State of Wisconsin

Court of Appeals

District II

Case No. 2024AP2239

State of Wisconsin,

Plaintiff-Respondent

v.

Jennifer R. Smart,

Defendant-Appellant

On a Notice of Appeal from a Judgment of Conviction
and Order Denying Postconviction Relief
Entered in the Circuit Court for Waukesha County,
the Honorable Ralph M. Ramirez, Presiding.

Brief of Defendant-Appellant

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Defendant-Appellant

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Legal Standing for Appeal

Referencing American Bar Association Criminal Justice Standard § 22-2.4 (Statute of limitations; abuse of process; stale claims) states:

(a) "A specific time period as a statute of limitations to bar post-conviction review of criminal convictions is unsound"

(b) "Abuse of process ought to be an affirmative defense to be specifically pleaded and proved by the state"

(c) "Where an applicant has completed service of a challenged sentence and belatedly seeks relief ,...[a] sufficient postconviction showing of present need is made where:". . . (iii) "an applicant is under a civil disability resulting from the challenged conviction and preventing the applicant from a desired and otherwise feasible action or activity."

Postconviction Remedies Chapter 22 in ABA Standards for Criminal Justice Volume IV, 2nd Edition (1980), p. 22•25, postconviction-remedies-2d-ed.,ch22 pdf (americanbar.org); 1986 supplement, post-convictionremedies-2d-ed-ch22-supp. pdf americanbar.org), p. 22•26, Post-Conviction Remedies, https://www.americanbar.org/groups/criminal_justice/resources/standards/post-conviction-remedies/. Scroll down to Standard 22-2.4. Statute of limitations; abuse of process; stale claims.

Statement of Issues

I. Smart was denied her right to effective assistance of counsel.

II. There was not a factual basis for the charges.

III. The plea negotiations and pleas were not knowing, voluntary, and intelligent.

Statement on Oral Argument and Publication

This case may be resolved by applying established legal principles to the facts of this case. Smart does not request oral argument. Smart does request publication because the case presents due process issues that are important for maintaining public trust in the criminal justice system.

Statement of Case and Facts

On June 11, 1999 Jennifer R. Smart was convicted of two counts of felony child abduction and one misdemeanor count of causing a person who has not attained the age of 18 years[1] to expose genitals (R. 5 at 19-20, 7-8, 1-2, App., p. 80).

1 Child defined: Wis. Stat. § 948.01(1) (1997).

Three years after Smart was convicted, the plea hearing transcript was sent to the Wisconsin Department of Corrections and Smart was notified that she would have to comply with sex offender registration (R. 2 at 1, App., p. 72).[2]

Twenty years after she was convicted, Smart was notified that she was required to comply with sex offender registration for the rest of her life (R. 30 at 1, App., p. 74).

Jennifer R. Smart was wrongfully convicted by the suppression of evidence, and the manipulation of laws and legal procedures. Smart will show why it took twenty five years to uncover the wrongful convictions.

The issues Smart raises are due process violations under U.S. CONST. amend. VI, § 1., amend. XIV., and WIS. CONST. art. I. § 7. The issues could not have been raised earlier because they were concealed in court proceedings that Smart had no reason to question. But the case has had an unreasonable outcome—just a year and one half in jail but a lifetime requirement to register as a sex offender.

For over twenty-two years, Smart remained unaware of any legal standing to approach the court for relief from the criminal convictions imposed on her on June 11, 1999. That started changing after April 19, 2019 when she was notified of the lifetime requirement for sex offender registration.

2 All highlighting is supplied for ease of reference.

After other attempts to seek justice, Smart sent a letter to the responsible official seeking review of her plea agreement, and relief from the public registry (R. 8 at 2, App., p. 75). The responsible official scheduled a hearing for November 15, 2021.

While awaiting the hearing, Smart had begun looking at the court record and discovered that she had unknowingly accepted a plea bargain. Without having explained the nature of the charges to Smart, counsel and the assistant district attorney worked out a plea bargain arrangement where two felony counts of second degree sexual assault (Wis. Stat. § 948.02(2),[3] would be dismissed in exchange for a misdemeanor count of exposing genitals (Wis. Stat. § 948.10(1) (R. 5 at 95, App., p. 46). Unknown to Smart however, both the second degree sexual assault charges and the exposing genitals charge were based on the specific criminal intention that Smart had been sexually aroused or sexually gratified in her relationship with JD. Sexual arousal or sexual gratification are the crucial second part of the definition of sexual contact. *See* Wis. Stat. § 948.01(5). Smart had no idea of the maneuvers being used to negotiate the plea bargain.

3 Case statutes from 1997-98.

Smart made another discovery—SD's murder/suicide threats (R. 5 at 29 ¶ 2, App., p, 32) and counsel's entire discovery had been suppressed from court proceedings. Counsel's Defendant's Sentencing Memorandum and eight attachments containing exculpatory evidence did not enter the court record until after Smart was convicted. Smart had made involuntary pleas and the material facts of SD's murder/suicide threats had been withheld from the court.

On October 25, 2021, (three weeks before the scheduled hearing regarding the requirement to register as a lifetime sex offender), Smart filed a letter with the court explaining why she believed she had been wrongfully convicted (R. 19 at 1, App., p. 76).

On November 11, 2021—four days before the hearing—Smart motioned the lower court to vacate and expunge the convictions (R. 20 at 1, App., p. 78).

Before September of 2021, Smart had no basis for questioning the original court proceedings leading to the convictions. She had been biding her time expecting to be released from the registry on August 19, 2023.[4] Smart's primary issues for the upcoming November 15, 2021 hearing were to be: **#1.** Smart was not given notice of the requirement to register as a sex offender until three years after sentencing;

4 The release date was calculated based on Wis. Stat. 301.45(5)(a)1.

#2. Smart was given notice of requirement to register as a **lifetime** sex offender on April 19, 2019—almost two decades after being convicted; **#3.** The requirement to register as a sex offender was not in the judgments of conviction (R. 5 at 19-20, 7-8, 1-2, App., p. 80); **#4.** Counsel had assured Smart that she would not have to register (included in her plea bargain—so she thought) (R. 5 at 95, 98, App., p. 46-47). These were the original issues that Smart planned to bring forward at the upcoming hearing. But with her expanding knowledge of the case, the issues had changed.

