supporting the addition of the three new counts filed against Ms. Hughes.

2. The amended information was filed by the State and accepted by the court in error because counts three and four were multiplicitous to counts five and six, and the legislature likewise specifically prohibited the charging of the multiple counts in section 948.03(5)(c), *Stats.*

3. Because the amended information was filed in error and Ms. Hughes was incorrectly led to believe her exposure had legally increased by more than one hundred years by the filing of

the three new charges, a manifest injustice has occurred because her understanding of the plea agreement at the time she waived her right to trial was based on presumptions that were false.

4. Because of the late filing of the three new charges less than two weeks before trial, Ms. Hughes' counsel could not be properly prepared to defend her case, and this deprived her of right to effective assistance of counsel.

5. Trial counsel was ineffective as a matter of law for failing to object to the amended information and for providing Ms. Hughes with incorrect advice regarding the value of the final plea agreement.

(87).

On September 2, 2021, the circuit court issued a written decision denying all claims raised by Ms. Hughes in her postconviction motion. (100). Related to the previously stated five arguments of Ms. Hughes, the court concluded the following:

1. The amended information was properly filed because the new charges were related to the context of the initial investigation and the allegations that Ms. Hughes had personally physically abused J.W. and T.W., while not detailed throughout the complaint, were transactionally related to the facts in the complaint. (100:7-9).

2. The court briefly addressed the multiplicity argument, concluding there was no issue, because "[c]ounts three and four were based on the defendant's knowledge that Martinez was abusing TW and JW and her failure to prevent the abuse, and counts five and six were based on the defendant's repeated abuse of TW and JW, either directly or as a party to a crime." (100:9-10). Therefore, the court wrote, the "charges are plainly not identical in law or fact." (100:10).

3. Because the amended information was properly filed in the court's eyes and contained probable cause, there was no illusory plea bargain and the benefit Ms. Hughes' received was real and significant. (100:10).

4. Based on the supplemental information provided by the State regarding the advance notice to counsel of the forthcoming charges, the court found that there was no issue with adequate notice that implicated Ms. Hughes' due process rights or her counsel's ability to defend against the new allegations. (100:10-12).

5. Because the court found that there was no prejudice regarding counsel's failure to object to the amended information (i.e., the amendment to the information and its subsequent acceptance by the court was proper), trial counsel was not ineffective as a matter of law. (100:12-13).

Ms. Hughes now appeals the adverse decisions[1] of the postconviction court.

ARGUMENT

I. The probable cause section of the criminal complaint lacked a factual basis for the newly added counts one, five and six, nor was there any specificity regarding counts five and six, and as a result, the filing of the amended information by the State should not have been permitted by the court.

A. Legal principles and standard of review.

i. *Plea Withdrawal, Manifest Injustice & the Benefit of a Plea Negotiation*

"When a defendant seeks to withdraw a guilty or no contest plea after sentencing, he or she must prove by clear and convincing evidence that refusing to allow plea withdrawal would result in a 'manifest injustice.'" *State v. Douglas*, 2018 WI App 12, ¶10, 380 Wis. 2d 159, 908 N.W.2d 466, citing *State v. Finley*, 2016 WI 63, ¶58, 370 Wis. 2d 402, 882 N.W.2d 761. A manifest injustice has occurred and "a defendant has the right to withdraw a plea when, prior to deciding whether to accept the plea, the defendant is mistakenly advised

[1] Due to the additional supplementation of the record by the State in the form of exhibits attached to its postconviction motion response (See, 91-93) regarding Ms. Hughes' claim that her counsel did not have adequate notice of the potential new charges, Ms. Hughes is not pursuing this claim on appeal.

about his or her potential punishment" or the possibility of conviction on charges where dismissal is contemplated by the plea agreement if he or she proceeds to trial. *Douglas*, 2018 WI App 12, ¶10; *See also State v. Dillard*, 2014 WI 123, 358 Wis. 2d 543, 859 N.W.2d 44.

