STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2023AP458-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DUSTIN J. VANDERGALIEN,

Defendant-Appellant.

APPEAL FROM JUDGMENT OF CONVICTION AND ORDER DENYING DEFENDANT'S POSTCONVICTION MOTION FOR VARIOUS RELIEF WITHOUT A HEARING IN DODGE COUNTY CIRCUIT COURT WITH THE HONORABLE MARTIN DE VRIES PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUES

Whether the operating with a detectable amount of restricted controlled substance in blood statute is constitutional when the only relevant foreign substance in the blood is conclusively inactive and non-impairing?

The circuit court answered yes.

Whether VanderGalien met the threshold factual showing to merit an evidentiary hearing as to his prosecutorial conflict of interest claim?

The circuit court answered no.

Whether VanderGalien met the threshold factual showing to merit an evidentiary hearing on his motion for post-sentencing plea withdrawal based upon ineffective assistance of counsel?

The circuit court answered no.

Whether VanderGalien met the threshold factual showing to merit an evidentiary hearing on his claim that his pleas were not entered knowingly, intentionally, and voluntarily?

The circuit court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary as Defendant-Appellant anticipates that the briefs of the parties will fully meet and discuss the issues on appeal. Publication would be appropriate as the published opinion would establish a new rule of law or modify, clarify, or criticize an existing rule. Wis. Stats. §§ 809.22 and 809.23(1)(a)1.

STATEMENT OF THE CASE

On Tuesday, July 30, 2019, Dustin J. VanderGalien (hereinafter "VanderGalien") was the driver at fault in a tragic car collision involving two other vehicles. (R. 16, p. 3) The accident left one individual dead, and several others injured. (*Id.*) VanderGalien also suffered serious injuries because of the accident. (*Id.*) On June 1, 2020, a Criminal Complaint and Arrest Warrant were filed, charging VanderGalien with various crimes related to the July 30, 2019 crash. (RR. 2, 3)

The charges stemmed from a test of VanderGalien's blood which was performed at the hospital over three hours after the time of operation—and *after* VanderGalien had already received treatment and medication for his injuries. (R. 41, p. 2) The blood test results provided the following relevant results: .061 g/100mL of ethanol; and 240 ng/mL of the inactive cocaine metabolite, benzoylecgonine (hereinafter, "BE").[1] (R. 16, p. 2) The complaint charged VanderGalien with 14 counts, resulting in a total exposure of 82 years and 6 months in the Wisconsin State Prison system.[2] (See R.1) On

[1] While other substances were detected in VanderGalien's blood, they were not germane to the issues considered by the circuit court or raised on appeal.

[2] The charges in the Criminal Complaint related to the injury or death of seven individuals: Victim G (Counts 1 & 2); Victim B (Counts 3 & 4); Victim A (Counts 5 & 6); Victim R (Counts 7 & 8); Victim D (Counts 9 & 10); Victim K (Counts 11 & 12); and Victim S (Counts 13 & 14). All even numbered counts charged conduct alleging operating a motor vehicle while intoxicated resulting in death, great bodily harm, or injury. All odd numbered counts charged conduct alleging operating a motor vehicle with a restricted controlled substance in the blood resulting in death, great bodily harm, or injury. As an individual cannot be sentenced for both operating while intoxicated and operating with a restricted controlled substance for the exact some conduct, the total amount of

July 2, 2020 an Information was filed mirroring the Criminal Complaint. (See R. 13)

During trial proceedings, VanderGalien was represented by Attorney Todd Snow. (R. 6) Instead of assigning an Assistant District Attorney to the case, then-Dodge County District Attorney, Kurt Klomberg, personally served as prosecutor on the case. On September 14, 2020, Attorney Snow filed a motion to dismiss counts 2, 4, 6, 8, 10, 12, and 14 of the Information. (See R. 16) All counts challenged in the motion to dismiss charged offenses alleging that VanderGalien operated a motor vehicle with a detectable amount of restricted controlled substance in his blood. (*Id.*) The motion argued that charging VanderGalien with said offenses was a violation of his right to substantive due process, based on the fact that the only "restricted controlled substance" found in VanderGalien's blood—BE—is a *non-impairing* substance. (*Id.*) On January 29, 2021, the court denied VanderGalien's motion to dismiss after conducting an evidentiary hearing on the matter. (See R. 123)

On April 16, 2021, DA Klomberg filed a Motion for Leave to Amend the Information. (R. 45) On May 12, 2021, the court granted the State's motion, and a First Amended Information was filed. (See R. 122) The First Amended Information charged VanderGalien with a modified variety of offenses which were more serious than those originally pursued by DA Klomberg. (See R. 122) The charges contained in the First Amended Information resulted in VanderGalien facing an increased total exposure of 190 years in the Wisconsin State Prison system.[3] (See R.53) In order to avoid

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exposure faced by VanderGalien was 82 years and 6 months Wisconsin State Prison. (See R. 1)

[3] The First Amended Information charged VanderGalien with: (Ct. 1) First Degree Reckless Homicide as to Victim G; (Ct. 2) First

trial, a Second Amended Information was eventually filed as part of a plea agreement, charging VanderGalien with a new, modified variety of offenses resulting in a total exposure of 170 years Wisconsin State Prison.[4] (See R. 60)

Ultimately, on June 29, 2021, VanderGalien entered pleas of no-contest to Counts 1, 3, and 13 of the Second Amended Information with counts 2, 4, 5, 6, 7, 8, 9, 10, 11, and 12 dismissed and read-in. (R. 121, p. 18) Count 1 charged Homicide by Vehicle- Use of Controlled Substance, 2+ as to Victim G, in violation of Wis. Stat. § 940.09(1)(am); Count 3 charged Use of a Vehicle with Controlled Substance in Blood, Causing Great Bodily Harm as to Victim B, in violation of Wis. Stat. § 940.25(1)(am); and Count 13 charged Operating with a Restricted Controlled Substance in Blood Causing Injury, 2+, as to Victim S, in violation of Wis. Stat. §§ 346.65(3p) & 346.63(2)(a)3. (See R. 60) As part of the plea offer, the State agreed to cap its initial confinement recommendation to no

