United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted September 24, 2020
Decided September 30, 2020

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 19-3175

VINCENT E. BOYD,
Petitioner-Appellant,

v.

DYLON RADTKE,
Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 2:18-cv-00275-JPS

J.P. Stadtmueller,
Judge.

ORDER

Vincent Boyd has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254 and an application for a certificate of appealability. We have reviewed the final order of the district court and the record on appeal and find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, Boyd's request for a certificate of appealability is DENIED.

App A

2019 WL 5298526
Only the Westlaw citation is currently available.
United States District Court, E.D. Wisconsin.

Vincent E. BOYD, Petitioner,

v.

Warden Scott ECKSTEIN, Respondent.

— Case No. 18-CV-275-JPS —

|

Signed 10/18/2019

Attorneys and Law Firms

Vincent E. Boyd, Green Bay, WI, pro se.

Jacob J. Wittwer, Wisconsin Department of Justice Office of the Attorney General, Madison, WI, Wisconsin Dept of Justice, for Respondent.

ORDER

J.P. Stadtmueller, U.S. District Judge

***1** Petitioner Vincent Boyd ("Boyd") has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, alleging that his Sixth Amendment rights to self-representation and to confront his witnesses were violated, and that his *nolo contendere* pleas were, consequentially, invalid. The parties have fully briefed their respective positions on Boyd's asserted grounds for relief. For the reasons explained below, the Court finds that Boyd's petition is without merit and therefore must be denied.

1. STANDARD OF REVIEW

State criminal convictions are generally considered final. Review may be had in federal court only on limited grounds. To obtain habeas relief from a state conviction, 28 U.S.C. § 2254(d)(1) (as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA")) requires the petitioner to show that the state court's decision on the merits of his constitutional claim was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court. 28 U.S.C. § 2254(d)(1); *Brown v. Payton*, 544 U.S. 133, 141 (2005). The burden of proof rests with the petitioner. *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). The relevant decision for this Court to review is that of the last state court to rule on the merits of the petitioner's claim. *Charlton v. Davis*, 439 F.3d 369, 374 (7th Cir. 2006).

A state-court decision runs contrary to clearly established Supreme Court precedent "if it applies a rule that contradicts the governing law set forth in [those] cases, or if it confronts a set of facts that is materially indistinguishable from a decision of [the Supreme] Court but reaches a different result." *Brown*, 544 U.S. at 141. Similarly, a state court unreasonably applies clearly established Supreme Court precedent when it applies that precedent to the facts in an objectively unreasonable manner. *Id.*; *Bailey v. Lemke*, 735 F.3d 945, 949 (7th Cir. 2013).

The AEDPA undoubtedly mandates a deferential standard of review. The Supreme Court has "emphasized with rather unexpected vigor" the strict limits imposed by Congress on the authority of federal habeas courts to overturn state criminal convictions. *Price v. Thurmer*, 637 F.3d 831, 839 (7th Cir. 2011). It is not enough for the petitioner to prove the state courts were wrong; he must also prove they acted unreasonably. *Harrington v. Richter*, 562 U.S. 86, 101 (2005); *Campbell v. Smith*,

App. B

770 F.3d 540, 546 (7th Cir. 2014) ("An 'unreasonable application of' federal law means 'objectively unreasonable, not merely wrong; even 'clear error' will not suffice.' ") (quoting *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014)).

Indeed, the petitioner must demonstrate that the state court decision is "so erroneous that 'there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents.' " *Nevada v. Jackson*, 133 S. Ct. 1990, 1992 (2013) (quoting *Harrington*, 562 U.S. at 102). The state court decisions must "be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002); *Hartjes v. Endicott*, 456 F.3d 786, 792 (7th Cir. 2006). Further, when a state court applies general constitutional standards, it is afforded even more latitude under the AEDPA in reaching decisions based on those standards. *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009); *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004) ("[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.").

***2** As the Supreme Court has explained, "[i]f this standard is difficult to meet, that is because it was meant to be." *Harrington*, 562 U.S. at 102. Indeed, Section 2254(d) stops just short of "imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings." *See id.* This is so because "habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Id.* at 102–103 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring)).