The final revelation came when Smart discovered that counsel had not represented her. Counsel did not advocate for her. Counsel's admitted failure to represent Smart, is evident in an explanation that follows item #1— *Background Letter from Jennifer to Attorney [BSC]* (R. 5 at 36, App., p. 69)—of his table of attachments. The explanation reads:

> This letter was originally handwritten by Jennifer to Attorney [BSC] to provide him with background information in this matter. It was written over six months ago [January 17, 1999], at a time when it was not contemplated that this information would be presented to the court. It is included here because it

provides Jennifer's perspective from her jail cell at an early stage in this case.[5]

Counsel's Defendant's Sentencing Memorandum, Smart's letter (attach. #1) (R. 5 at 37-44), and the other seven attachments contained the evidence that should have been used to defend Smart, but was **not** presented to the court until after Smart was convicted. Although Smart was given copies of these undated documents of record, she had no reason to examine them. In September of 2021, Smart realized that they were the discovery documents that counsel had collected but never used to defend her.

Until September of 2021 (decades after being convicted), Smart had no reason to question how counsel had proceeded in litigating her case. By counsel making numerous court requests concerning college entrance activities, Smart was led to believe that he was functioning as her defense attorney.

Counsel led Smart to believe that she would avoid substantial prison time **only** by accepting the plea bargain that he had negotiated with the prosecutor (R. 5 at 95, App., p. 46). That may have been true, had Smart actually committed the crimes. By suppressing SD's murder/suicide threats and by concealing from Smart the nature of the crimes being

5 "[O]ver six months ago" + January 17, 1999 = July 26, 1999—the day counsel filed the Defendant's Sentencing Memorandum and eight attachments under 98CF762 R. 3 at 16 (off the record).

attributed to her actions, counsel was not acting in her defense. Smart entered into the deceptive plea bargain on June 7, 1999 (R. 5 at 95, App., p. 46). Taking a closer look at the plea negotiations—the supposed plea bargain had been in place from the day charges were filed on October 22, 1998 (R. 5 at 127, 129, App., p. 11-12). Smart pled no contest and was convicted of two felonies—the check marked child abduction charges, (App., p. 11). Smart pled no contest and was convicted of the misdemeanor exposing genitals—the notation at bottom of p. 3—Ct 5 amended inform. Exposing —, App., p. 12). *See* Argument II. But it was not until September of 2021—after examining court records for both the original and amended criminal complaints for both cases 98CF761 and 98CF762, and Muskego Police Report PR98-0475—that Smart discovered she had been wrongfully convicted.

ARGUMENT

I. Smart was denied her right to effective assistance of counsel.

Weeks before the preliminary hearing, Smart explained to counsel the situation leading to the filing of charges. Smart met SD through SD's daughter, SF, one of Smart's classmates. When Smart was chumming with SF, SF's little brother JD was always tagging along. Smart got to know JD and they started to enjoy each other's company (attach. 1 at 5) (R. 5 at

41 ¶ 4, App., p. 23). SD needed help to pay her expenses, and help with JD. Smart needed a place to stay close to work. SD suggested that Smart could rent her walkout basement rec-room for her living quarters. Smart agreed. It was a convenient arrangement for both SD and Smart (R. 5 at 27 ¶ 3, App., p. 57).

Smart described to counsel how her relationship with JD progressed—which she would later commit to writing in the January 17, 1999 letter, requested by counsel: "My intention by moving in with [SD] at the mid/end of summer…changed from wanting to help [SD] financially and keep J out of boredom and trouble with the law as a result, to needing someone who needed me. Maybe I'm wrong, but I truly believe that J needed me. We spent so much time together So much conversation, etc. that I don't know how he could not have needed me. Suddenly it seems I didn't view him as a little brother, but as an equal, my uncomplaining companion." (R. 5 at 42, ¶ 1, App., p. 24).

Smart explained to counsel the living arrangement setup in SD's walkout basement rec-room. Smart rented the walkout basement rec-room on the south side of a two family equally-divided townhouse. Looking at the duplex as a whole, at first sight, it may appear that there was more than one room in the walkout basement. Not so. The rec-room was the **only**

room in the walkout basement of SD's side of the duplex. (R. 28 at 1, App., p. 29). The walkout basement rec-room was used by both JD and Smart. The walkout basement rec-room was JD's space before Smart started staying there. It was JD's space while Smart was there. And it was JD's space after Smart was told to leave. In the criminal complaint, SD referred to the walkout basement rec-room in two ways—both as "[a] room in the basement" that she rented to Smart (R. 5 at 128 ¶ 6, App., p. 26), and as JD's "bedroom in the basement" (R. 5 at 128 ¶ 5, App., p. 26). The end result was that SD rented space to Smart that was already being used by JD.

Counsel knew that SD had a gun because Smart explained to counsel how she had talked SD into temporarily surrendering the weapon during an incident at a party (R. 5 at 30 ¶ 2, App., p. 31).

Smart explained to counsel SD's assault on her—which would later be documented in counsel's Defendant's Sentencing Memorandum (R. 5 at 29 ¶ 2, App., pp. 30-31).

Counsel knew that during the evening before JD left with Smart for Lac du Flambeau, SD threatened to shoot them both, then kill herself. JD reported the threats to the Lac du Flambeau police when he was taken into custody on October 7, 1998 (R. 5 at 29 ¶ 2, App., p. 30). Counsel had all of this information before the preliminary hearing.

In spite of the information provided by Smart and the district attorney, on the day of the preliminary hearing—when Smart requested that counsel question SD about her role in the events leading to the charges—counsel emphatically refused. SD had already been cast as the victim (R. 2 at 5:23, App., p. 36). Counsel refused to do anything to challenge that perception. The court reporter's notes verify counsel's refusal to confront and cross-examine SD (R. 5 at 121, App., p. 43).

