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I N S U P R E M E C O U R T

Case No.: 2019AP000090-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

vs.

GEORGE E. SAVAGE,

Defendant-Appellant-Petitioner

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT I, REVERSING A DECISION DENYING DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE MARK SANDERS, PRESIDING.

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication are warranted.

STATEMENT OF THE CASE

The Petitioner's Brief has included a Statement of the Case. However, Defendant asserts that this Statement is materially incomplete.

Defendant had originally been charged in a one Count Criminal

Complaint. The Complaint had charged Defendant with one Count of Violation of Sex Offender Registry, contrary to Wis. Stats. 301.45(6), 301.45(6)1, and 939.50(3)(h). The Complaint had attached multiple pages of attachments. This Complaint had been dated on or about August 4, 2016. The Sex Offender registration requirement had occurred because Defendant had been convicted on November 3, 2014 of Exposing Genitals to a Child. He had received eighteen months of initial confinement plus two years of extended supervision. (2:1-10). Also, attached to the Complaint had been Sex Offender Registration paperwork that had indicated that Defendant's address was "homeless." (2:8).

Subsequently, Defendant had waived his preliminary hearing. The Court Commissioner had bound Defendant over for trial. This had occurred on February 28, 2017. Also on that date, the State filed a one Count Criminal Information charging the same one Count as in the Criminal Complaint. The court arraigned Defendant immediately after the bindover finding. Defendant pled not guilty. (43:1-5; 4:1-1).

Defendant pled guilty to the one Count of the February 28, 2017 Criminal Information. This occurred on May 23, 2017. Defendant pled guilty to one Count of Violation of Sex Offender Registry, contrary to Wis. Stats. Sec. 301.45(6)(a)(1) and 939.50(3)(h). (4:1-1).

Therese Dick was Defendant's trial attorney throughout the trial level proceedings. This had consisted of the initial appearance hearing through the plea/sentencing hearing.

The trial court had sentenced Defendant on May 23, 2017. This was the same day as, and immediately after, the plea hearing. This had been a combined guilty plea and sentencing hearing. At that hearing, the State had informed the trial court that Defendant had been released from prison on the underlying felony on March 23, 2016 (44:21). Hence, he was on extended supervision for two years following that date.

At sentencing, Judge Mark Sanders had sentenced Defendant to fifty four months prison, with thirty months as initial confinement plus twenty four months as extended supervision. The trial court ran the sentence concurrent to the time that he was presently serving on revocation. This revocation sentence was for two years. The court had indicated that he would have to do nine more months and then he would be on supervision for two years. (44: 25, 29-30) (11:1-2).

At the initial appearance hearing in this matter, trial attorney Therese Dick had informed the court commissioner that the Defendant was not unwilling or refusing to follow any registry requirements. Instead, he was homeless. The court had agreed that the Defendant did not have a home. (42:3-4). The Petitioner's Brief has failed to include this information.

Further, at the time of the plea/sentencing hearing, Defendant's trial attorney, Therese Dick, had informed the trial court of the following:

> ATTORNEY DICK: ..."I don't know how you can return a letter if you don't have an address for which the

letter to be sent.

I believe that was the issue for Mr. Savage and sadly for many others that they are incarcerated. Ultimately the sentenced is finished, completed, and they are released but often released back into the community with nothing. And I believe that was the situation for Mr. Savage.

In reviewing the notes from the agent and the registry, he was in fact, calling in, leaving messages with phone numbers, with addresses, emails which he could actually access at a library or other community centers and trying to do so.

...

It is noted in those reports it appears his intent was to remain compliant, but there's also an acknowledgment that it can be difficult. And I quote, 'This is happening quite a bit especially with the homeless.'

I believe that this is exactly the situation for Mr. Savage. The GPS here was discretionary. I don't know what the thought was behind that or the reasoning. But Mr. Savage was literally was staying where he could whether it was empty buildings, back of a car, stairwells.

...

I believe he was doing the best he could.

...

I also note they kept sending letters to an address where, in fact, the letters were returned." (44:23-25).

Trial counsel had indicated that, in her case notes, she had received information as to an email on 5/19/16 from DoC Employee AOR Akinsaya that "...since he reported the address to SORP, it may appear his intent is to remain compliant with SORP and just does not want to be on supervision (or follow the rules). This is

happening quite a bit especially with the homeless - and who have been through FTR cases already. I also note that he is on discretionary GPS so if arrested, a felony charge for tampering with it could not be issued." The case notes also indicate that the Department of Corrections was aware that the Defendant was homeless. See e.g, 5/18/16 email, as referred to by Ms. Dick. (20:Exhibit 3) (35:1-1). Petitioner's Brief did not fully indicate this sentencing argument.

Subsequent to Defendant's conviction, he had filed a Motion for Postconviction Relief. In this Postconviction Motion, he had indicated that prior to the guilty plea hearing, his trial attorney had made multiple representations to him that had induced him to plead guilty. These representations are as follows:

I. Defendant had discussed the plea offer with Ms. Dick over the telephone while he was at the Milwaukee County jail. This was prior to his transfer to Dodge Correctional Institution to serve his two year revocation sentence. He had indicated to her that he only wanted to accept a concurrent recommendation to this revocation sentence as part of the plea offer. She had informed him that the recommendation would be concurrent and that he would not serve any additional time. However, she had also indicated to him that she would confirm this with the assigned Assistant District Attorney.