When a defendant has been provided misinformation about the consequences of the pending criminal charges, such as potentially being subject to a substantial additional criminal convictions or lengthy additional exposure, a "defendant's capacity to knowingly, intelligently, and voluntarily choose between accepting the State's plea offer and proceeding to trial" has been undermined. *See Douglas*, 2018 WI App 12, ¶16, citing *Dillard*, 2014 WI 123, ¶¶69-70. Under such circumstances, a manifest injustice has occurred, and a defendant is entitled to plea withdrawal accordingly. *Id.*

ii. *Lesser-included offenses & the propriety of multiple convictions for the same conduct*

Both the Fifth Amendment to the United States Constitution and Article 1, sec. 8 of the Wisconsin Constitution protect an individual from twice being placed in jeopardy for a single offense. Long-standing case law has established that this protection includes a prohibition against subjecting a defendant to multiple punishments for the same offense. *State v. Sauceda*, 168 Wis. 2d 486, 492, 485 N.W.2d 1 (1992); *State v. Grayson*, 172 Wis. 2d 156, 159, 493 N.W.2d 23 (1992) (Multiple convictions and punishments arising from a single criminal act "are impermissible because they violate the

double jeopardy provisions of the Wisconsin and United States Constitutions.").

When assessing double jeopardy claims, Wisconsin courts have traditionally utilized a two-prong test. If the answer is "yes" to either of the following questions, the offenses are multiplicitous and conviction under both statutory provisions is barred:

> (1) Are the charged offenses identical in law and fact?
>
> (2) If the offenses are not identical in law and fact, did the legislature intend that the conduct underlying the multiple offenses be brought as a single count?

State v. Anderson, 219 Wis. 2d 739, 746, 580 N.W.2d 329, 333 (1998).

Whether simultaneous convictions for multiple offenses violate a defendant's double jeopardy rights under the Wisconsin and U.S. Constitution is a question of law, and therefore, the standard of review is de novo. This Court need not give any deference to the holdings of the lower courts on this issue. *Sauceda*, 168 Wis. 2d at 492.

While the "general rule is that a guilty, no contest, or Alford plea 'waives all nonjurisdictional defects, including constitutional claims,'" a double jeopardy challenge may be raised postconviction if it can be resolved on the record as it existed at the time of the plea. *State v. Multaler*, 2002 WI 35, ¶54, 252 Wis. 2d 54, 643 N.W.2d 437; See *State v. Kelty*, 2006 WI 101, ¶¶ 24, 39, 294 Wis. 2d 62, 716 N.W.2d 886 ("We do not hold that a double jeopardy claim may never be waived. We

simply hold that a plea of guilty to a charge does not waive a claim that-judged on its face-the charge is one which the State may not constitutionally prosecute."). No party may supplement the factual basis on appeal to justify the charging of potentially multiplicitous offenses, and the reviewing court is limited to considering only those facts and arguments known to the circuit court at the time of the plea. *See State v. Steinhardt,* 2017 WI 62, ¶16, 375 Wis. 2d 712, 896 N.W.2d 700, *citing e.g. State v. Kelty,* 2006 WI 101, ¶38 ("What this means is that a court will consider the merits of a defendant's double jeopardy challenge if it can be resolved on the record as it existed at the time the defendant pled."); *State v. Eisch,* 96 Wis. 2d 25, 27, 291 N.W. 800 (1980) ("Because we confront the case at the pleading stage, we are confined to the facts alleged in the complaint, information, and transcript of testimony of the witnesses at the preliminary examination.").

iii. *Wis. Stats. §948.03(5)(c)*

Section 948.03(5)(c), *Stats.*, controls the charging of repeated acts of physical abuse of a child, a crime set forth in section 948.03(5)(a). The charging provision asserts that "[t]he state may not charge in the same action a defendant with a violation of [948.03(5)] and with a violation involving the same child under [948.03](2), (3), or (4), unless the other violation occurred outside of the" specified period of time related to the charging of crime of repeated acts of physical abuse against the same child. Sections 948.03(2), (3) and (4) prohibit individuals from intentionally causing bodily harm to a child, recklessly causing bodily harm to a child and failing to act to prevent another from causing bodily harm to a child, respectively.

B. The record as it existed at the time of the plea contained no factual basis supporting the newly added counts one, five and six of the amended information, and the provisions in the law controlling charging following preliminary hearing does not permit the State leave to amend a complaint in such a manner.