In *Custis v. United States*, 511 U.S. 485, 494-495, "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel" (quoting *Powell v. Alabama*, 287 U. S. 45, 68-69 (1932)). In Smart's case, starting at the preliminary hearing, counsel did not exercise Smart's right to be heard. Competent representation required counsel to confront and cross-examine Smart's accuser, SD, to get to the truth of the matter. Without Smart's attorney offering her any defense, it was simple for a court commissioner to find probable cause that six felonies had been committed (four for 98CF761 and two for 98CF762). While not advocating for Smart, counsel had no problem letting SD maintain the victim role.

After the preliminary hearing, counsel requested a background letter from Smart. In that letter Smart states (regarding the charges of sexual assault), "I do believe that

my feelings for J weren't a reaction to some internal carnal need to get some play. If I was really in need of sex, I didn't need a 13-year-old for it" (R. 5 at 43, ¶ 1, App., 25). Now, verifying what Smart had told counsel prior to the preliminary hearing, counsel had Smart's written statement attesting to her non-sexual relationship with JD.

Three months before the plea hearing, counsel hired a specialist to examine Smart in relation to the sexual assault charges (R. 5 at 45-52). The specialist's findings verified what Smart had told counsel. There was no evidence of Smart being sexually motivated in her interactions with JD. The consultant stated, "[Smart] was not seeking personal sexual gratification," (R. 5 at 51 ¶ 1, App., p. 21).

With the expert's findings in agreement with Smart's statements to counsel, counsel could have defended Smart against the second degree sexual assault allegations. But counsel withheld Smart's statements and the expert's findings until after Smart was convicted.

Counsel had a witness who understood Smart's concern for JD's need for protection. The parents of the witness penned their letter of support for Smart five days after the preliminary hearing. Both the author and her husband signed it. Counsel did not contact the parents of the witness. Counsel

presented their letter to the court after Smart was convicted (R. 5 at 62 ¶ 4, App., p. 44).

In *Strickland v. Washington*, 466 U.S. 668, 688 (1984), 104 S. Ct. 2052, "Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest (citation omitted). From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause… Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *See Powell v. Alabama*, 287 U. S., at 68-69.

In her January 17, 1999 letter to counsel, Smart ponders the second degree sexual assault charges, "Honestly, I didn't even know giving a kid a hand job with his consent was illegal" (R. 5 at 42 ¶ 1, App., 24). It is obvious by this statement that Smart did not understand the charge of second degree sexual assault. Smart was led to believe that her actions were the crimes. But counsel did not advise Smart, otherwise. To the contrary, counsel allowed Smart to persist in the belief that she had sexually assaulted JD by virtue of their actions.

Smart states in her letter to Judge Mawdsley before sentencing: "Your Honor, my charges are much more serious

than I realized when I committed them. In spite of the severity of the crimes I committed last year, I had no intentions of harming anyone who was involved, directly or indirectly" (attach. 8) (R. 5 at 75, ¶ 3, App., 54). And later (in the same letter), "I have deep remorse for having committed these crimes. I will never know the full impact of what I have done to those involved, directly or indirectly, which bothers me continuously" (R. 5 at 76, ¶ 1, App., 55).

These were not the thoughts and words of a person with prurient interests, criminal intentions, or concealed guilt. These were the statements of a person who was misinformed. Smart was not apprised of the nature of the violations—sexual arousal and sexual gratification. Counsel was obligated to inform Smart of the meaning of sexual contact. But counsel did not inform Smart of the meaning of the second degree sexual assault charges or the definition of sexual contact.

Under Wisconsin Supreme Court rules (Chapter 20A - Rules of Professional Conduct for Attorneys (Jul 01, 2023) Client-Lawyer Relationship: (SCR) 20:1.1 Competence[:] "A lawyer **shall** provide competent representation to a client" (emphasis added). "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Under SCR

20:1.1, *supra*, "legal knowledge," it was of paramount importance for counsel to know and inform Smart of the definition of "sexual contact" because sexual contact contained the nature of the second degree sexual assault charge against her—sexual arousal and sexual gratification.

Sexual contact is defined in the first section of Chapter 948 Crimes Against Children at Wis. Stat. § 948.01(5). Sexual contact is a required element of the charge of second degree sexual assault and has its own jury instruction—Wis. JI—Criminal 2101-A (7/2024) Sexual Contact § 948.01(5). *See also,* Wis. Stat. 948.02(2) and Wis. JI—Criminal 2104 (2020) SECOND DEGREE SEXUAL ASSAULT of a Child. Counsel did not advise Smart of this critical information.

Given that counsel did not inform Smart of the nature of the charges, Smart thought she had no defense. Therefore counsel's plea negotiations were her only way forward. Not being informed of the criminal intent elements for any of the charges, made it impossible for Smart to participate in fair plea negotiations—what's more, advance to a fair plea hearing.

Statements made by Smart both before and after the negotiations show that she was not seeking sexual arousal or sexual gratification in her interactions with JD. Since Smart was not made aware of the sexual arousal and gratification

element common to the crimes of second degree sexual assault and exposing genitals, she unknowingly agreed to the terms of the plea negotiations.

Regarding the misdemeanor charge—exposing genitals (Wis. Stat. § 948.10(1)): During the plea hearing, counsel told the judge, "I have gone through a guilty plea questionnaire with Jennifer this morning and I filed that with the court" (R. 2 at 2:16-19, App., p. 48). Counsel concealed the elements of criminal intent when filling out the plea questionnaire: First, counsel allowed Smart to initial the box on page 2. labeled: **Each element of the crime(s) to which I am pleading.** By not showing, explaining, or requiring Smart to state the crucial element prefacing the exposing genitals charge (Wis. Stat. § 948.10(1)), **"Whoever, for purposes of sexual arousal or sexual gratification,"** Smart remained uninformed of the criminal intent being attributed to her actions; Second: the "See attached sheet" check box is blank. The "attached sheet" could have been jury instructions showing Smart what the prosecutor would have had to prove to get a conviction for child abduction.[6] But counsel did not show Smart jury instructions. Smart was not asked to write down the elements of the charges. Instead, at the plea hearing, she repeated parts of statutes that counsel had told her to say;

6 Wis. JI—Criminal 2160 (1/2023) Abduction of Another's Child.

And Third: counsel signified: “I believe [Smart] understands this document and the plea agreement, and is making this plea freely and voluntarily, and intelligently” (R. 5 at 99, App., p. 49). Counsel’s ‘belief’ was in error because counsel had not explained to Smart the elements of the charges.