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Degree Reckless Injury, as to Victim B; (Ct. 3) Use of a Vehicle w/ Restricted Controlled Substance in Blood Causing Great Bodily Harm, as to Victim B; (Ct. 4) First Degree Recklessly Endangering Safety as to Victim A; (Ct. 5) Operating w/Restricted Controlled Substance in Blood Causing Injury, 2+, as to Victim A; (Ct. 6) First Degree Recklessly Endangering Safety, as to Victim R; (Ct. 7) Operating w/ a Restricted Controlled Substance in Blood Causing Injury, 2+, as to Victim R; (Ct.8) First Degree Recklessly Endangering Safety as to Victim D; (Ct. 9) Operating w/Restricted Controlled Substance in Blood causing Injury, 2+, as to Victim D; (Ct. 10) First Degree Recklessly Endangering Safety as to Victim K; (Ct. 11) Operating w/Restricted Controlled Substance in Blood Causing Injury, 2+ as to Victim K; (Ct. 12) First Degree Recklessly Endangering Safety as to Victim S; and (Ct. 13) Operating w/Restricted Controlled Substance in Blood Causing Injury, 2+, as to Victim S. (R. 53)

[4] Counts 2-13 of the Second Amended Information mirror counts 2-13 of the First Amended Information. In the Second Amended Information, Count 1 was amended to a charge of Homicide by Vehicle-Use of Controlled Substance, 2+, as to Victim G.

more than the maximum term of initial confinement for Counts 1 and 13. (*Id.* at p. 3) The State was free to recommend any length of extended supervision. (*Id.*) Based on his plea to counts 1, 3, and 13, VanderGalien faced a maximum total term of 58 years 6 months Wisconsin State Prison at sentencing, which was to occur on September 15, 2021.

In preparation for sentencing, a PSI was written by the Department of Corrections. (R. 77) There, the Department recommended VanderGalien be sentenced to consecutive terms of 12 years initial confinement and 8 years extended supervision on Count 1; 5 years initial confinement and 5 years extended supervision on Count 3; and 3 years initial confinement with 3 years extended supervision on Count 13. (R. 77, p. 45) A private PSI was also filed with the court, and that writer argued that the Department of Corrections' sentencing recommendation was determined in a manner that was inconsistent with standard DOC policies. (See R. 82) The private PSI writer illustrated a *proper* application of the facts to the DOC sentencing framework in his report, (R. 82, pp. 5-9) and showed that instead, VanderGalien should be sentenced to consecutive sentences of 5-6 years initial confinement with 3-4 years extended supervision on Count 1; 1 year initial confinement with 1-2 years extended supervision on Count 3; and 1 year initial confinement with 1 year extended supervision on Count 13. (R. 82, pp. 11-12)

Approximately one week before sentencing, Attorney Snow became aware of an undisclosed conflict of interest with the Dodge County District Attorney's Office and its prosecution of VanderGalien. (R. 82, p. 4) Although previously unknown to the defendant, DA Klomberg's assistant, Paula Justman, had a close personal relationship with the deceased, Victim G. (*Id.*) Attorney Snow informed the court of this conflict in a September 14, 2021 sentencing

memorandum, (*id.*); however, the court and DA Klomberg both failed to address the conflict at the sentencing hearing. (See R. 124) As described in Attorney Snow's memorandum, Ms. Justman's daughter, Payton, dated Victim G prior to his death. (R. 82, p. 4) Ms. Justman made numerous public posts to a Facebook remembrance page for the deceased, and also contributed money to help cover funeral costs. (*Id.*) Moreover, Ms. Justman personally submitted a signed letter to the court prior to sentencing consisting of 4 written pages and 6 color photographs. (R. 81) Payton also submitted a lengthy letter and additional color photographs to the court to be considered at sentencing. (R. 80)

Attorney Snow's memorandum also provided a summary of sentences imposed in Dodge County for similar crimes to which VanderGalien had entered pleas. (See R. 84) There, Attorney Snow illustrated that the range of sentences ordered for these similar offenses included a low end of probation (with a withheld sentence) and conditional jail time, and a high end of up to 7 years initial confinement. (R. 84, p. 2) Snow additionally alleged that, based upon his research, no other defendant in the state of Wisconsin had *ever* been sentenced for an offense alleging: 1). Homicide by Vehicle-Use of Controlled Substance; or 2). Operating a Vehicle with a Restricted Controlled Substance in Blood Causing Great Bodily Harm; or 3). Operating a Vehicle with a Restricted Controlled Substance in Blood Causing Injury, where the only "controlled substance" at issue was BE. (R. 84, p. 2)

Additional Victim Impact Statements were then received before the parties began argument. During the State's presentation, DA Klomberg asked that VanderGalien be sentenced to 25 years initial confinement and 15 years of extended supervision on Count 1; 2 years initial confinement and 5 years extended supervision on Count 3, to be served

consecutively to Count 1; and 1 year initial confinement with 3 years extended supervision on Count 13, to be served consecutively to Counts 1 and 3. (R. 124, p. 90) DA Klomberg additionally made numerous representations to the court that by accepting the State's offer, VanderGalien affirmatively *admitted* that he committed the dismissed but read-in charges. (See R. 124) Attorney Snow challenged Klomberg's representations of the law, (R. 124, p. 24); and the parties argued back and forth about the meaning and effect of read-in charges. (R. 124, pp. 107-10) Ultimately, the court sentenced VanderGalien to 17 years initial confinement and 12 years of extended supervision on Count 1; 3 years initial confinement and 4 years extended supervision on Count 3, consecutive to Count 1; and 1 year 6 months initial confinement and 2 years extended supervision on Count 13, to be served consecutively to Counts 1 and 3. (R. 124, p. 118) The total sentence was 21 years, 6 months initial confinement and 18 years extended supervision. (*Id.*)