A criminal complaint is sufficient if it sets forth essential facts within its four corners that would allow a reasonable person to conclude that a crime was probably committed, and that the defendant is probably the individual who committed the crime charged. *State v. Haugen*, 52 Wis. 2d 791, 793, 191 N.W.2d 12 (1971). Probable cause must be found from facts as to each count of a complaint, and mere conclusions or recitation of statutory language are not sufficient. *Giordenello v. United States*, 357 U.S. 480, 486 (1958); *State ex rel. White v. Simpson*, 28 Wis. 2d 590, 597, 137 N.W.2d 391, 394 (1965), and *State v. Williams*, 47 Wis.2d 242, 253, 117 N.W.2d 611 (1970) ("The use of statutory language is not proscribed, nor do we seek to have drafters of complaints search out recondite synonyms for the clear statutory language that was carefully selected by the legislature. Rather, a constitutionally sufficient complaint must contain the 'essential facts' constituting the offense charged.").

A court will find a complaint sufficient if the complaint answers the questions:

"Who is charged?";

"What is the person charged with?";

> "When and where did the alleged offense take place?";
>
> "Why is this particular person being charged?"; and
>
> "Who says so or How [sic] reliable is the informant?"

State v. White, 97 Wis.2d 193, 203, 295 N.W.2d 346 (1980); *See also State ex. Rel. Evanow v. Seraphim*, 40 Wis. 2d 223, 161 N.W.2d 369 (1968).

A criminal complaint that does not allege sufficient facts establishing the violation of the law charged against the defendant as defined by statute, is jurisdictionally defective and must be dismissed. *Champlain v. State*, 53 Wis. 2d 751, 754, 195 N.W.2d 868 (1972) and *State v. Lampe*, 26 Wis. 2d 646, 648, 133 N.W.2d 349 (1965) ("If the defendant is correct that no offense is charged then the court had no jurisdiction to proceed to judgment."). Here, the probable cause criminal complaint contains no evidence to substantiate counts one, five or six of the amended information. Moreover, because there was no preliminary hearing in this case, the only factual basis on which the court could rely when permitting the amendment of the charges was found in the criminal complaint.

Count one alleges that Ms. Hughes was a party to the crime of first-degree reckless homicide in the death of T.W. Regarding counts five and six, Ms. Hughes was alleged to have committed, as party to a crime, at least three unspecified acts of child abuse against both T.W. and J.W. The complaint, however, is devoid of any specific facts or conclusions supporting these charges. The probable cause section does not contain any facts

alleging that Ms. Hughes physically assaulted T.W. and caused his death as a result, nor does it include any allegations she personally physically assaulted either T.W. or J.W. or withheld food from them, causing their weight loss.

Simply charging the counts as "party to a crime" contrary to section 939.05, *Stats.*, does not cure the error either. Party to a crime liability requires that the defendant be the person who directly committed the crime, intentionally aided and abetted another who commits the crime or engages in a conspiracy with another individual to commit the crime. Wis. Stat. §939.05; *See State v. Howell*, 2007 WI 75, ¶14, 301 Wis. 2d 350, 734 N.W.2d 48. As set forth in *State v. Howell*, 2007 WI 75, it is not enough to say that a defendant "assisted" another in the commission of another crime. There must be some information that the defendant had the requisite preexisting intent to aid or conspire with another in the commission of the crime charged.

Here, the complaint lacks any allegation sustaining the new charges against Ms. Hughes. There is nothing in the complaint that establishes that Ms. Hughes intentionally aided and abetted in the abuse of either T.W. or J.W. on November 29, 2016 or in the weeks leading up to T.W.'s death. Further, there are no allegations that Ms. Hughes directly committed either of the offenses charged in counts one, five and six.

The postconviction court concluded otherwise, asserting that the complaint was not devoid of other allegations of physical abuse of a child as the defense had argued in its postconviction motion, but rather it contained two claims from the son of Ms. Martinez,

Carlos Gonzalez, involving Ms. Hughes' alleged role and that those allegations sustained the new charges. (100:8). Mr. Gonzalez stated that Ms. Hughes had given Ms. Martinez permission to "physically discipline" J.W. and T.W., and on one occasion, Mr. Gonzalez observed the children tied up in a seated position and Ms. Martinez claimed that Ms. Hughes had done this.