Subsequently, Defendant had met with Ms. Dick the day before the plea hearing. This meeting was at the Milwaukee County jail. At that meeting, she had confirmed that the State's recommendation

was for a concurrent sentence. Once again, she had also indicated that he would not serve any additional jail time. This, based upon the recommendation. This was an unequivocal promise. Based upon this assurance, Defendant had accepted the plea offer. He would not have pled guilty otherwise.

As indicated by the Petitioner, this issue and matter is not presently before this Court. However, the Petitioner has raised in this matter. This, due to the Petitioner's position that the testimony that had occurred at the evidentiary postconviction hearing had applied to the second issue, presented below. However, this second issue is the only issue relevant to this present appeal, and the matter before this Supreme Court.

II. Ms. Dick had never informed the Defendant that good faith efforts to comply with his sex offender supervision requirements would bar his conviction. Essentially, he was homeless during the relevant time period of time. He now understands that this homelessness was a defense to his ability to provide an address. Ms. Dick had advised him of the elements of the offense, but she had never advised him that this defense was available to him. He had informed her of his homelessness, and his inability to provide an address due to this homelessness. He would have proceeded to trial had he realized from Ms. Dick that he could pursue this defense.

Defendant's Motion for Postconviction Relief had indicated that State vs. Dinkins, 339 Wis.2d 78, 810 N.W.2d 787 (2011) had indicated that a registrant cannot be convicted of violating the

sex offender registration statute for failing to report the address at which he will be residing when he is unable to provide this information. A registrant is unable to provide the required information when that information does not exist, despite the registrant's reasonable efforts to provide it.

The Postconviction Motion had indicated that Defendant had indicated that he had pled guilty to this above-captioned case only due to attorney Dick's representations, omissions, and promise(s) indicated previously. Defendant only signed the plea agreement because of these representations, omissions, and promise(s). If not for these representations, omissions, and promise(s), he would have proceeded to jury trial.

Defendant's Postconviction Motion had attached Savage's sworn Affidavit in support of Postconviction Motion in order to support all of Defendant's assertions. (20:Exhibit 4).

Defendant had argued that, clearly, the fact scenarios indicated within his Postconviction Motion had constituted an unknowing and involuntary plea.

Subsequent to the filing of Defendant's Postconviction Motion, the trial court had issued an Order for a briefing schedule. (21:1-1). The trial court had later modified this Order. (23:1-1). The State filed its Response Brief on June 11, 2018. (26:17). Defendant filed his Reply Brief on June 21, 2018. (27:1-10).

On January 3, 2019, the trial court considered both of Defendant's issues argued in his Postconviction Motion. On that date, the trial court had taken testimony, had heard oral

arguments, and had issued an Oral Decision denying both of Defendant's issues in his Postconviction Motion. (45:1-77). Also on that date, the trial court issued a written Order denying this Motion for Postconviction Relief. (37:1-1; A 103).

On January 3, 2019, the trial court took testimony from Terese Dick as well as the Defendant. As indicated, Ms. Dick had been Defendant's trial attorney during the trial case.

On January 3, 2019, Ms. Dick had testified that she had represented the Defendant during the trial portion of his case. (45:8-9). She had indicated that it was her understanding that the Defendant was homeless during the relevant time period. Petitioner's Brief does not indicate this testimony. She had agreed that she had documentation from the sex offender registration people concerning the Defendant. She had indicated that she had referred to this documentation at the sentencing hearing which had occurred the very same day as the guilty plea hearing. She had referenced to the court that the Defendant had been calling and leaving messages with phone numbers. The sex offender registration people had also been sending him letters and they were bouncing back. There was a reference that apparently his intent was to remain compliant. He had cut off his discretionary GPS, but this had only been discretionary. Defendant had introduced this documentation as Exhibit 1. This was the same documentation as Exhibit 3 to Defendant's Postconviction Motion. Ms. Dick had received this Exhibit as part of the discovery material. (44:13-16) 35:1-1).

Ms. Dick had continued to testify on January 3, 2019. She had agreed that she had hearing Exhibit 1 at the time of Defendant's plea and sentencing hearing. (44:16). Exhibit 1 had indicated that the Defendant had called the sex offender registration people on both May 16, 2016 as well as June 17, 2016. (35:1-1). Ms. Dick had acknowledged the phone call during her testimony. Further, Ms. Dick had testified that Exhibit 1 had indicated that Defendant had not received correspondence from the sex offender registration people. The documentation indicated that Defendant had called the appropriate phone number twice. He did give a new address. She had testified that she had told the court at the sentencing hearing that Defendant was, in fact, calling and leaving messages with phone numbers, with addresses, emails which he could actually access in the library or other community centers trying to do so. She acknowledged that she had received this information from the notes from the agent and the registry. She never told the trial court that she had received this information from the Defendant. (44:16-19).