On July 29, 2022, a post-conviction motion for relief was filed in the circuit court. (R. 135) There, VanderGalien argued that: 1). the trial court erroneously denied his pretrial motion to dismiss all operation of a motor vehicle with a detectable amount of restricted controlled substance counts; 2). he was denied his constitutional due process rights when the Dodge County District Attorney's office failed to disclose a disqualifying conflict of interest and request the appointment of a special prosecutor; 3). he was entitled to withdraw his no contest pleas because his trial counsel was ineffective for failing to properly explain the actual meaning and effect of dismissed and read-in charges at sentencing; and 4). that he was entitled to withdraw his no contest pleas because they were not entered knowingly, voluntarily, and intelligently. (R. 135)

On October 14, 2022 the State responded and filed a Request to Deny VanderGalien's Post-Conviction Motions Without a Hearing. (R. 147) During the pendency of the post-conviction motion process, DA Klomberg left his position as the lead prosecutor for Dodge County for employment with the Green Lake County District Attorney's Office. However, instead of allowing an assistant district attorney to continue prosecuting the matter or appoint a neutral, disinterred prosecutor, the court merely appointed Klomberg as special prosecutor and allowed him to continue his unethical involvement in the case. (R. 156). Additional briefing occurred, and on February 24, 2023 the Court issued a decision denying all claims in VanderGalien's post-conviction motion without a hearing. (R. 158) This appeal follows.

ARGUMENT

I. INCLUDING BENZOYLECGONINE IN THE DEFINITION OF 'RESTRICTED CONTROLLED SUBSTANCE' FOR THE PURPOSES OF PROSECUTION UNDER THE WISCONSIN VEHICLE CODE HAS NO RATIONAL BASIS UNDER THE LAW AND IS THEREFORE UNCONSITUTIONAL BECAUSE IMPOSING STRICTLY LIABLE CRIMINAL PENALTIES FOR OPERATING A MOTOR VEHICLE WITH NON-IMPAIRING SUBSTANCES IN THE BLOOD IS NOT RATIONALLY RELATED TO THE LEGISLATIVE INTEREST OF COMBATING DRUGGED DRIVING.

Substantive due process provides protection from certain arbitrary, wrongful government actions. ***State v. Luedtke***, 2015 WI 42, ¶74, 362 Wis. 2d 1, 863 N.W.2d 433 (internal citation omitted). It further "forbids a government from exercising power without any reasonable justification in

the service of a legitimate governmental objective." ***Id.*** (internal citations omitted). It is not rational to conclude that the government's interest in protecting the highways from drugged driving is reasonably achieved by prohibiting any detectable amount of an inactive, non-impairing substance in a driver's blood stream. However, the definition of "restricted controlled substance" as applied to the Wisconsin vehicle code includes at least one substance that definitively has *no* effect on the central nervous system—benzoylecgonine ("BE"). Furthermore, the presence of BE in an individual's blood alone, without further evidence of impairment, provides no evidence that a person was actually under the influence of an impairing substance while operating a vehicle. Therefore, there is no rational justification for the independent inclusion of benzoylecgonine in the definition of "restricted controlled substance" as applied to the Wisconsin vehicle code, and the statute should be deemed unconstitutional. However, the circuit court erroneously failed to differentiate VanderGalien's constitutional claim from existing legal principles, and its decision, therefore, cannot be sustained.

A. Governing legal principles and standard of review.

Because the statute at issue in this case does not implicate a fundamental right or suspect class, it is subject to rational basis scrutiny. ***Id.*** at 76. Furthermore, existing caselaw proscribes that because Wis. Stat. § 346.63(2)(a)(3)- Operating a motor vehicle with a detectable amount of restricted controlled substance in the blood constitutes a strict liability offense, constitutional challenges to its application must be reviewed under the rational basis level of scrutiny. ***Id.***, at ¶¶76-78. Under rational basis review, a court must consider "whether the statute is a reasonable and rational means" to achieve the desired legislative end. ***Id.*** at ¶¶76-78.

The constitutionality of a statute presents a question law that the court of appeals must review independently of the lower court's decision. ***State v. Smet***, 2005 WI App 263, ¶5, 288 Wis. 2d 525, 709 N.W.2d 474.

B. The definition of "restricted controlled substance"

A validly licensed individual has the right to operate a motor vehicle on a public highway when he has no impairing substances in his system. As the circuit court held at the pre-trial motion hearing, the purpose of the operating with a detectable amount of restricted controlled substance laws exist to "combat the dangers associated with drugged driving." (R. 123, p. 61). Problematically, however, not all of the substances included in the definition of "restricted controlled substances" under the vehicle code actually cause impairment.

1. Wis. Stat. § 340.01(50m)

Wis. Stat. § 340.01(50m) (2019)[5] contains the definition of "restricted controlled substance" as applied to the Wisconsin Vehicle Code. The statue defines a "restricted controlled substance" as:

> (a) A controlled substance included in schedule I or II under schedule I or II under Ch. 961 other than tetrahydrocannabinol.
>
> (am) The heroin metabolite 6-monoacetylmorphine
>
> (b) A controlled substance analog, as defined in s. 961.01(4m),[6] of a controlled substance described in par. (a).

[5] All statutes cited in this brief were valid at the time of offense in 2019, unless otherwise specifically identified.

[6] "'Controlled substance analog' means a substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance included in schedule I or II and: 1). Which has a stimulant, depressant, narcotic or hallucinogenic effect on the central

(c) Cocaine and any of its metabolites.

(d) Methamphetamine;

(e) Delta-9-tetrahydrocannabinol.