A federal court may also grant habeas relief on the alternative ground that the state court's adjudication of a constitutional claim was based upon an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(2). The underlying state court findings of fact and credibility determinations are, however, presumed correct. *Newman v. Harrington*, 726 F.3d 921, 928 (7th Cir. 2013). The petitioner overcomes that presumption only if he proves by clear and convincing evidence that those findings are wrong. 28 U.S.C. § 2254(e)(1); *Campbell*, 770 F.3d at 546. "A decision 'involves an unreasonable determination of the facts if it rests upon factfinding that ignores the clear and convincing weight of the evidence.' " *Bailey*, 735 F.3d at 949–50 (quoting *Goudy v. Basinger*, 604 F.3d 394, 399–400 (7th Cir. 2010)). " '[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.' " *Burt v. Titlow*, 134 S. Ct. 10, 15 (2013) (quoting *Wood v. Allen*, 558 U.S. 290, 301 (2010)). If shown, an unreasonable factual determination by the state court means that this Court must review the claim in question *de novo*. *Carlson v. Jess*, 526 F.3d 1018, 1024 (7th Cir. 2008).

2. BACKGROUND

In 2010, Boyd was charged with two counts of first-degree sexual assault of a child. He cycled through three attorneys before he was finally assigned to John Wallace ("Wallace") in 2012. At the final pretrial conference, Boyd sought a continuance and, when that was denied, tried to fire Wallace because he felt that Wallace was not adequately prepared for trial. Additionally, he felt that Wallace wanted him to enter a guilty plea.

Initially, the trial court would not allow Boyd to fire his attorney. [1] Petitioner then sought to represent himself. The Court allowed this, with the caveat that Wallace would remain as standby counsel. The contours of Wallace's role as standby counsel were defined in the following exchange:

DEFENDANT: Can I just represent myself on this case then?

COURT: Mr. Wallace is still going to be sitting there.

MR. WALLACE: That would be fine with me.

COURT: And you want to do your own openings and closings and all that?

DEFENDANT: I would like to completely represent myself on this case.

COURT: Okay, and Mr. Wallace will be at your side for standby counsel.

...

DEFENDANT: All right, and if I'm allowed to represent myself, can I have an opportunity to file the motions that I've asked be filed—

MR. WALLACE: We can take 'em—he can take 'em up chronologically a couple of 'em, we can do 'em, yes. I know exactly what he wants to do but—I can—I can assist him, so for the record, he has terminated me, he is proceeding pro se, and I have been appointed standby counsel. I will assist him in his defense, and I will advise him on what and what not to do.

COURT: Well, he hasn't fired you. You're standby counsel, but he has a right to represent himself.

*3 (Docket #12-22 at 11–13).

The parties addressed further logistics, and the district attorney, "Ms. Paider," raised the issue of Boyd questioning the victims on the stand in light of his prior sexual assault convictions. The transcript reads, in relevant part:

MS. PAIDER: Well, Your Honor, then in terms of the - at least one of the other acts' victims, the **one from the Langlade County case**, the one he was convicted of, I know in some of his motions he is questioning that conviction and wants to have a trial within a trial. He's already pled and been sentenced. There's a Judgment of Conviction there. He can't dispute the fact that that's there, and technically, **because the charge is first-degree sexual assault of a child, the fact he has been convicted of it by law is allowed to come in,** so I just want him to be aware of that as well. **He's not going to be able to collaterally attack that conviction** at this trial -

(Defendant speaks but is inaudible.)

COURT: That's true.

COURT REPORTER: I didn't hear him.

DEFENDANT: **I have the right to defend myself against it. I would—I would like some latitude in questioning the victim** and I would talk to—

COURT: You will get no latitude.

MR. WALLACE: He's wishes—he's requesting some latitude in questioning—

COURT: You will get no latitude. You don't—just because you're representing yourself doesn't mean you get to violate the rules of evidence. I mean you get to – you're right, **you have a right to defend yourself within the law.** That doesn't mean just because you're representing yourself you—means you get to ask questions that aren't relevant, that are prejudicial, that are hearsay. **You don't get to violate the rules of evidence just because you're representing yourself.**

DEFENDANT: No, I understand that. **I just think I should be able to tell the jury —**

COURT: If you don't—if you don't know what the rules are, maybe you should reconsider whether or not you want to represent yourself.

DEFENDANT**: I'm not allowed to explain to the jury why I pled guilty to the case?**

COURT: **You are not. You don't get to explain anything unless you testify.**

Id. at 14–16 (emphasis added).