Ms. Dick had continued to testify on January 3, 2019. She had testified that she had told the court during sentencing that it had appeared that Defendant's intent was to remain compliant, but that there was an acknowledgment that it can be difficult. This information was in the reports. She also told the court that this was happening quite a bit especially with the homeless. She also testified that she had told the court her opinion that this was exactly the situation for the Defendant. She had told the court

that the GPS was discretionary, but that the Defendant was literally staying where he could, whether it was empty buildings, back of a car, stairwells. (44:19-20).

On January 3, 2019, Ms. Dick had testified that she was somewhat familiar with the case State vs. Dinkins. She had testified that the author of the sex offender report, Exhibit 1, had indicated that Defendant's intent was to remain compliant. She had relayed this information to the trial court at sentencing. Empty buildings, back of a car, or stairwells were not addresses. The GPS had been discretionary, as indicated in Exhibit 1. She also had testified that the report that she had referenced at sentencing had indicated that on June 17, 2016 Defendant had called the sex offender registry that he did not receive a letter from them. (44:20-22).

On June 17, 2016, the author of Exhibit 1 had written that she or he had received a phone call from the Defendant reporting that he did not receive his letter and that he had called the appropriate phone number twice. The author of Exhibit 1 had indicated that it had appeared that his intent was to remain compliant. She had assumed that the writer of Exhibit 1 had been a specialist. (44:29-31).

Defendant George Savage had testified after Ms. Dick. He had testified that Ms. Dick had told him nothing about the defense of good faith efforts to comply with sex offender supervision requirements. She had never discussed this sort of defense with him. During the time of the period of supervision he had been

staying in alleys, back of cars, bus stops. He did not have a home. He also did not have an address that he could provide to the agent. He had called the Sex Offender Registration (SOR) people in Madison. He had never been given any protocol about how he should handle the situation if he was homeless. He had not been told to call in for daily locations or anything like that. She had never indicated to him that an inability to provide an address because of his personal situation was a defense. He had informed her of his situation. He had told Ms. Dick as well as his agent that he was living in abandoned buildings, bus stops, back of cars. His agent knew from the GPS that he was staying at a bus stop all night on a given night or on another night he was between blocks in the alley all night. Had he known about the defense he would not have pled guilty. Instead, he would have proceeded to trial. He had relied upon Ms. Dick's comments. (44:37-40).

Subsequent to the testimony, the trial court had issued its oral ruling. The trial court had simply indicated that, with respect to the inability to provide an address defense, that the Defendant had misconstrued Dinkins. The court had indicated that Dinkins had contained the words recited by the Defendant, but Defendant had misconstrued this case's meaning. The trial court had indicated that Dinkins had involved a Defendant who had been in custody on a sex related crime. The court had indicated that Dinkins was to report to the Sex Offender Registry but could not. This, because Dinkins had been in custody and was unable to find a place to live. The trial court attempted to distinguish Dinkins

from the present situation because of this custody status. The court had never discussed the factual matters concerning Defendant's situation. (44:71-75).

Contrary to the Petitioner, this decision by the trial court as to the Dinkins issue had been simply based upon legal considerations, not factual. The trial court had simply indicated that Dinkins did not legally apply in the present situation. The trial court had never discussed any factual issues, to include making credibility determinations, with respect to this issue.

Petitioner has discussed the trial court's assertions of Defendant's credibility at the evidentiary Postconviction hearing. Petitioner has indicated that these assertions are relevant to the appellate court's determinations of Issue II, the only issue relevant to this case. However, this indication is incorrect. The trial court's oral determinations concerning Defendant's credibility had applied to the first issue, that being any asserted promises by Ms. Dick to the Defendant to induce him to enter his plea. The court had concluded that it did not believe Defendant's testimony that his agent had told him that nothing would happen to him if he cut off his GPS tracking bracelet. However, the court utilized this credibility determination to deny only the first issue, which was Defendant's word against the word of his trial counsel. (44:66-69). Further, the court's sole reference to the bracelet, outside of credibility was that the court had stated:

> "Again, the representation about cutting off the GPS device by itself is largely irrelevant because it

> doesn't make that much difference as to any of the claims here except it does reflect strongly upon the Defendant's credibility." (44:68).

Once again, the trial court's sole determination with respect to Defendant's credibility had been as to the first issue, not the Dinkins issue.

Subsequent to the court's oral decision denying Defendant's Postconviction Motion, Defendant appealed that decision. Subsequently, the Court of Appeals reversed and remanded that decision. Essentially, the Court had indicated that Dinkins is well established and well settled law. The Court had indicated that the trial court had misconstrued Dinkins. According to the Court, and contrary to the trial court, Defendant might have a viable defense under Dinkins. The Court had not indicated that Defendant should lose, under consideration of Dinkins. Instead, the Court had simply remanded the matter back to the trial court for entry of factual findings with respect to Issue II, based upon this legal determination that Dinkins is well settled established law that might apply to the Defendant as a viable defense, under the facts of this case. Now, the Petitioner is arguing that this Court should make such factual determinations, contrary to other well established and well settled case law.