In Defendant's Sentencing Memorandum under the subheading Sex Offender Assessment—written by counsel—counsel summarized the sex offender assessment report, stating: ‘Ms. Sherman found that the sexual contact between Jennifer and [JD] appeared to be “an isolated incident since Jennifer does not appear to be sexually drawn to others significantly younger than herself”’ (R. 5 at 31 ¶ 1, App., p. 66). Counsel misrepresented the specialist. Ms. Sherman did not find sexual contact between Smart and JD. Ms. Sherman did not, even once, use the phrase “sexual contact” in her entire report. While Ms. Sherman (the expert) was presenting Smart’s actions as protective and nurturing, counsel was introducing sexual contact.

Ms. Sherman said this: #4. “[Smart] was not seeking personal sexual gratification;” #5. “Jennifer denies having received sexual gratification from the offenses;” #7. “Jennifer’s conduct appears to have been motivated by a want to nurture and protect JD” (R. 5 at 51, App., p. 21). Counsel had the specialist’s report over two months before the plea

hearing (R. 5 at 45-52), but counsel failed to use the report findings to counter the charges of second degree sexual assault.

By counsel saying that Smart had sexual contact, he was contradicting the specialist that he had hired to examine Smart. By saying Smart had sexual contact, he placed himself in agreement with the prosecution—saying, in effect, that Smart had been sexually aroused and sexually gratified in her interactions with JD. The criminal complaints presented no evidence that Smart's interactions with JD were for her sexual arousal or gratification. Reiterating what counsel claimed the specialist had said, counsel brought up "sexual contact" again in Defendant's Sentencing Memorandum under the subheading Jennifer's Character: "Although there was sexual contact between Jennifer and [JD], she neither has a history of being attracted to younger males, nor is she sexually drawn to them" (R. 5 at 34 ¶ 1, App., p. 67). By repeatedly saying Smart had sexual contact with JD, counsel made a clear showing that he was not advocating for Smart but assisting the State in validating the dismissed and read-in charges of second degree sexual assault.

Regarding the Child Abduction charges (Wis. Stat. § 948.30(1)(a)), the statute reads:

> Abduction of another's child; constructive custody. (1) Any person who, for *any unlawful purpose*, does any of the following is guilty of a Class C felony: (a) Takes a child who is not his or her own by birth or adoption from the child's home or the custody of his or her parent, guardian or legal custodian (emphasis added).

Smart told counsel that SD threatened to shoot JD, Smart, and herself the evening of October 5, 1998. To avoid the possibility of SD acting on the threats, Smart offered for JD to travel with her up north. She had a safe place to stay with family on the Lac du Flambeau Reservation. Counsel was aware of SD's threats from the discovery materials given to him by the district attorney but he allowed them to be suppressed from court proceedings.

Counsel had a potential witness to SD's threatening behavior. In one of the character witness letters that counsel requested, the writer stated: "I fully believe that [Smart] felt this boy was in danger at his home and this belief has been corroborated by our daughter" (R. 5 at 62 ¶ 4, App., p. 44). The aforementioned "daughter" was a fellow classmate of Smart and SF (SF being SD's daughter). Counsel withheld the statement from the court. Whatever evidence could have been

used to advocate for Smart, counsel kept out of the view of the court.

Counsel had gathered exculpatory evidence months before the plea hearing, but counsel did not use any of the evidence to defend Smart. Instead, he allowed the prosecution to suppress SD's threats of violence and infer that Smart's actions were sexually motivated.

Under "preparation," *see* SCR 20:1.1, counsel was fully prepared: Counsel had advance notice in Criminal Complaint PR98-10710 telegraphing the prosecutor's plea bargain ploy, via the check-marked child abduction charges and the handwritten misdemeanor notation—Ct. 5 amended inform. Exposing— (R. 5 at 127, 129, App., p. 11-12). *See* Argument II; counsel had SD's murder/suicide threats from the Lac du Flambeau police report; counsel had a defense witness (attach. 4 at 4) (R. 5 at 62, App., p. 44); counsel had Smart's statements and her background letter (attach. 1) (R. 5 at 37-44); counsel had the findings of a sex offender specialist (attach. 2) (R. 5 at 45-52, App., p. 21); counsel had numerous character witness letters from associates of Smart (attach. 4) (R. 5 at 57-67, 78-81). But counsel kept it all under cover until six weeks after Smart's June 11, 1999 convictions.

Smart started her investigation of the convictions due to a perceived violation of her so called "plea agreement." In

retrospect, being that Smart was not informed of the criminal intent attributed to the offenses, the agreement not to be placed on the sex offender registry as part of plea negotiations was not unreasonable. However, counsel's wording of the agreement was both misleading and without any meaning: "Specifically, the [S]tate will not request that the court consider requiring Jennifer to comply with the reporting requirements for sex offenders under section 301.45 and 973.048, Wis. Stats" (R. 5 at 95, 98, App., p. 46-47). The agreement was empty—asking the State to do nothing but apply the law.

Counsel did not address sex offender registration at the plea hearing or thereafter. Under Wis. Stat. § 973.048(2m), counsel could have motioned for a hearing wherein to present his collection of exculpatory evidence. Instead, counsel allowed the court to determine that Smart's conduct was sexually motivated.

Three years after Smart was convicted, her probation officer informed her that if she did not register as a sex offender, he would have her arrested. When Smart called counsel and told him that her plea bargain had been violated, he responded in a letter, "I explained to you that since I have been unable to provide any explanation for the fact that the child abduction conviction required sex offender registry and

that I apparently failed to advise you of that, I must conclude at this point that I failed to properly advise you of that fact." (R. 29 at 1, App., p. 73).