The court's conclusion regarding the former allegation is wrongly premised on the notion that Ms. Hughes gave Ms. Martinez permission to *criminally* abuse the children and also that all forms of "physical discipline" of a child are illegal regardless of the surrounding circumstances. First, the phrase "physically discipline" can mean a variety of conduct that is legal, for example, including physically placing the children in a corner or secluded space for a time out when they are out of control, physically intervening in a fight between siblings. Second, the complaint makes no assertions as to what Ms. Hughes' specifically permitted Ms. Martinez to do to the children, and therefore, this claim does not itself sustain probable cause to find that Ms. Hughes was personally or aiding and abetting Ms. Martinez's abuse of the children.

Regarding the claim by Mr. Gonzalez that he was told by Ms. Martinez that Ms. Hughes had tied up the children in a seated position, there are two issues. First, this allegation is assigned to Ms. Hughes by her co-defendant, Ms. Martinez, and her son. There is no additional corroborating evidence found in the complaint that Ms. Hughes did anything of the sort. Second, there is no allegation that even had Ms. Hughes tied the children in a seated position that doing so caused bodily harm to the children on this specific

occasion, as required by sections 948.03(2) or (3). Simply because this type of discipline, if true, may be distasteful or not the preference of the reviewing court does not make it criminal physical abuse of a child under sections 948.03(2) or (3). Therefore, this allegation cannot be used to sustain a claim that Ms. Hughes directly committed violations of sections 948.03(2) or (3).

C. In addition to the issues regarding the lack of probable cause supporting the new charges, due to the lack of specificity found in the criminal complaint and the record at the time of the plea, the addition of counts five and six created a multiplicity issue that remained unresolved when the court accepted the waiver of Ms. Hughes' right to trial.

Regarding counts five and six, the lack of specificity of the allegations created a second significant constitutional due process problem. Ms. Hughes argued in her postconviction motion that counts three and four were multiplicitous and lesser included offenses of counts five and six, and also that the legislature specifically prohibited in its passage of section 948.03(5)(c), *Stats.*, the charging of both the individual acts of physical abuse of a child and repeated acts of physical abuse of a child for conduct occurred in the identical time frame.

These issues were given short shrift by the postconviction court, which summarily denied the claim, finding that the counts in question are "plainly not identical in law or fact." Moreover, the postconviction court erroneously did not address at all

the second part of the claim, that the legislature specifically barred charging of both repeated acts of physical abuse of a child under section 948.03(5) and also a specific act of child abuse under sections 948.03 (2), (3), or (4) when those acts allegedly occurred within the same time period.

As outlined in the postconviction motion, to be charged with repeated acts of physical abuse of a child, one must have completed at least three violations of sections 948.03(2), (3) or (4), *Stats.*, during a specified time frame – here September 1, 2016 through November 29, 2016 (this is the same time period for all charged offenses in the amended information). (12). Those three subsections prohibit the following conduct: intentional causation of bodily harm to a child (948.03(2)), reckless causation of bodily harm to a child (948.03(3)) and failing to act to prevent bodily harm to a child (948.03(4)). The criminal complaint details only allegations of the third form of physical abuse of a child, failing to act to prevent bodily harm.

The postconviction court largely ignored this argument, dismissing the argument in a single paragraph. This court wrote that it generally finds that there is an independent factual basis for counts three and four as compared to counts five and six. The court held:

> Counts three and four were based on the defendant knowledge that Martinez was abusing TW and JW and her failure to act to prevent the abuse, and counts five and six were based on the defendant's repeated abuse of TW and JW, either directly or as a party to a crime. The charges are plainly not identical in law or fact.

(100:9-10). Of note, the court does not address how the allegations made by Mr. Gonzalez make for an independent factual basis that Ms. Hughes repeatedly engaged in violations of 948.03(2) or (3), either intentionally or reckless causing bodily harm to J.W. and T.W.