The next day, Petitioner entered a no-contest plea. Wallace and Boyd appeared at the hearing, and the trial court began to review with Boyd his request to represent himself. At that point, Wallace interrupted the trial court and requested a moment to confer

with Boyd. They spoke briefly, and then Wallace requested five minutes "to speak with the district attorney and discuss maybe a resolution." (Docket #12-23 at 3:12–14). The trial court granted the request and, after conferring with the district attorney, Wallace provided the trial court with a summary of the plea agreement, which would be a *nolo contedere* plea with the removal of the "persistent repeater" status. The district attorney and Wallace discussed the potential implications of the plea on another case in another county, but the district attorney clarified that she had no power over the disposition of the case in the other county. *Id.* at 5:3–6. Following this exchange, the Court proceeded to conduct a plea colloquy to ensure that Boyd understood the plea and its consequences, and that the plea was made knowingly, intelligently, and voluntarily. Boyd responded in favor of all questions regarding the plea except for the following:

*4 COURT: Do you understand that...your plea[s] to the two counts of first-degree sexual assault of a child without the persistent repeater...are no contest?

DEFENDANT: Yeah. I feel a lot of pressure, but yeah, I feel I don't really have any other option but to do that.

COURT: Well, obviously, I understand how you feel pressure, and I just want you to understand that—or agree that I'm not pressuring you, you don't feel pressure from me, do—

DEFENDANT: Pressure that I—since coming in yesterday, I feel pressured today.

COURT: [Y]ou feel pressure based upon the rulings I made?

DEFENDANT: Yes. I don't feel I'm going to be able to get a fair trial here.

COURT: You don't—pardon me?

DEFENDANT: I don't feel like I would be able to get a fair trial. I don't —and I didn't have—I don't know how to represent myself at trial.

COURT: Well, you do.

DEFENDANT: No, sir, so I'm going to plead no contest.

COURT: You could have Mr. Wallace represent you. You understand that?

(Defendant nods head up and down.)

COURT: I mean you've had numerous attorneys, and as you said yesterday, you feel that you know this case better than anybody, but you've had an opportunity to—and obviously, this case has been going on a long time—you've had an opportunity to become familiar with this case and you've had attorneys working on this case; you understand?

DEFENDANT: Nothing's been done. I mean there's not a single motion that's been filed on my behalf. [2]

COURT: Sure there has been. We've had many motion hearings on this case. Do you understand also that by entering this plea you'd be giving up these rights: the right to a trial? You're giving up the right to have a trial here today; you understand that?

DEFENDANT: Yes, sir.

COURT: Do you understand you're giving up your right to remain silent? You're not remaining silent because you say — you're pleading no contest. Do you understand that?

DEFENDANT: Yes, sir.

...

COURT: Also, the fact you're giving up the right to confront your accusers, people who say you did this, ask them questions up here on the witness stand, and you're also giving up the right to have the State prove that you were guilty beyond a reasonable doubt. Do you understand you're waiving or giving up all those rights?

DEFENDANT: Yes, sir.

...

COURT: Okay. Has anyone made any promises or threats—other than the promise of the plea agreement—did anyone make any promises or threats to get you to enter a plea today?

DEFENDANT: No, just a lot of pressure.

Id. at 6–9.

***5** Prior to sentencing, Boyd moved to withdraw his pleas, claiming that he felt pressure by the trial court's refusal to adjourn the trial and his admonishment that he would receive "no latitude" in cross-examining witnesses. The trial court appointed yet another attorney to assist Boyd with the post-conviction relief process. This attorney also filed a motion to withdraw the pleas, claiming that the trial court had failed to conduct a hearing to determine whether Boyd had knowingly, intelligently, and voluntarily waived his right to counsel.

The trial court denied both post-conviction motions to withdraw the pleas, but on November 6, 2013 the Wisconsin Court of Appeals determined that the trial court had not conducted a hearing pursuant to *State v. Klessig*, 564 N.W.2d 716, 720 (Wis. Ct. App. 1997), which requires courts to determine whether a waiver of counsel is knowing and voluntary. Boyd's case was remanded for an evidentiary hearing to determine the validity of his waiver of counsel. (Docket #1-1 at 4). The trial court conducted the hearing and concluded that Boyd's waiver of counsel was valid. *Id.* at 9. At this hearing, the trial court commented that he would have provided Boyd with some latitude during the cross-examination. (Docket #15-1 at 12:18–23).