Wis. Stat. § 340.01(50m). As exhibited, the definition of "restricted controlled substance" includes all substances that appear in schedules I or II under Chapter 961, or analogs of those substances (R. 16, p. 4) The substances listed in § 340.01(50m) are all impairing substances, *except* for the metabolites of cocaine.[7] (R. 123, p. 36)

2. Benzoylecgonine

When cocaine is broken down in the body for elimination, it is metabolized into multiple substances, known as metabolites, which includes benzoylecgonine ("BE"). (R. 123, p 34) BE is an *inactive* metabolite of cocaine, which means that it *does not* have an impairing effect on the central nervous system, or any other bodily system.[8] While the detection time of cocaine in the blood is 4-6 hours, the metabolite BE is detectable on average for 5.1 days after ingestion. **Alain G. Verstraete**, *Detection Times of Drugs of Abuse in Blood Urine, and Oral Fluid*, The Drug Monit. Vol.

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nervous system substantially similar to the stimulant, depressant, narcotic or hallucinogenic effect on the central nervous system of a controlled substance included in schedule I or II; or 2). With respect to a particular individual, which the individual represents or intends to have a stimulant, depressant, narcotic or hallucinogenic effect on the central nervous system of a controlled substance included in schedule I or II." **Wis. Stat. § 961.01(4m)**

[7] All metabolites of cocaine are generally inactive and therefore have no impairing effect. **Alan Wayne Jones**, *Perspectives in Drug Discovery*, 12. Cocaine, TIAFT Bulletin, Vol. XLIII, Number 2, 2013. The body *can* metabolize cocaine into cocaethylene when alcohol is also present, which can enhance impairment. ***Id.*** However, no cocaethylene was detected in VanderGalien's blood.

[8] ***Id.***

26, Number 2, p. 203, 2004. This means that after cocaine itself has gone from an individual's system and *all* impairing effects have ceased, there is an average period of time up to approximately 4.5 days in length where a person may have BE in their blood, although their body does *not* experience *any* impairment on their central nervous system. ***Id.*** Accordingly, BE is *not* a "drug."

C. The post-conviction decision

The post-conviction court summarily dismissed VanderGalien's constitutional claim as to the restricted controlled substance statute without conducting a thorough review of the actual challenge raised. Instead, the court held that:

> A party challenging the constitutionality of a statute must demonstrate that it is unconstitutional beyond a reasonable doubt. *State v. Wood*, 323 Wis. 2d 321 (2010). Operating with a restricted controlled substance under Wis. Stat. § 346.63(1)(am) is a strict liability offense that does not require scienter. In 2015, this statute was found to be constitutional by the Wisconsin Supreme Court. *State v. Luedtke*, 362 Wis. 2d 1, 14 (2015). The statute is unambiguous and rationally justified by the legislative intent to stop drugged driving. *See Luedtke***,** supra 362 Wis. 2d 1 at 36.

However, the constitutional challenge presented in ***Luedtke*** is distinct from that raised by VanderGalien, and the post-conviction court erred by failing to independently review the actual challenge presented under the proper framework.

D. *State v. Luedtke*

The constitutional challenge presented in ***State v. Luedtke*** is distinguishable from that presented by VanderGalien. In ***Luedtke***, the defendant was charged with one count of operating a motor vehicle while under the influence of a controlled substance (diazepam and methadone), as a

seventh, eighth, or ninth offense, contrary to Wis. Stat. § 346.63(1)(a) (2009-10) and one count of operating a motor vehicle with a detectable amount of a restricted controlled substance (cocaine and BE) in the blood, as a seventh, eighth or ninth offense contrary to Wis. Stat. § 346.63(1)(am). ***Id.*** at ¶2. A jury found Luedtke not guilty of operating a motor vehicle under the influence of a controlled substance but found him guilty of operating a motor vehicle with a detectable amount of a restricted controlled substance in the blood. ***Id.*** at ¶2. Luedtke filed a post-conviction motion arguing that the charge of operating a motor vehicle with a detectable amount of a restricted controlled substance in the blood was unconstitutional without a scienter requirement, because the statute would punish those who accidentally ingest a controlled substance. ***Id.*** at ¶3. The circuit court rejected Luedtke's challenge. ***Id.*** at ¶77.

On appeal, the Wisconsin Supreme Court considered both whether operating a motor vehicle with a detectable amount of a restricted controlled substance in the blood was a strict liability offense and, if so, whether the statute was constitutional as applied to Luedtke. ***Id.*** at ¶6. The Court held that the statute was a strict liability offense. ***Id.*** at ¶73. It also held that the statute was constitutional without a scienter requirement, because drivers who *unknowingly* ingest a restricted controlled substance "are at least as dangerous as those who knowingly ingest a controlled substance." ***Id.*** at ¶77. However, Luedtke *did not* adequately argue that he actually had accidentally consumed the restricted controlled substances found in his blood, so the court refused to fully consider that argument. ***Id.*** at ¶77, n. 20.

E. VanderGalien presents a different constitutional question from that considered in *Luedtke* and the post-conviction court erred by failing to conduct a full review of the claim.

The case at hand differs greatly from ***Luedtke*** because here, VanderGalien *only* tested positive for BE in his blood whereas Luedtke tested positive for *both* cocaine *and* BE. Because cocaine actually has an impairing effect on the central nervous system, Luedtke's factual circumstances and challenge to the restricted controlled substance statue were patently different than that presented by VanderGalien. Here, VanderGalien's constitutional challenge to the restricted controlled substance statute is specifically limited to circumstances wherein the *only* "restricted controlled substance" located in a person's blood has no impairing effect on a driver *and* has *no probative value* to assist in determining whether or not an individual actually was impaired at the time of driving.