ARGUMENT

I. MS. DICK WAS PREJUDICIALLY INEFFECTIVE FOR MISINFORMING AND MISREPRESENTING DEFENDANT DURING THE CHANGE OF PLEA PROCESS. THIS CONSTITUTES MANIFEST INJUSTICE, THEREBY CONSTITUTING A VALID GROUND

FOR WITHDRAWAL OF A GUILTY PLEA. DEFENDANT IS ENTITLED TO WITHDRAW HIS GUILTY PLEA ON THIS BASIS. THE COURT OF APPEALS' HAD CORRECTLY DETERMINED THAT THE TRIAL COURT IS THE PROPER JURISDICTION TO MAKE SUCH A DETERMINATION OF THE VALIDITY OF DINKINS TO THIS CASE. FURTHER, THE COURT OF APPEALS HAD CORRECTLY DECIDED THAT THIS DEFENSE WAS VIABLE IN THE PRESENT SITUATION.

A. The Constitutional and Legal Standard.

The right to effective assistance of counsel stems from the Sixth Amendment of the United States Constitution and Article I, Section 7, of the Wisconsin Constitution, which guarantee a Defendant a fair trial and effective assistance of counsel. The test for ineffective assistance of counsel is two pronged. First, the Defendant must demonstrate that his trial counsel's performance was deficient; and second, the Defendant must demonstrate that the deficient performance prejudiced him. Strickland vs. Washington, 104 S.Ct. 2052, 466 U.S. 668 (1984); State vs. Sanchez, 201 Wis.2d 219, 227-228, 548 N.W.2d 69 (1996). In order to show prejudice, the Defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. State vs. Sanchez, 201 Wis.2d 219 at 236 citing Strickland vs. Washington, 466 U.S. at 694.

An appellate court will reverse a discretionary ruling if there is not a reasonable basis for the trial court's determination. State vs. Wyess, 124 Wis.2d 681, 370 N.W.2d 745 (1985); State vs. Alsteen, 108 Wis.2d 723, 324 N.W.2d 426 (1982).

B. The Standard for Withdrawal of Guilty Pleas after Sentencing.

A Defendant may withdraw a plea of guilty or no contest after sentencing if he or she is able to demonstrate that a manifest injustice would exist if the plea were allowed to stand. State vs. Reppin, 35 Wis.2d 377, 151 N.W.2d 9 (1967); State vs. Carlson, 48 Wis.2d 222, 179 N.W.2d 851 (1970).

Manifest injustice occurs under any of the following circumstances: (1) he was denied effective assistance of counsel guaranteed to him by constitution, statute or rule; (2) the plea was not entered or ratified by the defendant or a person authorized to so act on his behalf; (3) the plea was involuntary, or was entered without knowledge of the charge or that the sentence actually imposed could not be imposed; or (4) he did not receive the charge or sentence concessions contemplated by the plea agreement and the prosecuting attorney failed to seek or not to oppose these concessions as promised in the plea agreement. State vs. Rock, 92 Wis.2d 554, 285 N.W.2d 739 (1979), citing State vs. Reppin, 35 Wis.2d 377 at 385.

Furthermore, on timely application, the trial court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertance. LeFebre vs. State, 40 Wis.2d 666, 162 N.W.2d 544 (1968) citing Pulaski vs. State, 23 Wis.2d 138, 126 N.W.2d 625 (quoting Kercheval vs. United States, 274 U.S. 220, 47 Sup. Ct. 582, 71 L.Ed. 1009 (1927)).

A defense attorney must advise the client with complete candor concerning all aspects of the case. A.B.A. Standard for Criminal Justice, Standard 4-5.1(a) (The Defense Function: Third Edition,

August 1990). Furthermore, under no circumstances should a defense counsel recommend to a Defendant to take a plea unless appropriate investigation and study of the case has been completed, including an analysis of the evidence likely to be introduced at trial. A.B.A. Standard for Criminal Justice, Standard 4-6.1(b) (The Defense Function: Third Edition, August 1990).

A Defendant has a constitutional right to effective assistance of counsel during the plea bargain stage. Lafler vs. Cooper, 132 S.Ct. 1376, 566 U.S. 156, 182 L.Ed.2d 398 (2011); State vs. LaMere, 368 Wis.2d 624, 879 N.W.2d 580 (2016).

When a Defendant's assertion of a violation of a constitutional right forms the basis for a plea withdrawal request, he may withdraw the plea as a matter of right by demonstrating (1) that a violation of constitutional right has occurred, (2) that the violation caused the Defendant to plead guilty, and (3) that at the time of the plea, the Defendant was unaware of the potential constitutional challenge to the case against him or her because of the violation. State vs. Harris, 272 Wis.2d 80, 680 N.W.2d 737 (2004); State vs. Sturgeon, 231 Wis.2d 487, 605 N.W.2d 589 (Ct.App. 1999).

C. The Further Standard for Withdrawal of a Guilty Plea is with Respect to Trial Counsel's Failure to Advise the Defendant that his Homelessness was a Defense to the Charge. Based upon this Law Concerning this Legal Defense, the Trial Court had Materially Erroneously Erred in Denying Defendant's Postconviction Motion.

An attorney's performance was deficient when he was unaware of pertinent case law that would have supported a defense or

prevented a prejudicial error. State vs. Domke, 337 Wis.2d 268, 805 N.W.2d 364 (2011); State vs. Coleman, 362 Wis.2d 447, 865 N.W.2d 190 (Ct.App. 2015).