Counsel wanted to avoid a jury trial. In one of his higher education requests for Smart, counsel made this irrelevant statement: "I am still hopeful that these cases can be resolved without trial" (R. 5 at 110, App., p. 45). At the time of sentencing, counsel opined to the judge how Smart was convicted so economically: "A minimum of court and prosecutorial resources have been used to obtain the two felony and one misdemeanor convictions which Jennifer pled to" (R. 5 at 34 ¶ 2, App., p. 68).

Smart believes the two requirements for ineffective counsel have been met. In *Strickland*, 466 U.S. 668, 687: "[F]irst,...counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. [S]econd,...the deficient performance prejudiced the defense...[c]ounsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

II. There was not a factual basis for the charges.

The case at hand commenced with an assistant district attorney filing a criminal complaint (district attorney file PR98-10710) entitled:

CRIMINAL COMPLAINT

on October 22, 1998 (R. 5 at 127-30, App., p. 5).

The next day, October 23, 1999, the same assistant district attorney filed an amended criminal complaint (state file 98CF761) (R. 5 at 3-6, App., p. 15) entitled:

AMENDED
CRIMINAL COMPLAINT
(Correcting Middle Initial)

Smart was also a defendant in a case associated with the aforementioned complaints, so while the complaints stated above were being filed, the complaints in the associated case were also being filed. The headings for the associated complaints were exactly the same because the same issue was being addressed—correcting Smart's middle initial. However, the cases were handled differently.

In the associated

AMENDED
CRIMINAL COMPLAINT
(Correcting Middle Initial)

Smart's middle initial was corrected from 'K' to 'R.' The clerk filed a certification that the amended criminal complaint was a true copy of the original criminal complaint. And proper warrants were issued. However, that did not happen in

the case at hand. The complaint was altered so it could not be true copied; and Smart's middle initial was not corrected (R. 5 at 3-6, App., p. 15).

The hand-written notation at the bottom of page three in the original criminal complaint, did not appear in the amended complaint. The notation is somewhat abbreviated but it shows exactly what the prosecutor was going for on the day he filed the original charges—including the hand-written "**Ct 5 amended inform. Exposing—"** (R. 5 at 129, App., p. 12). To break it down: There would be a fifth count; it would be documented in the AMENDED INFORMATION (R. 5 at 101-102, App., p. 13); and the charge would be Exposing genitals. *See* Wis. Stat. § 948.10(1). That is exactly what came to pass seven and one half months later. The prosecutor filed the complaint. No warrant of record exists for the complaint. It was just there. And it remained there for all to see, except for Smart. From the day the complaint was filed, all—except Smart—were privy to the results of the plea negotiations and the plea hearing (R. 5 at 101-102, App., p. 13). The complaint with "**Ct 5 amended inform. Exposing —"** showed—from the beginning—the prosecutor's true intention, while the complaint without it showed only the felonies that Smart was faced with after the preliminary hearing INFORMATION was filed (R. 5 at 119-120, App., p.

19). By allowing the two complaints to coexist, the State violated Smart's right to due process because Smart was not given notice of the charge that would be used to coerce her no contest plea.

It is fair to surmise that it was never the prosecutor's intention to stand before a jury and prove beyond a reasonable doubt that Smart was guilty of either second degree sexual assault or child abduction. The prosecutor already knew that he would not need to do that. Trading two second degree sexual assault felonies for a causing to expose misdemeanor was an irresistible plea bargain. The assistant district attorney used the second degree sexual assault felonies to bait Smart into a plea of 'no contest' to the misdemeanor charge of exposing genitals. The assistant district attorney's confidence was such that he used the predictory "amended inform." to signal the outcome of the plea hearing on the day he filed the charges (R. 5 at 127, 129, App., p. 12) (R. 5 at 101-102, App., p. 13).

"The purpose of an[y] information is to inform the accused of the charge against [her], so that the accused will have an opportunity to prepare a defense."[7] Smart was not afforded that due process because the forgone conclusion of the prosecutor's case—forecast on October 22, 1998 in **Ct 5**

7 West's Encyclopedia of American Law, edition 2. Copyright 2008 The Gale Group, Inc. All rights reserved.

amended inform. Exposing— was sprung on Smart shortly before the June 7, 1999 plea negotiations—four days before the plea hearing, and after being jailed for six and one half months (R. 5 at 95, App., p. 46). Looking back to the preliminary hearing INFORMATION (R. 5 at 119-120, App., p. 19), Smart knew only that she was charged with two counts of felony child abduction, two counts of felony second degree sexual assault (R. 5 at 119-120, App., p. 19), and facing a possible eighty years in prison. Smart was not aware of **Ct 5 amended inform. Exposing—** lurking in the background.

Regarding the plea negotiations dismissing and reading in the second degree sexual assault charges (that were dismissed and read-in in exchange for the **Ct 5 amended inform. Exposing—** charge): The negotiations were implemented by keeping Smart ill-advised as to the nature of both the second degree sexual assault charges and the exposing charge. Sexual arousal and gratification—the underpinning element of both of the charges—was not made known to Smart and was not Smart's intention with JD.

Regarding the abduction charges: Smart's purpose was to protect JD, SD, and herself from SD acting on murder/suicide threats (R. 5 at 29 ¶ 2, App., 32). The flash point for JD leaving home with Smart was SD's rage—culminating in life threats being directed at JD. Smart thought that by JD going

with her to visit her mother, SD would calm down (R. 20 at 2, App., p. 79).

Smart's intent was to protect JD from physical and emotional harm. Smart's purpose was without criminal intention.

The State did not establish an unlawful purpose for Smart allowing JD go with her. The plea hearing judge made no effort to discern Smart's intentions for any of the charges (R. 2 at 10:18-23, App., p. 53). SD's threats of murder/suicide were absent from the police report (R. 25 at 7, App., p. 33); and Smart's purpose to protect JD, SD, and herself from SD acting on the threats was suppressed from evidence starting with the police report (R. 25 at 7, App., p. 33).