As mentioned previously, BE is a *metabolite* of cocaine—not a drug. It does not impact the central nervous system or produce any physiological effect.[9] While the detection time of cocaine in the blood is 4-6 hours, BE is detectable *on average*, for 5.1 days—or 122.4 hours—after ingestion.[10] Therefore, BE, on average stays in a person's bloodstream up to 2,040% longer than cocaine. Accordingly, it is impossible to know from *just* the presence of BE in a person's blood stream whether or not that individual was actually suffering from impairment at the time of driving. Therefore, the presence of BE in a person's blood without the presence of additionally impairing substances *does not* make it more or less likely that the person was actually impaired while driving and *cannot* be rationally related to the governmental

[9] See n. 7.
[10] ***Id.***

objective of preventing impaired driving. However, the court failed to distinguish the challenge presented by VanderGalien from that already considered in ***Luedtke***, so no actual analysis was done under the appropriate rational basis constitutional standard. Accordingly, relief must be granted and further proceedings ordered therewith.

II. VANDERGALIEN MADE A SUFFICIENT FACTUAL SHOWING TO MERIT AN EVIDENTIARY HEARING ON HIS PROSECUTORIAL CONFLICT OF INTEREST CLAIM AND THE POST CONVICTED COURT ERRED BY FAILING TO CONSIDER HIS CLAIM UNDER THE PROPER LEGAL FRAMEWORK.

The Wisconsin Supreme Court has stated that "prosecutors must be ever mindful that they wield significant authority and must *carefully guard against the temptation to let personal considerations interfere with their obligation to seek justice.*" ***OLR v. Humphrey***, 2012 WI 32, ¶ 65 339 Wis. 29 531, 811 N.W.2d 363. (Emphasis added) A prosecutor's conflict of interest in a criminal matter can create prejudice necessitating invalidation of the entire proceedings. ***State v. Smith***, 198 Wis. 2d 584, 591, 543 N.W.2d 512 (Wis. App. 1995). If a defendant makes a prima facie showing that a charging decision was in some way influenced by the existence of a conflict of interest or that plea negotiations were distorted because of the conflict, it is incumbent upon the State to prove beyond a reasonable doubt that the conflict did not affect the proceedings. ***Id.*** (citing ***State v. Eison***, 194 Wis. 160, 178, 533 N.W.2d 738 (1995); ***State v. Britton***, 157 W.Va. 711, 203 S.E.2d 462 (1974)).

In this matter, a conflict of interest existed which ethically required DA Kurt Klomberg and the Dodge County District Attorney's Office to recuse itself from prosecuting this matter, and a special prosecutor should have been assigned. DA Klomberg's failure to disclose this conflict of interest or

request appointment of a special prosecutor violated VanderGalien's right to due process and all proceedings prior to discovery of the conflict should be nullified. However, the post-conviction court incorrectly invalidated VanderGalien's claim as "conflict of interest" and instead reviewed his claim for "prosecutorial vindictiveness." However, VanderGalien correctly raised and argued his claim as a prosecutorial "conflict of interest" and alleged sufficient facts to warrant an evidentiary hearing. Therefore, relief is necessary, and this Court should remand the issue to the circuit court for further proceedings.

A. General legal principles and standard of review

Whether a defendant's post-conviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. ***State v. John Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. First, a reviewing court must determine whether the motion, on its face, alleges sufficient material facts that, if true, would entitle the defendant to relief. ***Id.*** This is a question of law that must be reviewed de novo. ***Id.*** (citing ***State v. Bentley***, 201 Wis. 2d 303, 304, 548 N.W.2d 433) If the motion raises such facts, the circuit court must hold an evidentiary hearing. ***Id.*** (citing ***Nelson v. State***, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972))

However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or it the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing. ***Id.,*** citing ***Bentley***, 201 Wis. 2d at 310-11; ***Nelson***, 54 Wis. 2d at 497-98. A circuit court is required "to 'form its independent judgment after a review of the record and pleadings and to support its decision by written opinion.'" ***Id.***, quoting ***Nelson***, 54 Wis. 2d at 498. A circuit court's discretionary decisions are reviewed for erroneous exercise of discretion. ***Id.***

B. Prosecutorial conflicts of interest, generally

In its post-conviction decision, the circuit court held that "VanderGalien's claim is really for an alleged vindictive or retaliatory prosecution rather than a conflict of interest." R. 158 at p. 6. To support its conclusion, the court stated:

> There is no evidence that the prosecutor or Justman had access to any privileged or prejudicial information about VanderGalien that could have derived from a relationship between VanderGalien and anyone. The victims, and Justman, did not know VanderGalien. There is no evidence or even an allegation that the district attorney knew VanderGalien. The situation presented here does not fit within the general principles of conflict of interest.

R. 158, p. 6. However, the circuit court provided absolutely no caselaw or other legal authority in support of its contention that the situation presented "does not fit within the general principles of conflict of interest." This is highly problematic, as prosecutorial conflicts of interest are patently different than traditional attorney conflicts of interest.

Prosecutorial conflicts of interest "can arise not only out of personal and professional relationships and interests, but out of any personal belief, ambition, or institutional interest that undermines the prosecutor's ability to pursue justice in a disinterested way." **Bruce A. Green and Rebecca Roiphe**, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. Rev. 463 (2017), pp. 465-66. The assumption that prosecutors are relatively immune from conflicts of interest "overlooks the significance of non-financial self-interest." ***Id.*** at 472.