Boyd then appealed the trial court's conclusion, arguing that his right to self-representation was violated; that his waiver of counsel was not voluntary and deliberate; that he was not competent to proceed without counsel; and that, under the totality of circumstance, he should be allowed to withdraw his pleas. (Docket #5 at 3). He explained that the trial court did not define standby counsel's role, or give Petitioner any input as to how standby counsel could be used. (Docket #1-1 at 10). He also argued that he was unrepresented in the plea negotiations, because he was not present for the conversation between his standby counsel and the district attorney. *Id.* at 12. He took issue with standby counsel's role in advising him, and opining to the court, that Boyd entered into the *nolo contendere* pleas knowingly, intelligently, and voluntarily. Finally, he contended that his decision to proceed by self-representation was involuntary because he was pressured into it by his attorney's lack of preparation and the trial court's refusal to continue the trial date. *Id.* at 14. The Wisconsin Court of Appeals evaluated each of these arguments, and concluded, based on the transcripts of the prior proceedings, that they were without merit. On June 12, 2015, the Wisconsin Supreme Court denied the petition for review. *Id.* at 18.

Petitioner then filed a post-conviction motion for relief with the trial court, seeking to withdraw his pleas on the basis that his trial counsel and post-conviction counsel were ineffective. Specifically, he claimed that trial counsel should have fought harder to allow him to withdraw his pleas in light of the Court's "no latitude" order, and his post-conviction counsel should have raised the deficiencies of his trial counsel in failing to argue for withdrawal of appeal. (Docket #5 at 3–4). On August 23, 2017, the Wisconsin Court of Appeals denied his appeal of the trial court's denial of post-conviction relief. (Docket #1-1 at 19). On December 12, 2017, the Wisconsin Supreme Court denied the petition for review. *Id.* at 22.

On March 21, 2018, this Court allowed Petitioner to proceed on two grounds for habeas corpus relief: "First, that his plea was not knowing, intelligent, and voluntary 'because of the events relating to standby counsel—including negotiating [the] plea agreement, signing [the] plea questionnaire, and opining that [the] plea was voluntary—violated Boyd's right to self-representation.' " (Docket #5 at 5) (citing (Docket #1 at 6–7)). Second, "that his plea was not knowing, intelligent, and voluntary

'because it was induced, in part, by the court's pre-trial ruling that Boyd would get no latitude during his cross-examination of the state's witnesses at the trial the next day." *Id.* (citing Docket #1 at 7–8). The parties' arguments regarding each ground will be analyzed below.

3. ANALYSIS

3.1 Validity of Boyd's Plea – Participation of Standby Counsel

***6** A plea must be knowing, voluntary, and intelligent. *Parke v. Raley*, 506 U.S. 20, 29 (1992). Whether a plea was entered knowingly, intelligently, and voluntarily is determined from "all of the relevant circumstances surrounding it." *Brady v. United States*, 397 U.S. 742, 749 (1970). Respondent does not dispute that a violation of the right to self-representation in the plea-bargaining process would entitle Boyd to a plea withdrawal. (Docket #19 at 13) (citing *Lafler v. Cooper*, 566 U.S. 156, 162 (2012); *Faretta*, 422 U.S. at 819–20; *Boykin v. Alabama*, 395 U.S. 238, 242 (1969)). The issue before the Wisconsin Court of Appeals was whether the participation of Wallace as standby counsel in the plea negotiation process infringed Boyd's right to self-representation. The Wisconsin Court of Appeals concluded that it did not. The issue before this Court is whether the Wisconsin Court of Appeals reasonably applied established Supreme Court precedent in reaching this conclusion.

The Supreme Court has held that it is unconstitutional for a state to "hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense." *Faretta*, 422 U.S. at 807. Accordingly, "[t]he Sixth Amendment, when naturally read... implies a right of self-representation." *Id.* at 821. "[A]lthough he may conduct his own defense ultimately to his own detriment, his choice must be honored." *Id.* at 834. Nevertheless, the Supreme Court acknowledged that "a State may—even over objection by the accused—appoint a 'standby counsel' to aid the accused if and when the accused requests help." *Id.* at 834 n.46.

Nearly a decade later, the Supreme Court revisited the "stand-by counsel" concept in *McKaskle v. Wiggins*, 465 U.S. 168 (1984). There, the Supreme Court confirmed that standby counsel's unsolicited participation in a case could be appropriate in some circumstances. *Id.* at 176. The central inquiry was "whether the defendant had a fair chance to present his case in his own way." *Id.* at 177. In a pre-trial context, the right to self-representation could be "adequately vindicated...if the *pro se* defendant is allowed to address the court freely on his own behalf and if disagreements between counsel and the *pro se* defendant are resolved in the defendant's favor whenever the matter is one that would normally be left to the discretion of counsel." *Id.* at 179.