An attorney has a duty to advise the Defendant effectively throughout the plea process. This, with respect to defenses and the legal ramifications of a plea. Lafler vs. Cooper, 132 S.Ct. 1376 at 1383-1384; Padilla vs. Kentucky, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010). Affirmative misrepresentation of the law by a defense counsel can support a holding that withdrawal of a plea of guilty must be permitted because the plea is uninformed and its voluntariness is compromised. State vs. Dillard, 358 Wis.2d 543, 859 N.W.2d 44 (2014). The failure of an attorney to inform his client of the relevant case law clearly satisfies the first prong of the Strickland analysis, as such an omission cannot be said to fall within "the wide range of professionally competent assistance" demanded by the Sixth Amendment. Strickland vs. Washington, 466 U.S. 668 at 690.

Here, the Petitioner has argued that Defendant has failed to show a reasonable probability of success at trial, even with the Dinkins' defense. This, as a matter of law. Petitioner has cited Hill vs. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) for this argument. However, contrary to the Petitioner, and based upon the facts of this case as confirmed by the Court of Appeals, Defendant has met this standard.

A registrant cannot be convicted of violating Wis. Stats. 301.45(6) for failing to report the address at which he will be

residing when he is unable to provide this information. A registrant is unable to provide the required information when that information does not exist, despite the registrant's reasonable efforts to provide it. State vs. Dinkins, 339 Wis.2d 78, 810 N.W.2d 787 (2011).

Here, Defendant had indicated that his trial counsel had been prejudicially ineffective for failing to inform him that he could not be convicted of his failure to provide an address as part of his Sex Offender Registration Requirements due to his homelessness. This, because he did not have an address. Hence, his homelessness had prevented him from being able to provide an address. This defense was an absolute defense. The Court of Appeals had agreed that this might be a viable defense, pursuant to Dinkins. Prior to the plea hearing, trial counsel had information that he did not have an address. She had informed the court commissioner of such at the initial appearance as well as the trial court during the guilty plea/sentencing hearing. She had also informed the trial court during the sentencing hearing that he was trying to comply, but could not do so because of his personal conditions. He was living out of cars, in empty buildings, and in stairwells. These living conditions do not constitute "addresses." These are transient and on-the-street locations. Park benches, transient locations, or other on-the-street locations do not constitute an address for purposes of registration requirements. State vs. Dinkins, 339 Wis.2d 78 at 96. Trial counsel had confirmed at the January 3, 2019 evidentiary hearing that she had made such

representations to the trial court during the sentencing hearing. This had been the same date as the guilty plea hearing. The Court of Appeals had indicated such comments in its Decision.

Furthermore, Exhibit 3 to the Postconviction Motion, which had been Exhibit 1 to the Motion hearing, had indicated that the Department of Corrections had been aware that the Defendant was transient, homeless, and had lacked an address. For example, the agent had indicated on May 18, 2016 that the Defendant was homeless. Furthermore, as trial counsel had conceded at the evidentiary hearing, this Exhibit had indicated that Defendant had called the sex registry twice, and had acknowledged that he had not received the correspondence from the registry. He had been calling into the registry, and leaving phone numbers. Exhibit 1 had indicated that the Defendant had been attempting to remain compliant, but could not due to his personal situation. (35:1-1). Counsel had testified at the evidentiary hearing that she had known of such information, and had relayed it to the court on May 23, 2017.

Also, attorney Dick cannot argue that any failure to know of the case law and holding of State vs. Dinkins, cited above, is a defense to prejudicial ineffectiveness of counsel. As cited above, failure to learn of potential defenses and relevant and applicable case law is not a defense to prejudicial ineffectiveness of counsel. Clearly, Ms. Dick had known of the relevant facts that had further clearly warranted the defense cited in that case law. Hence, either: (1) any failure to learn of such a defense; or (2)

advise the Defendant of such a defense, would constitute prejudicial ineffectiveness of counsel.

Contrary to the Petitioner, there had not been any credibility determinations made by the trial court concerning the Dinkins issue. Here, the trial court had not discounted or rebutted any of Defendant's statements at the guilty plea/sentencing hearing, and as confirmed on January 3, 2019. This, with respect to this issue. The trial court had not discussed any of these facts or representations. The court had never discussed any of the relevant and pertinent facts, as previously discussed herein and adduced at the evidentiary hearing and Defendant's Postconviction Motion with respect to this issue. Instead, the trial court had simply focused on its belief that Dinkins had been limited solely to situations where Defendants cannot meet the sex offender registration requirements solely because of "impossibility" due to custody. However, the Petitioner is not disputing that the Court of Appeals had determined that Dinkins is well established law that might be applicable to the present situation.

Interestingly, the Court of Appeals conclusion that Defendant might have a viable defense under Dinkins had not been due to his testimony. Instead, the Court had made this decision based upon the trial counsel's comments and the SORP notes. The Petitioner has failed to note this fact.