The law "presupposes that prosecutors make decisions disinterestedly, unaffected by their own self-interest of the interests of others, " but only because "public confidence in the fairness of the criminal justice system demands this." ***Id.*** at 466. However, prosecutors have broad discretion in

determining what "public interest" actually is, and "extremely limited oversight in the exercise of that discretion." ***Id.*** at 470. Because prosecutors themselves define the relevant public interests and objectives of a criminal prosecution, determining whether an interest is likely to "distort the prosecutor's judgment or conduct" is complicated. ***Id.*** at 471. Prosecutors have a duty to "do justice" which requires "impartiality, neutrality, and *especially disinterestedness*." ***Id.*** at 471. (Emphasis added). Therefore, "the concept of disinterestedness" sets a better standard when considering whether a prosecutorial conflict of interest exists. ***Id.***

Wisconsin case law provides scant guidance as to what constitutes a prosecutorial conflict of interest outside of a former attorney-client relationship. However, what little pertinent case law exists shows that prosecutorial conflicts of interest *can* exist outside of the "general principles of conflict of interest" referenced by the circuit court. *See* ***State v. Smith***, 198 Wis. 2d 584 (Where the Court held that a conflict of interest implicating a district attorney's "natural feelings of loyalty" to a family member did not result in prejudice because the conduct did not influence any charging decisions.) Wis. Stat. § 978.045, the statute governing the appointment of special prosecutors, however, does provide that a special prosecutor should not only be appointed when a conflict of interest involves a district attorney or assistant district attorney, but also when a conflict of interest exists regarding "the district attorney's staff." **Wis. Stat. § 978.045(1r)(bm)8.** Such "staff" would include a direct legal assistant of the District Attorney, like Ms. Justman.

C. A prima facie showing was made, and an evidentiary hearing should have been ordered

When considering VanderGalien's claim as a prosecutorial conflict of interest challenge instead of a prosecutorial vindictiveness claim, it is clear that sufficient

material facts were presented in his postconviction motion to warrant an evidentiary hearing. Here, VanderGalien has alleged that 1). the Dodge County District Attorney's office had a conflict of interest with this case that necessitated appointment of a special prosecutor; and 2). that this conflict prejudiced VanderGalien's constitutional rights to be prosecuted in a fair and neutral manner. (R. 152 at 7) For purposes of determining whether an evidentiary hearing should be held, the allegations in a defendant's post-conviction motion are to be taken as true. ***Allen***, at ¶12, n 6. If the facts in a motion "are assumed to be true, yet seem to be questionable in their believability," the circuit court *must* hold a hearing. ***Id.***, citing ***State v. Leitner***, 2001 WI App 172, ¶34, 247 Wis. 2d 195, 633 N.W.2d 207.

1. The conflict of interest

As to VanderGalien's alleged conflict of interest, the material facts presented in his post-conviction motion support inferences that directly relate to several potential areas where a prosecutorial conflict of interest could exist. These inferences and supportive material facts include, but are not limited to:

> Inference 1: Ms. Justman and her family members had a close personal relationship with the deceased, beyond that of a simply "friendly" nature. The relationship was that of a "familial nature."
>
> Supporting material facts:
>
> - In her letter to the court, Ms. Justman describes the shock and heartbreak her entire family felt upon learning of the identity of the deceased. (See R. 81, p. 1)
> - In her letter to the court, Ms. Justman describes the significant amount of time the deceased spent with her family, and his participation in familial type-activities. (See R. 81, p. 2-3)

- In her letter to the court, Ms. Justman states that the deceased "became a part of our family." (R. 81, p. 2)
- In her letter to the court, Ms. Justman states that the deceased and her younger daughter were "like brother and sister and they referred to each other as such." (R. 81, p. 3)
- In her letter to the court, Ms. Justman shared several, color photographs evidencing the familial relationship the deceased had with all members of her family. (R. 81, pp. 5-10)

Inference 2: Ms. Justman had a personal and/or vested interest in the outcome of this case and was personally, not professionally biased against VanderGalien.

Supporting material facts:

- Ms. Justman personally wrote a letter to the court "on behalf of the community" yet only detailed her, and her family's, personal experiences with the deceased. (See R. 81)
- In her letter to the court, Ms. Justman indicates knowledge and judgment of some of Mr. VanderGalien's Facebook content, which was not legally relevant to the matter at hand. (See R. 81, p. 1)
- In her letter to the court, Ms. Justman makes comments about admiring the deceased for certain religious convictions, while also condemning VanderGalien for not living up to her religious standards. (R. 81, p. 2-3)
- In her letter to the court, Ms. Justman makes judgments against Mr. VanderGalien for driving while "intoxicated" however there is no definitive evidence that Mr. VanderGalien ever actually consumed alcohol prior to driving.
- Despite the Dodge County District Attorney's knowledge that VanderGalien's prior conviction

for OWI was *not* with a minor child in the vehicle, Ms. Justman used these incorrect facts as a basis for her condemnation of VanderGalien. (R. 81, p. 4)

- Ms. Justman made numerous, public comments about the incident to a public Facebook remembrance page for the deceased. (R. 84)
- Ms. Justman contributed money to help cover financial costs for the family of the deceased. (R. 84)

Inference 3: Ms. Justman's relationship with the deceased and personal bias against VanderGalien was known by DA Klomberg and imparted upon the Dodge County District Attorney's Office.

Supporting material facts:

- Ms. Justman is a long-time employee of the Dodge County District Attorney's Office and worked directly under DA Klomberg. It would be unfathomable to believe that Ms. Justman would not have discussed her personal connection with this case—as well as her personally motivated bias towards the individual she considered responsible for his death, regardless of his actual legal culpability—with other office staff, especially her long-time, direct supervisor, DA Klomberg.

Inference 4: Paula Justman and the Dodge County District Attorney's personally motivated bias against VanderGalien caused him to be prosecuted more severely than would have occurred if the case was handled by a neutral prosecutor.

Supporting material facts:

- This case was charged by DA Klomberg in all filed Complaints and Informations.

- DA Klomberg personally prosecuted this case instead of assigning it to an Assistant District Attorney.
- This is the first known event of a defendant being charged and sentenced to violations involving Operating with a Restricted Controlled Substance, based only upon the presence of BE. (See. R. 84, p. 2)
- Despite not having left the jurisdiction in a year and VanderGalien's awareness that charges would be coming at any time, DA Klomberg issued a warrant for VanderGalien's arrest instead of arranging a voluntary surrender. (See R. 84, p. 2)
- DA Klomberg personally appeared in court for the initial appearance in this matter and requested a 100K cash bond. This bond was substantially higher than that sought in additional comparable cases, some of which the defendants were awarded signature bonds. (See R. 84, p. 2)
- DA Klomberg amended the charges in this case to more serious charges in a manner that is not consistent with the State's normal practice. (See R. 84, p. 2)
- Comparable offenses in Dodge County have been prosecuted much less aggressively, with significantly lower sentencing recommendations from the court. (See R. 84, p. 2)
- No one from the Dodge County District Attorney's office ever disclosed Ms. Justman—the assistant of the prosecuting attorney's—relationship with the deceased with the defendant or trial counsel.