Although the detective knew of SD's threats of murder/suicide from the Lac du Flambeau police report, he excluded the threats from his own reporting the day after (R. 25 at 7-8, App., pp. 33, 42). The report posits that JD left home just because SD was yelling at him (R. 25 at 7, App., p. 33). The detective had the Lac du Flambeau police report where JD reported SD's threats of murder/suicide. The detective was therefore aware that Smart had a reason for allowing JD to accompany her. And, the detective reported nothing about child abduction in his report (R. 25 at 1-9).

By the detective failing to acknowledge SD's murder/suicide threats, he had transformed SD into a victim (R. 2 at 5:23, App., p, 36) and Smart into a criminal, thereby aggravating the circumstances under which Smart would invite JD to leave with her again.

Police report PR98-0475 documents the detective's request for an arrest warrant for Smart for second degree sexual assault (R. 25 at 8, App., p. 42). But Smart could not be arrested without SD being implicated. By SD's own statement—if her accusations were true, then SD had failed to protect JD from sexual assault. SD claimed sexual activity had started in early August and SD was first reporting the activity two months later—on October 6, 1998 (R. 5 at 127-28, App., p. 34-35). *See* Wis. Stat. § 948.02(3): Failure to Act.

In the police report filed on October 8, 1998, the detective's confusion about the meaning of sexual contact is documented. He intermixed "intimate contact" with "sexual contact"—applying the plain meaning of "sexual contact" to JD in the police report (R. 25 at 7-8, App., p, 40-41). Then when he filed the criminal complaint two weeks later, he applied the **legal** meaning of "sexual contact" to Smart (R. 5 at 127, ¶ 6-128 ¶ 2, App., p. 9-10). Both contradictory applications of sexual contact referenced the same events.

Starting with the wording in the police report to its final rendition in the criminal complaint: first it was JD's 'intimate contact' with Jennifer Smart; then it was JD's 'sexual contact' with Jennifer Smart. After a complete 180°, it had become Jennifer Smart's 'sexual contact' with JD…." "Sexual contact" had migrated from the plain meaning applied to JD, to the legal definition applied to Smart. As it appears in second degree sexual assault Wis. Stat. § 948.02(2), sexual contact is, at first, ambiguous because it is **legally** defined elsewhere at Wis. Stat. § 948.01(5). But both parts of sexual contact are essential to establish criminal intent—the action and the intention. The wording of the second degree sexual assault charges misled Smart into thinking that she had committed second degree sexual assault. Here is how the charges were advanced in the criminal complaint:

Count #3:

"Jennifer K. Smart, did: have sexual contact … by touching the person's penis with her hand, contrary to Section 948.02 (2), Wisconsin Statutes;" (R. 5 at 127, ¶ 6-128 ¶ 2, App., p. 9).

Count #4:

"Jennifer K. Smart, did: have sexual contact … by the person touching the breast of the defendant, contrary to Section 948.02 (2), Wisconsin Statutes" (R. 5 at 127, ¶ 6-128 ¶ 2, App., p. 10).

Stated in this manner, a reasonable person—without the help of a defense attorney—would assume that the "touching" is the crime. And that is exactly what Smart thought. The affirmative declaration that Smart had sexual contact by her actions with JD, served to obscure the fact that sexual contact required an action to be coupled with a specific criminal intention. "Sexual contact" is legally defined at Wis. Stat. § 948.01(5). "Sexual contact" means [in this case]: (a) Intentional touching by the complainant or defendant, either directly or through clothing by the use of any body part or object, of the complainant's or defendant's intimate parts **if that intentional touching is either for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant** (emphasis added).[8]

By Smart being misled into the foreordained plea bargain, the State avoided having to prove criminal intent by avoiding a jury trial (R. 5 at 34 ¶ 2, App., p. 68). *See, State v. Arden Krueger,* 2001 WI App 14, ¶ 9, 240 Wis. 2D 644, 623 N.W.2d 2113 where a case was reversed for not including the element of sexual arousal and gratification in a jury instruction.

Since the prosecution suppressed SD's murder/suicide threats, all of the charges were half-proofs[9] because criminal

8 Wis. JI—Criminal 2101-A (7/2024) Sexual Contact § 948.01(5)

9 BLACK'S LAW DICTIONARY (Abr. 7th ed. 2000).

intent was not established. Allowing JD to accompany her after SD uttered life threats was not done "for any unlawful purpose." Pleasing JD, a willing adolescent, without the intent for personal sexual arousal and gratification is not second degree sexual assault. At best, the charges established hidden rebuttable presumptions that went unchallenged. All of the charges were open to attack by competent counsel. Smart's actions were not meant to humiliate or degrade JD or sexually arouse or gratify herself. Smart was without criminal intent. Without the specific intent of sexual arousal and/or sexual gratification, there was no sexual contact, no second degree sexual assault, and no causing to expose genitals.

Going back to the onset of the police detective's investigation starting on October 6, 1998—over two weeks before criminal complaints were filed—SD told the police detective that she suspected JD had become sexually active with Smart starting in early August. Without questioning SD about the two-month delay in reporting the alleged sexual assaults (R. 5 at 127-28, App., p. 34-35),[10] the detective launched a sexual assault investigation against Smart. (R. 25 at 2, App., p. 37).

SD told the detective "several days after Jennifer Smart moved in she went downstairs and found her son, [JD],

10 FAILURE TO ACT under Wis. Stat. § 948.02(3) is, also considered sexual assault.

sleeping in the same bed as Jennifer. [SD] indicated that her son was wearing jeans and a T-shirt and Jennifer was wearing a night shirt. [SD] indicated that [Smart] advised [SD] that she was just talking to [JD] and they fell asleep. [SD] indicated that she told Smart that it better not happen again. [SD] indicated that several days later she again caught [JD] sleeping in the same bed as Jennifer. [SD] [sic] was again wearing a night shirt and [JD] was wearing clothes" (R. 5 at 128, App., p. 38). When the detective fact-checked [JD] about these specific instances on October 8, 1998, JD responded. "I did not do anything with Jennifer Smart during those times" (R. 25 at 7, App., p. 39).