In Dinkins, the Wisconsin Supreme Court had stated its holding as that a registrant cannot be convicted of violating Wis. Stats. 301.45(6) for failing to report the address at which he will be

residing when he is unable to provide the required information when that information does not exist, despite the registrant's reasonable attempt to provide it. Id. At 82. Here, the plain language of this case uses the word "unable" and not "impossible," as the trial court would interpret. In this case, the Supreme Court never utilizes or uses the word "impossible." Instead, the Supreme Court couches its ruling with the word "unable." Clearly, a situation as the trial court had interpreted, where an individual is incarcerated, would create an "impossible" situation. Although Dinkins had involved a situation with an incarcerated Defendant, the Supreme Court clearly had not limited itself to such a situation. The Supreme Court had never specifically limited its holding to such custodial Defendants, or to such factually "impossible" situations. As acknowledged by the Court of Appeals and the Petitioner, the trial court had materially misinterpreted this case. However, contrary to the Petitioner, and as discussed by the Court, the "unable" language might provide Defendant with a viable defense.

Here, as evidenced in hearing Exhibit 1, and as outlined by the trial counsel at the sentencing hearing and acknowledged at the evidentiary hearing, Defendant had been unable to provide an address. The Postconviction hearing Exhibit 1 indicates that the registry had acknowledged such inability. He had contacted the sex offender registry by phone twice, and had not received their correspondence. The sex offender registry had found that he had the intention of being compliant. As counsel had indicated at the

sentencing hearing, and ignored by the Petitioner, the Defendant was unable to provide an address. This, due to his living in places that did not have a legal address for purposes of registration. Such places had included empty buildings, cars, and stairwells. As indicated in Dinkins, such locations are not addresses for purposes of sex offender registration requirements. The Department, as indicated in hearing Exhibit 1, had known of the Defendant's situation. Hence, Defendant had been unable to provide an address. Contrary to the trial court and the Petitioner, this inability is legally sufficient for the legal defense at issue in the present matter, as mandated by Dinkins. The Court of Appeals had been correct in concluding that Defendant may potentially have had a viable defense under this case.

In the present matter, the Petitioner has essentially indicated that Defendant's conduct of cutting off his GPS tracker would have defeated any Dinkins defense at trial. The Petitioner wants this Court to make factual determinations to this effect. However, the Court had noted this fact in its Decision. The Court had noted that the GPS had been discretionary. Nevertheless, the Court had concluded that Dinkins might provide a viable defense here. Further, the Court had indicated that the reports had indicated that Defendant's intent with respect to the Sex Offender Registry had been to remain compliant. The Court had also quoted trial counsel's quotes at sentencing to this effect, as well as her quotes that he was homeless, "...was staying where he could whether it was empty buildings, back of a car, stairwells..." (Para 8,

Ct.Appls Decision). Based upon these assertions, the Court had concluded that Defendant might have a viable defense under Dinkins.

The Petitioner has argued that the Court should consider the absconding from extended supervision matter, based upon his 2014 child sex offense matter, simultaneously with the Sex Offender Registration matter before this Court. However, such an argument is materially erroneous. These are two materially different matters. The facts pertaining to these two matters are materially different. The present matter only applies to an allegation of felony Sex Offender Registration violation. This is the only charge before the Court. Absconding from extended supervision based upon a separate 2014 felony offense is a completely different matter. Such a different matter has an entirely different procedural track, with administrative revocation hearings. True, there had been cutting off of the discretionary GPS monitor. However, as indicated in the reports, and as cited by the Petitioner, this did not indicate that he did not want to remain compliant on SORP. He had reported his address to SORP. He had been in contact with his SORP agent. Instead, this GPS cutting had involved his intent to not abide by his extended supervision with respect to his earlier, 2014 felony extended supervision matter. The Petitioner cites the relevant language from the report. "Since he reported his address to SORP, it may appear his intent is to remain compliant with SORP and just does not want to be on supervision..." (Petn Brf, page 5). This report had occurred after Defendant had cut off his GPS tracker. Further, this report materially rebuts the Petitioner's

own argument concerning the relevance of the cutting off of the GPS tracker as to the felony Sex Offender Registration matter. This, even if the Court evaluates the facts of this matter based upon Dinkins.

Further, contrary to the Petitioner, as argued herein and indicated by the Court of Appeals, Defendant has shown a reasonable probability of success at trial with consideration of the Dinkins' defense. Hence, contrary to the Petitioner, and as confirmed by the Court, Defendant has met the standard of Hill vs. Lockhart to support his contention that prejudice has occurred with respect to trial counsel's failure to advise him of this defense prior to his guilty plea.

However, under the circumstances, the Petitioner has materially erred in arguing that this Court itself should make any factual determinations, and determinations as to the two ineffective assistance prongs of Strickland. The trial court is the proper legal forum for such determinations.

II. THE PETITIONER'S BRIEF DOES NOT ADEQUATELY REBUT THE RELEVANT AND APPLICABLE CASE LAW THAT REQUIRES THAT A TRIAL COURT MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO INEFFECTIVE ASSISTANCE OF COUNSEL CHALLENGES.