These inferences and supporting material facts implicate potential prosecutorial conflicts of interest in several areas,

because they definitively reveal that DA Klomberg and the Dodge County District Attorney's office were *not* otherwise *disinterested* in the prosecution of VanderGalien, as is required by prosecutorial ethical standards. See § 2.B, *supra*. Therefore, the record in this matter does not definitively preclude relief.

Legal authority provides that conflicts of interest for prosecutors are inherently different from those experienced by typical attorneys. **Green**, p. 465. While prosecutorial conflicts of interest may be more difficult to define, conflicts can, and do arise from situations other than just a prosecutor's prior representation of a defendant. ***Id.*** If the post-conviction court had assumed VanderGalien's allegations as true—as it was *required* to do under the law—it should have ordered a post-conviction evidentiary hearing take place so a factual record could be developed either confirming or denying his allegations. However, the court failed to do so, and instead, denied his claims under a standard VanderGalien never argued.

2. <u>VanderGalien was prejudiced by the Dodge County District Attorney's Office's conflict of interest in this matter.</u>

VanderGalien also made a satisfactory prima facie showing of prejudice as to the alleged conflict of interest. The impact of the conflict of interest and personal, impermissible bias of the Dodge County District Attorney's Office in this matter is abundantly clear when considering the charging decisions and negotiations in this case. As detailed by Attorney Snow in his sentencing memorandum, and also reiterated in VanderGalien's post-conviction motion:

> "The accident giving rise to the charges against Mr. VanderGalien occurred on July 30, 2019. On June 1st, [2020] an arrest warrant was issued for Mr. VanderGalien. Mr. VanderGalien was arrested and taken into custody, appearing for an initial appearance on June 2, 2020. DA Klomberg appeared for the State

> and requested a $100K bond, which was ordered. After litigating issues in the case, DA Klomberg amended the charges to much more serious charges than were initially charged, despite the fact that he had nearly a year to make a charging decision. And finally, the State's offer in this case, concerning its cap on a prison recommendation, is far removed from similar cases.
>
> Counsel points out these events because, while not improper on their face or in isolation, when viewed with the knowledge of the DA's personal relationship with the legal assistant [who submitted] the letter, [ ] support an inference of bias on the part of the DA. First why was it necessary to arrest an individual who had not left the jurisdiction for nearly a year, and certainly knew that he would be charged with some crime based on the accident? Second, why did DA Klomberg personally appear and request a $100K cash bond? This request was not in accord with any other bond request for similar crimes, as evidenced by the Courttracker information provided. The amendment of the charges to more serious charges is also not normal practice. In fact, normally amendments are to lesser charges to facilitate an agreement. Finally, why is the [sentencing] recommendation so far removed from all other similar cases? One cannot overlook the potential for bias when answering these questions."

(R. 84, pp. 3-4) However, these questions were never answered, as the circuit court did not consider VanderGalien's claims under the correct standard.

Therefore, the circuit court erred when it definitively held that a conflict of interest did not exist without first ordering an evidentiary hearing and remand is necessary to establish the extent of the prosecutorial conflict of interest.

III. VANDERGALIEN MADE SUFFICIENT PRIMA FACIE SHOWINGS IN HIS POST-CONVICTION MOTION TO MERIT EVIDENTIARY HEARINGS

ON BOTH GROUNDS FOR POST-SENTENCING PLEA WITHDRAWAL RAISED.

Under the United States Constitution, a guilty or no contest plea "must affirmatively be shown to be knowing intelligent and voluntary." ***State v. Brown,*** 2006 WI 100, ¶2, 293 Wis. 2d 594 (citing ***State v. Hampton,*** 2004 WI 107, ¶46 274 Wis. 2d 379; ***State v. Bangert,*** 131 Wis. 2d 246, 274 389 N.W.2d 12 (1986)). By pleading guilty or no contest to a crime, a defendant waives important constitutional rights, "including the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers." ***State v. Howell***, 2007 WI 75, ¶27-29, 301 Wis. 2d 350, 734 N.W.2d 48. Here, the meaning and effect of dismissed but read in charges at sentencing was not correctly conveyed to VanderGalien and an evidentiary hearing should have been ordered under both grounds raised in his post-conviction motion.

A. Governing legal principles

A defendant is entitled to withdraw his guilty plea after sentencing when he can show a manifest injustice by clear and convincing evidence. ***Bentley***, 201 Wis. 2d at 311. The manifest injustice test is met if a defendant received ineffective assistance of counsel. ***Id.*** A defendant may also demonstrate manifest injustice by showing that his plea was not entered knowingly, intelligently, and voluntarily. ***State v. Hoppe***, 2009 WI 41, ¶60, 317 Wis. 2d 161, 661 N.W.2d 407.