Although the detective and the prosecutor learned that SD's accusations against Smart were untrue on October 8 1998 (R. 25 at 7, App., p. 39), they still included them in the criminal complaints filed on October 22nd and 23.rd

Wis. Stat. § 968.01(2) states: "The complaint is a written statement of the **essential facts** constituting the offense charged" (emphasis added). Smart was charged with child abduction while SD's murder/suicide threats were suppressed.

In going from the plea negotiations to the plea hearing—then to the sentencing hearing, in *State v. Szarkowitz*, 157 Wis. 2D 740, 753, 460 N.W. 2d 819 (Ct. App. 1990), the court

wrote that "In Wisconsin, when a defendant agrees to crimes being read-in at the time of sentencing, [s]he makes an admission that [s]he committed those crimes." However, in *State v. Cleaves*, 181 Wis. 2D 73, 80 (1993), 510 N.W.2d 143, the court stated, "*In the absence of any objection to the crimes* being read-in, the court may assume that the defendant admits them for purposes of being considered at sentencing" (emphasis added). Smart did not object to the crimes being read-in because she mistakenly believed she was guilty, **when in fact she was not.** In Smart's case, counsel and the prosecution took advantage of the read-in procedure to dismiss and have read-in charges that were without a factual basis. Smart had been led to believe that she was guilty of second degree sexual assault, just because of her actions with JD.

Austin v. State, 43 A.L.R. 3d 274, 49 Wis. 2D 727, 183 N.W.2d 56, (quoting *Embry v. State* (1970), 46 Wis. 2d 151, 157, 174 N.W. 2d 521), provides the explanation of the read-in procedure. "In sentencing, a trial judge *must* consider the nature of the crime, the character of the accused, and the rights of the public" (emphasis added). *Austin*, 49 Wis. 2D 727 at 729. Unknown to Smart, the court used sexual arousal and gratification as the nature of the read-in charges. Wis. Stat. § 971.08(1)(b) provides that before a circuit court

accepts a defendant's guilty plea, it must "make such inquiry as satisfies it that the defendant in fact committed the crime charged." And that applies to the dismissed but read-in charges, also. In Smart's case, the nature of read-in offenses prejudiced Smart, because the nature of the offense itself remained undisclosed to Smart, while the sentencing judge was considering it for sentencing. It was of particular importance for the trial court to be assured of Smart's understanding of the nature of the dismissed charges because it was that very nature**—for purposes of sexual arousal and sexual gratification—**that was being presumed for the child abduction and exposing genitals charges. In *State v. Lackershire*, 2007 WI, 74, 301 Wis. 2d 418, 734 N.W. 2d 23: 'Wisconsin Stat. § 971.08(1)(b) provides that before a circuit court accepts a defendant's guilty plea, it must "make such inquiry as satisfies it that the defendant in fact committed the crime charged."' *Lackershire*, 2007 WI, 74, ¶ 33. Establishing a sufficient factual basis requires a showing that "the conduct which the defendant *admits* constitutes the offense charged . . . " (emphasis added). *Id*, at ¶ 33. *See, White v. State,* 85 Wis. 2D 485, 488, 271 N.W.2d 97 (1978) (quoting *Ernst v. State*, 43 Wis.2d 661, 674, 170 N.W.2d 713 (1969)). The factual basis requirement "protects a defendant who is in the position of pleading voluntarily with an

understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." *Lackershire*, 2007 WI, 74, ¶ 35.

At Smart's plea hearing:

> THE COURT : All right. The negotiation , please.
>
> MR KRUEGER: Judge, we are going to file an amended information after today's date adding a count to 98-CF-0761.
>
> THE COURT: Yes.
>
> MR KRUEGER: The charge will be causing a child to expose his genitals to an adult, which is a nine month misdemeanor.
>
> THE COURT: All right.
>
> (R. 2 at 6:17 - 7:1, App., p. 50)).

Neither the judge, the prosecutor, nor counsel stated the crucial requirement prefacing a violation of Wis. Stat. § 948.10(1): "Whoever, for purposes of sexual arousal or sexual gratification,…."

Later, in the plea colloquy, the judge said this:

> Q You further understand by pleading guilty you are relieving the State from proving each and every material allegation contained in this criminal complaint in Count 1 and Count 2 and, in the amended complaint, Count 5.

A Yes, sir. (R. 2 at 10:18-23, App., p. 53).

The court erred in accepting a guilty (no contest) plea by only addressing Smart's actions, without establishing criminal intent. Smart's intentions were not addressed. Therefore the State was **not** relieved of establishing the material allegations contained in the criminal complaints leading to the SECOND AMENDED INFORMATION (R. 5 at 101-02, App., p. 70). In *State v. Nichelson,* 220 Wis.2d 214, (1998), 582 N.W.2d 460,

> [A] defendant must understand the nature of the constitutional rights he or she is waiving before they can be waived. Included in these rights is the requirement that the state prove each element of the crime beyond a reasonable doubt. To waive this right, the defendant must know and understand all of the essential elements of the crime." *Nichelson,* 220 Wis.2d 214 at 220.

Regarding Count #1 and Count #2: The unlawful purpose for the child abduction charges was not addressed. Both the prosecutor and counsel suppressed SD's threats of violence. The threats led Smart and JD to depart for the reservation where Smart's mother resided with a great-aunt. As stated earlier, the police report made no mention of child abduction

(R. 25 at 1-9). By JD's statement to the Lac du Flambeau tribal police, the Muskego detective knew that prior to Smart and JD leaving, SD had threatened to shoot JD, Smart, and herself (R. 5 at 29 ¶ 2, App., 32).

Regarding Count #5: The preface to the exposing genitals charge, **"Whoever, for purposes of sexual arousal or sexual gratification,"** is an element of the crime of exposing genitals, and a part of sexual contact.

For purposes of sexual arousal or sexual gratification was not brought forth in the charging documents, the informations, the hearings, the plea negotiations, the plea questionnaire, and the plea colloquy. **For purposes of sexual arousal or sexual gratification** is plainly required for sexual contact and exposing genitals. *See* Wis, Stats. §§ 948.01(5) and 948.10(1).

The very fact that the element of intent is included in a criminal statute requires the court to address it. If the court does not address it, it proceeds without a factual basis. The court erred by not addressing Smart's specific intentions for any of the charges. The court was required to make further inquiry to establish a sufficient factual basis. The court did not fulfill this obligation.