In its written decision, the postconviction court said nothing of Ms. Hughes second challenge to the propriety of counts three, four, five and six being charged in the same complaint as it relates to the charging provision in section 948.03(5)(c). The legislature explicitly prohibited this manner of charging through its enactment of section 948.03(5)(c), *Stats.* The provision says that "[t]he state may not charge in the same action a defendant with a violation of [948.03(5)] and with a violation involving the same child under [948.03](2), (3), or (4), unless the other violation occurred outside of the" specified period of time related to the charging of crime of repeated acts of physical abuse against the same child.

Here, the error is clear – Ms. Hughes was charged contrary to the provision guiding these prosecutions found in 948.03(5)(c), as she was plainly charged with two violations of 948.03(5) and also two violations of 948.03(4). Those allegations indisputably involved the same children and identical time frames, and as a result, the amended charges were accepted in error and should never have been permitted to be added in the amended criminal complaint.

D. The charging errors and the acceptance of the three additional criminal counts in the amended information were not only

> independently due process violations, but these errors also created a manifest injustice in that Ms. Hughes waived her right to trial, one she had expressed all along an interest in pursuing, due to a plain misunderstanding of the material benefits of the plea bargain.

A manifest injustice has occurred in this case because Ms. Hughes was led to believe, both by the acceptance of the amended information by the court charging her with three additional serious felony offenses and by her counsel's lack of objection and incorrect legal advice, that she faced an additional one hundred years of exposure had she proceeded to trial and lost on the six counts. Unbeknownst to her at the time she decided to enter the plea, there was no probable cause sustaining any of the three new charges and moreover, the addition of counts five and six was prohibited both by constitutional due process and double jeopardy protections and by legislative decree as set forth in section 948.03(5)(c), *Stats.* For these reasons, Ms. Hughes should be permitted to withdraw her plea and move forward to trial.

Wisconsin courts have addressed similar legal questions in *Dillard*, 2014 WI 123, and *Douglas*, 2018 WI App 12. In *Dillard*, the defendant was mistakenly led to believe that he was facing a mandatory life sentence without the possibility of release if he were convicted at trial due to the persistent repeater provision in Wis. Stat. §939.62. 2014 WI 123, ¶¶69- 70. Based on that information, he accepted a plea to an amended charge of armed robbery, without the persistent repeater provision. *Id*. Dillard, however, had been misled to

believe that the persistent repeater provisions applied to him, though he did not meet the statutory criteria for its application, and thus, could never have been legally subject to its consequences. *Id.*

In *Douglas*, the defendant was charged with both first- and second-degree sexual assault of a child stemming from the same conduct against the same victim. *Douglas*, 2018 WI App 12, ¶¶2-5, 13. Second degree sexual assault of a child is a lesser-included offense of first-degree sexual assault of a child, and therefore, the defendant never truly faced conviction on both charges, though he was led to believe he could be convicted of both counts simultaneously and thus that he was receiving a bargain when he entered a plea to only one of the two charges. *Id*. In both *Dillard* and *Douglas*, the reviewing courts concluded that the defendants had been deprived their right to enter a knowing and voluntary plea as part of a plea negotiation due to their mistaken beliefs about the true value of the plea bargain being offered by the State. *Dillard*, 2014 WI 123, ¶69; *Douglas*, 2018 WI App 12, ¶18.

To further illustrate its holding, the *Dillard* court distinguished the facts in the case from a previous Wisconsin Supreme Court case, *State v. Denk*, 2008 WI 130, 315 Wis. 2d 5, 758 N.W.2d 775. *Dillard*, 2014 WI 123, ¶¶75-77. In *Denk*, the defendant was charged with multiple counts, including felony possession of methamphetamine paraphernalia. *Denk*, 2008 WI 130, ¶¶17, 19. *Denk* argued on appeal that there was not a factual basis to sustain the methamphetamine charge, asserting that the statutory language required that the paraphernalia one possesses be for the purpose of manufacturing the drug. *Id.* at ¶24 Mr. Denk asserted

that he was a user, not a manufacturer, and therefore, the appropriate charge was the misdemeanor version of possession of paraphernalia, not the felony. *Id.* The *Denk* court concluded that the defendant was not entitled to withdraw his plea. *Id.* at ¶75. The *Dillard* holding asserted that the *Denk* case was different than Mr. Dillard's in an important way. Unlike in Dillard's situation, the court wrote:

> …the charge that was dismissed pursuant to Denk's plea agreement did not pose a legal or factual impossibility. The Denk court did not decide (and the record did not demonstrate) that there was no factual or legal basis for that charge. In Denk, there was a factual and legal dispute about what Denk was doing with the methamphetamine paraphernalia, about whether the State could have proved the dismissed charge beyond a reasonable doubt, and about the proper scope of the statute applicable to the dismissed felony. The Denk court recognized that it was uncertain whether the State would have prevailed on the dismissed charge. At that stage in the proceeding, however, Denk had not demonstrated that the dismissed charge was a factual or legal impossibility. Denk thus benefitted when the felony drug paraphernalia charge was dropped pursuant to the plea agreement.

Dillard, 2014 WI 123, ¶¶76-77.

Like Douglas and Dillard, Ms. Hughes was denied the opportunity to thoughtfully consider the actual value of the State's plea offer and to carefully determine the level of risk she was willing to accept by proceeding to trial in lieu of accepting the State's negotiated plea. *See Douglas*, 2018 WI App 12, ¶16,

citing *Dillard*, 2014 WI 123, ¶¶69-70. Notably, Ms. Hughes had expressed an intention in pursuing a trial on the four initial charges, as it was this insistence that seemingly led to the State adding the three upgraded charges with an amended information at the final pretrial hearing. The timing detailed in the record demonstrates that it was only after the State filed the additional charges that Ms. Hughes reconsidered and accepted the original plea offer, entering pleas of "no contest" to all four charges found in the original complaint, at a special hearing the eve before trial. (40; 43; 93).

This is troubling because the State's agreement to dismiss the newly added counts one, five and six truly had no value to Ms. Hughes because as discussed above, their addition was procedurally barred both by the double jeopardy doctrine and Wisconsin law, and there was not a factual basis to support the new allegations found within the criminal complaint or the record at the time the plea was accepted. Ms. Hughes, like the defendants in *Douglas* and *Dillard*, was under the false impression that her negotiated plea carried with it some material benefit in terms of reducing her prison exposure and as a result, she did not knowingly and voluntarily enter her plea because those beliefs were based upon legal impossibilities. *See Douglas*, 2018 WI App 12, ¶¶17-18; *Dillard*, 2014 WI 123, ¶¶39, 66.

Further, Ms. Hughes is unlike the defendant in *Denk*, because she was led to believe that by acknowledging her guilt to one crime, she was avoiding being subject to additional criminal consequences, but unbeknownst to her at the time she entered a plea, there was no factual basis for the addition of the charges

found in the complaint and that the double jeopardy doctrine and statutory authority prevented her from being convicted of both counts three and four and five and six. Therefore, her plea, premised on her misunderstanding that she was avoiding additional and substantial prison time was not knowing and voluntary. As a result, a manifest injustice occurred, and Ms. Hughes is entitled to plea withdrawal and dismissal of the counts one, five and six of the amended information.

II. Trial counsel was ineffective as a matter of law by failing to object to the amended information filed by the State and for providing Ms. Hughes with incorrect advice about the value of the plea agreement, and Ms. Hughes suffered substantial prejudice as a result.

A. Legal principles and standard of review.

An accused's right to the effective assistance of counsel derives from the Sixth and Fourteenth Amendments to the United States Constitution, and Art. I, sec. 7 of the Wisconsin Constitution. *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). In assessing whether counsel's performance satisfied this constitutional standard, Wisconsin applies the two-part test outlined in *Strickland v. Washington*, 466 U.S. 668 (1984); *Smith*, 207 Wis. 2d at 273. To establish a deprivation of effective representation, a defendant must demonstrate that: (1) counsel's performance was deficient, and (2) counsel's errors or omissions prejudiced the defendant. *Id.*

To prove deficient performance, the defendant must establish that his or her counsel "made errors so

serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. (citations omitted). The prejudice prong requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Smith*, 207 Wis. 2d at 276 (citing *Strickland*, 466 U.S. at 694). In the context of a plea withdrawal case, a defendant is required to establish that there is "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

B. Trial counsel erred by failing to object to the filing of the amended information and the three new charges on the grounds that there was no sustaining probable cause and also that counts three and four were lesser-included offenses of counts five and six.