In assessing ineffective assistance of counsel claims in the context of a guilty or no contest plea, courts use the two-part test delineated in ***Strickland v. Washington***, 466 U.S. 668, 104 S.Ct. 2052 (1984). Consequently, a defendant must show that counsel's performance was both deficient and prejudicial. ***Bentley***, 201 Wis. 2d at 312. To prove deficient performance, a defendant must "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable

professional judgment." ***Strickland***, 466 U.S. at 690. To establish prejudice, a defendant seeking to withdraw a guilty plea must show "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." ***Bentley***, 201 Wis. 2d at 313-314 (citing ***Hill v. Lockhart***, 474 U.S. 52, 59, 106 S. Ct. 366 (1985)). A claim of ineffective assistance of counsel requires that a postconviction hearing be held "to preserve the testimony of trial counsel." ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

When considering whether a defendant's plea was entered knowingly, intelligently and voluntarily, a court should consider whether a defendant had an accurate understanding of the potential penalties associated with the conviction. ***Bangert***, 131 Wis. 2d at 261 (citing ***McCarthy v. United States***, 394 U.S. 459, 465, 89 S.Ct. 1166 (1969)). Whether a defendant's plea was entered knowingly intelligently and voluntarily presents an issue of constitutional fact and necessitates an evidentiary hearing under *Nelson/Bentley***.** *See* ***Hoppe***, at ¶61, (citing ***Brown***, at ¶19)

B. Standards of review

When reviewing a circuit court's decides to deny a motion for plea withdrawal without a hearing, a reviewing court must determine as a matter of law, independently of the circuit court, whether the defendant's motion to withdraw a guilty plea on its face alleges facts which would entitled the defendant to relief, and whether the record conclusively demonstrates that the defendant is entitled to no relief. ***Howell***, at ¶78.

C. The circuit court's rationale for denying an evidentiary hearing under both standards is premised upon factually irrelevant conclusions.

While VanderGalien raised two bases for plea withdrawal in his post-conviction motion, both involved the meaning and effect of dismissed but read in charges at sentencing. Therefore, it is not surprising that the circuit court denied both claims in tandem. However, the court's denial was based entirely upon conclusions that are not factually relevant to the issue at hand. The court held that:

> [Portions of the transcripts] show that the Court had an understanding of how the Court would consider the read in charges. The read-in charges were considered but the Court did not deem VanderGalien to have been convicted of any of them. At the plea colloquy, VanderGalien answered that he understood, that he had enough time to discuss the case with his lawyer, and he had no questions. VanderGalien said he had reviewed the criminal complaint with his lawyer and that all the facts in the complaint were true.

R. 158 at pp. 11-12. However, it is irrelevant to the issues presented whether or not the *court* "had an understanding of how the Court would consider the read in charges." What *is* relevant, is whether *VanderGalien* understood how the court would consider the read in charges.

VanderGalien presented an affidavit along with his post-conviction motion that, along with the record, provides a sufficient prima-facie showing to merit an evidentiary hearing. The sincerity and objective reasonableness of VanderGalien's claim of misunderstanding the effects of read-in charges at sentencing—and Snow's belief that he did not explain the meaning and effects correctly to his client—are supported by a simple review of the sentencing transcript itself.

A significant portion of the sentencing hearing was dedicated to a chaotic back and forth between the parties, arguing over the actual law behind the effect of dismissed but read-in charges. (See R. 124) And when the Court finally delivered its sentencing remarks, it did not actually resolve the disagreement between the two attorneys. (See R. 124, p. 109).

While the sentencing court stated that it believed "the principle behind read-in charges was made clear at the colloquy," the record does not support such a conclusion. If the sentencing court actually had made the principle behind read in charges clear at sentencing, then why were two trained, experienced criminal trial attorneys—who were both present for the colloquy—arguing on the record over the meaning and effect of read-in charges? How did the post-conviction court determine whether or not Attorney Snow correctly advised VanderGalien of the effects of read-in charges when the sentencing court did not clarify what it believed the proper standards were? How did the post-conviction court determine that VanderGalien actually entered his plea knowingly, intelligently, and voluntarily when there is no testimony from his attorney establishing whether or not his explanation was consistent with the standards the sentencing court actually implemented?

VanderGalien has not alleged that he was unaware that charges would be dismissed and read-in as part of his plea agreement, but rather that he was misadvised by his attorney—off the record—of the actual meaning and effect of dismissed but read-in charges. Nothing in the plea colloquy transcript recited by the court in the post-conviction decision remedies the misinformation which VanderGalien has alleged he received from trial counsel, and as a result nothing in the plea colloquy alleviates the need for an evidentiary hearing to develop a factual record as to these issues at an evidentiary hearing.

In the post-conviction affidavit provided, VanderGalien has asserted that he did not know he would be perceived as having admitted to the conduct alleged in the read-in charges by entering no contest please to Counts 1, 3, and 13. He has asserted that if he had known that he would be perceived as having admitted to the conduct alleged in the read-in counts,

he would not have accepted the plea offer. (R. 136) He has asserted that if he had known that the read-in charges could have such a significant impact on the sentence imposed, he would have proceeded to trial. (R. 136) This fact alone is highly relevant and speaks directly to both grounds for plea withdrawal raised in VanderGalien's post-conviction motion, because the court relied heavily on the read in charges when it finally sentenced the defendant. ("Now I want people to know that [ ] I'm considering these read-in cases, the injuries that took place, to all the other people. This is [ ] a whole picture thing." (R. 124, p. 118).

VanderGalien's claims in his post-conviction motion that his pleas rested on trial counsel's incorrect advice and were not entered knowingly, intentionally, and voluntarily were supported by objective factual observations and reasonable assertions; as well as special circumstances which indicate that he placed particular emphasis on trial counsel's incorrect advice. *See* ***Bentley***, 201 Wis. 2d at 313-14 (citing ***Hill***, 474 U.S. at 60). Attorney Snow and DA Klomberg passionately debated the meaning and effect of dismissed but read in charges at length at the sentencing hearing, and it is preposterous to conclude that VanderGalien actually understood the meaning and effects of dismissed but read in charges when his attorney and the district attorney could not agree. Accordingly, the post-conviction court's decision should be reversed on both grounds for withdrawal raised and evidentiary hearings must be ordered so that the factual records regarding these issues can be adequately developed.

CONCLUSION

For the reasons stated above, Mr. VanderGalien respectfully asks the Court of Appeals to overturn the trial court's order denying his postconviction motions and remand the case for further proceedings consistent therewith.

Dated this 26th day of June, 2023

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13-point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 8,259 words.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

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

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

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