Petitioner argues that the appellate courts may make findings of fact and conclusions of law. This, with respect to a Defendant's Postconviction Motion arguing that trial counsel had been prejudicially ineffective. As discussed, in the present situation, this pertains to trial counsel's failure to advise him that he had

a defense to the charge of Failure to Register as a Sex Offender based upon his homelessness. This, based upon Dinkins. Petitioner argues that the evidentiary hearing transcript already contains the relevant testimony for an appellate court, such as this Supreme Court, to decide such a motion. This, even if the trial court had not decided such a motion. However, the present relevant and applicable case law mandates that only the trial court make such findings and conclusions. State vs. Machner, 92 Wis.2d 797, 285 N.W.2d 905 (Ct.App. 1979); State vs. Curtis, 218 Wis.2d 550, 582 N.W.2d 409 (Ct.App. 1998). As the Court of Appeals had indicated in Curtis, the trial court is in the best position to judge trial counsel's performance. State vs. Curtis, 218 Wis.2d 550 at 554. There is no reason in the present matter to reverse or disturb this well established and well settled case law.

A clear and crucial reason for having the trial court conduct an evidentiary hearing, and subsequently decide, cases involving allegations of prejudicial ineffective assistance of counsel claims is that the trial court is the finder of fact. At such hearings, trial counsel must testify. State vs. Machner, 92 Wis.2d 797 at 804. In the present instance, counsel, as well as the Defendant himself, had testified. As the finder of fact, the trial court is in the best position to evaluate the credibility of the witnesses, and the weight to be given to each witness's testimony. The trier of fact is in a far better position than an appellate court to make this determination because it has the opportunity to observe the witnesses and their demeanor on the witness stand. The trial judge

not only hears the testimony, but also sees the demeanor on the witness and the body language. AS a result, the trial judge hears the emphasis, volume alterations, and intonations. State vs. Owens, 148 Wis.2d 922, 436 N.W.2d 869 (1989); Lessor vs. Wangelin, 221 Wis.2d 659, 586 N.W.2d 1 (Ct.App. 1998).

In the present situation, the trial court had made findings of fact and credibility determinations only with respect to Defendant's first issue, that trial counsel had made promises to him that had illegally induced him to enter his plea. However, this matter had not been appealed. Here, the trial court had explicitly not made such findings or determinations with respect to the only issue at appeal, the homelessness defense under Dinkins. As indicated in the Petitioner's Brief and the Court of Appeals' Decision, the trial court had simply concluded that Dinkins did not apply to the present situation. This, for the reasons discussed. Hence, the trial court had never made any determinations or findings, as required by the relevant and applicable law, with respect to this Dinkins issue before this Court. All credibility determinations had been made as to the one issue not before this Court. However, as previously discussed, such credibility determinations are neither relevant nor applicable in the present situation. Further, as indicated by the Petitioner, the Court of Appeals' Decision has indicated that this conclusion by the trial court that Dinkins did not apply had been erroneous. The Court's Decision had clearly indicated that "...Pursuant to Dinkins, Savage may have a defense for his failure to register as a sex offender."

(Ct.App. Decision, Para. 27). Contrary to the Petitioner, and as argued herein, such a Decision had been correct. The Court of Appeals had thus remanded the matter to the trial court for the court to make its legally required determinations and findings concerning prejudicial ineffective assistance of counsel. This remand, as required under State vs. Sholar, 381 Wis.2d 560, 912 N.W.2d 89 (2018).

Here, the Petitioner argues that when evidence occurs at an evidentiary Machner hearing, but the trial court does not make any findings of fact or conclusions of law, then the Court of Appeals may step in and make those findings and conclusions. However, as discussed, such an argument is illegal. As the Court of Appeals had indicated, the trial court had failed to carry out its legal obligations to make such findings and conclusions with respect to the Dinkins issue. According to the Court of Appeals, Dinkins applies to the present situation. The trial court had erred in deciding otherwise. A remand is in order. Under the relevant and applicable law, and applicable facts, the Court of Appeals had correctly made such a conclusion for remand. There is no need to reconsider or revisit Sholar. This, especially under the facts of this present case, as argued herein in this present Brief.

Interestingly, the Petitioner does not seek review on the basis that it disagrees with the Court's conclusion that Dinkins is well settled law and that it applies to the present situation. Hence, such an issue is not before this Court.

The Petitioner further argues that this Court allow the Court

of Appeals to, or that this Court itself, conclude that Defendant did not have a valid defense based upon Dinkins. This, essentially, because he had cut off his bracelet and had allegedly absconded from supervision. However, the Court of Appeals had already ruled, as discussed herein, that Defendant may have had a valid defense under this case, even under such facts. Contrary to the Petitioner, such a ruling is correct, as argued herein. Hence, such an argument in the Petitioner's Brief is not relevant at this stage. Under the relevant and applicable case law, such an argument is relevant before the trial court in the present situation. This, because, contrary to the Petitioner's Brief, the trial court had not made any findings of facts or conclusions of law with respect to the one issue before this Court. Here, there is no need to reverse the long standing case law, recently reaffirmed by the Supreme Court in Sholar, that the trial court must make such determinations in Machner type situations. Hence, this argument fails.

Here, the Petitioner argues that case law supports a position that an appellate court may make conclusions of law and findings of fact when that appellate court disagrees with the trial court's reasoning, but the facts support the trial court's decision. However, none of this case law is applicable or relevant to the present situation. Contrary to the Petitioner, and as outlined by the Court, the facts do not support the trial court's oral decision. This, because none of this law concerns the situation present here, that of an evidentiary Machner hearing with respect to allegations of prejudicial ineffectiveness of counsel in a

criminal case. As discussed, the Court of Appeals and Supreme Court have already determined that appellate courts may not make such determinations in such specific settings. There is no reason to reverse such well established law.