Wis. Stat. § 968.01(2) states: "The complaint is a written statement of the *essential* facts constituting the offense

charged. A person may make a complaint on information and belief … the complaint **shall be made upon oath…"** (emphasis added).

Contrary to Wis. Stat. § 968.01(2) and under oath, a police detective attested to CRIMINAL COMPLAINT PR98-10710; he did so, excluding material facts—SD's murder/suicide threats—and without stating the required essential facts to find probable cause.

Likewise: Contrary to Wis. Stat. § 968.01(2) and under oath, an assistant district attorney filed CRIMINAL COMPLAINT PR98-10710 and AMENDED CRIMINAL COMPLAINT (Correcting Middle Initial) 98CF761; he did so, excluding material facts—SD's murder/suicide threats—and without stating the required essential facts to find probable cause. All of the charges were missing the crucial and required elements of criminal intent. Without establishing the elements of intent, all of the charges were without a factual basis.

III. The plea negotiations and pleas were not knowing, voluntary, and intelligent.

In *Berger v. United States*, 295 U.S. 78 (1935) the court said: "[T]hat allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against [her], so that

[she] may be enabled to present [her] defense and not be taken by surprise….” *Id. a*t 82. There was no trial for Smart because of plea bargaining. The “surprise” came twenty-two years later when Smart discovered the hidden nature of the charges against her.

Wis. Stat. § 971.08(1)(a) requires the court to, “[a]ddress the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.” That did not happen. During the plea colloquy the judge asked Smart:

> Q You understand what you’re charged with?
>
> A Yes.
>
> Q What are you charged with?
>
> A I’m being charged with abducting a child, two counts and causing a child to expose his genitals under the age of 15.
>
> Q That is correct. How do you wish to plead to these charges?
>
> A No contest. (R. 2 at 8:15-23, App., p. 52)

Smart repeated the criminal act part of each statute without knowing the elements of criminal intent. A guilty plea is an admission of all the elements of a criminal charge. “[I]t cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.” *McCarthy*,

394 U.S. 459 at 466. The judge must determine that the conduct which the defendant admits constitutes the offense charged. *Id.* at 467. This requires examination that "exposes the defendant's state of mind on the record through personal interrogation." *Id.* In *State v. Cecchini***,** 124 Wis. 2D, 200, 368 N.W. 2d 830, the court stated that prior to accepting a guilty no contest plea, the trial court must be certain that the defendant understands the nature of the charge, and this must be done on the record at the plea hearing. *Cecchini***,** 124 Wis. 2D, 200 at 201. "While the trial judge's constitutional duty to establish defendant's understanding of the charge on the record does not depend upon whether the charge is complex or simple, the trial judge must be even more solicitous in fulfilling this duty when the charge is not readily understandable by a lay person." *Id*. at 213-214 (quoting *Nash v. Israel,* 707 F.2d 298 (7th Cir. 1983) at 302, n. 6.).

The plea colloquy failed to address criminal intent for any of the charges. Smart was charged with two counts of abducting a child for an "unlawful purpose." But the unlawful purpose was not determined and proffered for Smart's acceptance and assent. With the Causing to expose genitals misdemeanor, the preface to the violation—"Whoever, for purposes of sexual arousal or sexual gratification"—was

neither openly disclosed to Smart, nor affirmatively admitted by her. What counsel told Smart to say is what Smart in turn told the plea hearing judge when he asked her, "What are you charged with?" Smart responded, I'm being charged with… causing a child to expose his genitals under the age of 15."[11] The judge responded, "That is correct" (R. 2, p.8, ln.17-21, App., p. 52 Smart's being uninformed and misinformed gave rise to perfunctory expressions of guilt. It was impossible for Smart's plea to be knowing, voluntary, and intelligent without knowing what she had been charged with.

Wis. Stat. § 971.08(1)(b) requires the court to, "Make such inquiry as satisfies it that the defendant in fact committed the crime charged." For a guilty plea to meet the constitutional requirement that it be knowingly, intelligently, and voluntarily entered, a defendant must be aware of all of the essential elements of the crimes. *State v. Jipson*, 2003 WI App 222, ¶¶ 9-10, 267 Wis. 2d 467, 671 N.W.2d 18.

Smart had no understanding of the charges other than the obvious actions that they referred to. As in *Smith v. O'Grady*, 312 U.S. 329, 334 (1941), 61 S. Ct. 572, Smart "had been denied any real notice of the true nature of the charge[s]

11 Wis. Stat. § 948.10(1) (1997) does not state, "under the age of 15." It states:
"Whoever, for purposes of sexual arousal or sexual gratification, causes a child to expose genitals or pubic area or exposes genitals or pubic area to a child is guilty of a Class A misdemeanor."

against [her]; the first and most universally recognized requirement of due process."

The nature of the allegations against Smart remained unaddressed. The U.S. Supreme Court stated: "By personally interrogating the defendant, not only will the judge be better able to ascertain the plea's voluntariness, but he also will develop a more complete record to support his determination in a subsequent post-conviction attack." *McCarthy v. United*, 394 U.S. 459 (1969) at 466. "Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void."

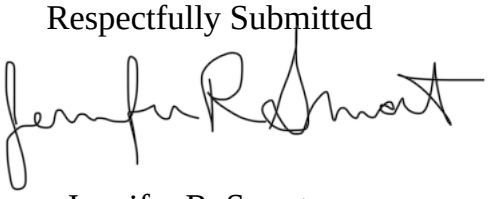
It was impossible for Smart's plea to be intelligent, knowing, and voluntary without Smart being informed of the essential elements of the crimes she was being charged with.

Conclusion

Wherefore, on the basis of the record on appeal, as it relates to the procedures and laws to be followed, and this defendant-appellant's affirmative showing of a manifest injustice, I, Jennifer R. Smart, pray this Court vacate all convictions and expunge all records in Waukesha County case number 98CF761 so that I may be afforded due process of law.

Dated at Confluence PA, January 16, 2025

Respectfully Submitted



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