As set forth in detail in the previous sections, the filing of the amended information should have been barred by the trial court as there was not probable cause to support the enhanced charges. For brevity's sake, those arguments need not be repeated here.

What is plain is that trial counsel should have identified the defects in the amended information and the legal challenges that should have been contemporaneously made via an objection to the court's acceptance of the amended information. Trial counsel plainly and indisputably failed to wage such an objection. The issues at hand are certainly not novel and counsel clearly did not and could not have permitted

multiple baseless charges to be filed against his client. Instead, counsel's error falls outside of the realm of reasonable, effective representation. For these reasons, Ms. Hughes has satisfied the first prong of the *Strickland* test. *Strickland*, 466 U.S. 668; *See also Smith*, 207 Wis. 2d at 273.

C. Trial counsel's failure to object to the filing of the amended information caused Ms. Hughes prejudice.

Throughout this case and even during her allocution during sentencing, Ms. Hughes maintained her innocence regarding the charges of neglect and harming J.W. and T.W. (1; 32). Even within the State's supplemental emails provided postconviction, it is clear that Ms. Hughes had a stated intent to go to trial on the allegations against her from the outset of the proceedings. (91-93). There is ample evidence to support this throughout the record, including the fact that Ms. Hughes maintained a trial posture until the day before the jury was set to be sworn and entered "no contest" pleas only after the State dramatically upgraded the charges against her.

Moreover, at the March 17, 2017 bail hearing, the State mentioned that it had intended only to file the upgraded charges if Ms. Hughes proceeded to trial. (39). The filing of the charges at the final pretrial and the continuation of the matter to the trial date following that hearing further supports her position that she would have gone to trial absent the filing of the upgraded charges. (12; 40; 43).

The record plainly demonstrates that Ms. Hughes' trial counsel did not object to the filing of the

amended information and made no argument that the new charges in the complaint lacked probable cause. (43). As set forth in detail in the previous section, there was not a factual basis in the complaint supporting the addition of the three charges. Thus, had trial counsel properly objected to the filing of the amended information and had the court denied the State's motion to enhance the charges against her, Ms. Hughes would have taken her case to trial. Therefore, she was prejudiced as a result of counsel's failure to object.

Additionally, trial counsel failed to object to the amendment on the basis that the filing of the new charges prejudiced Ms. Hughes in that she made the decision to waive her statutory right to preliminary hearing based upon the understanding that the allegations that she was facing were set forth in the probable cause section of the complaint and those allegations did not involve any claims that she personally physically assaulted or harmed J.W. or T.W. As a result, when Ms. Hughes agreed to waive preliminary hearing, she was doing so based on a very different picture of the accusations being made against her and without any knowledge that in the coming months, the narrative against her would be dramatically different and far more serious.

With the filing of new charges, those that lacked any support in the criminal complaint, it created a situation in which Ms. Hughes had effectively given up her statutory rights to challenge the complaint against her long before those accusations were made and months before the new charges were filed. Accordingly, Ms. Hughes' decision to waive her preliminary hearing

was fundamentally not knowing and voluntary and she was prejudiced accordingly.

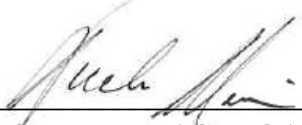
Instead, because of her counsel's failure to object to the filing of the amended information, Ms. Hughes entered a plea without a full and proper understanding of the benefit of the plea bargain and without adequate notice or time to prepare to fight the new charges, and therefore, she was substantially prejudiced. *See Hill v. Lockhart*, 474 U.S. 52, 59. On this basis and due to her counsel's deficient representation, Ms. Hughes asks this court to conclude that trial counsel erred as a matter of law, to permit plea withdrawal and to remand this case back to the circuit court for further proceedings.

CONCLUSION

For all the reasons set forth above, Ms. Hughes moves this court for an order granting her plea withdrawal and returning the matter to the trial court for further proceedings consistent with the holding of this court.

Dated this 22nd day of December, 2021.

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 6,577 words.

Dated this 22nd day of December, 2021.

Signed:

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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.

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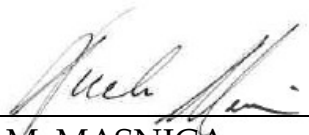

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