Other cited Petitioner's case law is inapplicable to the present situation. State vs. Horn had dealt with whether or not a jury could hear a defense. State vs. Horn, 139 Wis.2d 473, 407 N.W.2d 854 (1987). Mueller vs. Mizia was not even a criminal case. Mueller vs. Mizia, 33 Wis.2d 311, 147 N.W.2d 269 (1967). Neither State vs. Baudhuin nor State vs. Fishnick had applied to prejudicial ineffectiveness of counsel situations and Machner hearings. Fishnick applied to the admission of other acts evidence. State vs. Fishnick, 127 Wis.2d 247, 378 N.W.2d 272 (1985). Baudhuin dealt with fourth amendment stop legality during a traffic stop. State vs. Baudhuin, 141 Wis.2d 642, 416 N.W.2d 60 (1987). None of these cases had dealt with situations such as present here. Hence, none of this case law is relevant and applicable to the present situation.

Here, Petitioner argues that Defendant has failed to adequately show that he would have gone to trial but for counsel's prejudicial ineffectiveness. This, because of the essentially "great deal" that he had received from the State. However, this argument materially fails. Such argument does not adequately rebut that, but for counsel's prejudicial ineffectiveness in failing to advise Defendant of the Dinkins' defense, he stood a reasonable chance of an acquittal at trial. There would not have been any

conviction, much less to a recommendation of less time. This argument is the crux of Defendant's contention, that his counsel had ineffectively failed to advise him of a viable defense that arguably stood a reasonable probability of acquittal at trial. As discussed, the Court of Appeals had confirmed that this defense was viable. Defendant had previously cited relevant and applicable case law to support that such a contention is a valid basis for withdrawal of guilty plea, even after sentencing. Also, this contention is the basis for the Court of Appeals' remand.

The Petitioner cites State vs. Dillard, 358 Wis.2d 543, 859 N.W.2d 44 (2014). This, to show that a Defendant must show a reasonable probability that he would not have pled guilty and would have proceeded to trial. This, but for counsel's prejudicially ineffective conduct. The Petitioner argues that Defendant has failed to meet this burden. This, in the context of plea withdrawal and prejudicial ineffective assistance of counsel. However, that case does not assist the Petition. In that case, there already had been a postconviction evidentiary hearing at the trial court level. State vs. Dillard, 358 Wis.2d 543 at 550. Contrary to the Petitioner, this fact defeats its argument. Here, there had not been any such adequate hearing at the trial court level with respect to the Dinkins issue. Dillard does not support a position that appellate courts can make such findings of fact and conclusions of law without a relevant evidentiary hearing. Here, unlike the situation in Dillard, the Court of Appeals had concluded that there had not been an appropriate evidentiary hearing to

determine Defendant's Dinkins claim. Hence, Dillard is irrelevant to the present situation for this reason.

Further, in Dillard, the Supreme Court had granted Dillard's desire to withdraw his guilty plea. This, because he did not understand the consequences of his plea, and, that, therefore, his plea had not been knowing, intelligent and voluntary. Id. at 550.

Contrary to the Petitioner, this present case does not involve a determination of the standard of prejudice claims under ineffective assistance of counsel matters. Further, contrary to the Petitioner, this case does not factually involve whether or not an appellate court should sustain a trial court's decision when it's decision is correct and the record supports it, even if the lower court's reasoning is erroneous. This present case involves a trial court's failure to conduct a legally required Machner hearing in order to determine findings of facts and conclusions of law with respect to ineffective assistance of counsel claims. As discussed, the Court had correctly determined that Defendant might have a viable defense under Dinkins. The Petitioner's case law and arguments are irrelevant and inapplicable to the present situation. Trial courts conduct evidentiary Machner hearings. After such hearings, trial courts make findings of fact and conclusions of law, not appellate courts. There is no need to establish law or resolve unsettled law. The law is well-established and clearly settled. There is no need to revisit Sholar.

CONCLUSION

WHEREFORE, For the Reasons Indicated Above, GEORGE SAVAGE, by and through his attorney Mark S. Rosen of the Law Offices of Rosen and Holzman, hereby requests that this Honorable Court affirm the Decision of the Court of Appeals.

Dated this 24th day of June, 2020.

Respectfully Submitted,

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CERTIFICATION

I hereby certify that the Defendant-Appellant's Supreme Court Brief in the matter of State of Wisconsin vs. George Savage, 2019AP000090-CR conforms to the rules contained in Wis. Stats. 809.19 (8)(b)(c) for a Brief with a monospaced font and that the length of the Brief is thirty two (32) pages.

Dated this 24th day of June, 2020, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-
Appellant
State Bar No. 1019297

CERTIFICATION

I hereby certify that the text of the e-brief of Defendant-Appellant's Supreme Court Brief in the matter of State of Wisconsin vs. George Savage, Court of Appeals Case No. 2019 AP 00090-CR is identical to the text of the paper brief in this same case.

Dated this 24th day of June, 2020, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-Appellant