In light of the aforementioned Supreme Court precedent, the Wisconsin Court of Appeals engaged in the following analysis to ultimately conclude that Wallace's appointment in the case, scope of involvement, and participation in the plea negotiation was appropriate:

> Boyd did not object to the appointment of Wallace as standby counsel. When the court told Boyd that Wallace was "still going to be sitting there" even if Boyd represented himself, Boyd[3] replied, "That would be fine with me." Boyd asked questions about what he would and would not be permitted to do, and his questions were answered. He asked whether he would be permitted to file the motions that he had asked Wallace to prepare, and Wallace confirmed that he could assist Boyd with the motions. Boyd asked whether he, personally, would be permitted to question witnesses. The court confirmed that Boyd could question witnesses, but told him that he would be bound by the rules of evidence in terms of what testimony would be allowed.
>
> We agree with the State that Boyd has not pointed to any applicable legal authority that would require the court to define the scope of representation of standby counsel. However, even if such a requirement existed, the record demonstrates that Boyd did ask for and receive guidance about the scope of what he would do and what Wallace would do. We are satisfied, based on the record before us, that the court did not deprive Boyd of his right to self-representation under *Faretta*, 422 U.S. at 807, by the manner in which it appointed Wallace as standby counsel.

***7** *State v. Boyd*, 2014AP837, 2015 WL 789666, at *3 (Wis. Ct. App. Feb. 26, 2015).

Having concluded that Wallace's presence as standby counsel was constitutional and appropriately defined, the Wisconsin Court of Appeals assessed whether Wallace's conduct during the plea hearing violated Boyd's right to self-representation.

> The transcript of the plea hearing shows that, at the beginning of the hearing, Wallace requested a moment to confer with Boyd, and that Boyd and Wallace conferred off the record. Immediately after his off-record discussion with Boyd, Wallace asked the court for five minutes to speak with the district attorney about a resolution. Upon conclusion of that discussion, Wallace and the district attorney informed the court of the terms of the plea agreement. The court then engaged Boyd in a plea colloquy, after which it found that Boyd's no contest plea was made freely, voluntarily, and intelligently, and accepted the plea.
>
> The circuit court reaffirmed its finding that Boyd's plea was made freely, voluntarily, and intelligently at the hearing on his plea withdrawal motion. In making that finding, the court rejected Boyd's argument that he felt pressured by Wallace into entering the plea agreement. The court stated that Boyd "would not allow any attorney to push him around or make a decision for him. He's clearly exhibited throughout these proceedings that he is the one in charge...." Implicit in the court's finding that the plea was valid is the reasonable inference that Boyd authorized Wallace to engage in plea negotiations on his behalf. Given the facts in the record and the reasonable inferences to be drawn from them, we conclude that the circuit court did not erroneously exercise its discretion in finding that Boyd's plea was knowingly, voluntarily, and intelligently entered. *See State v. Lopez*, 173 Wis.2d 724, 729, 496 N.W.2d 617 (Ct.App.1992) (we will uphold the decision of the circuit court if it is supported by credible evidence or reasonable inferences that can be drawn from this evidence)...[Finally,] Boyd has not demonstrated that Wallace's involvement as standby counsel prevented Boyd from having "actual control" over his own defense. *See McKaskle*, 465 U.S. at 178. Thus, we conclude that Boyd's right to self-representation was not violated by the appointment or use of standby counsel.

Id. at *4.

The Court is satisfied that the Wisconsin Court of Appeals reasonably applied Supreme Court precedent in its analysis of whether Boyd's right to self-representation was abridged or violated. Although standby counsel was appointed at the trial court's insistence, the record indicates that Wallace acted at Boyd's direction. Respondent further points out with regard to Boyd having control over his defense, that although Boyd expressed feeling "pressure" to accept the *nolo contendere* pleas, he indicated that this pressure was from the trial court itself—not his standby counsel. (Docket #19 at 15) (citing (Docket #13-23:6–10)). On balance, the Court does not find that the Wisconsin Court of Appeals erred in its analysis of Wallace's conduct.

***8** Boyd points to *Frantz v. Hazey*, 533 F.3d 724 (9th Cir. 2005) to support his argument that his right to self-representation was violated when he was not included in the plea-bargaining conference. In *Frantz*, the Ninth Circuit held that a defendant who represented himself entirely throughout a case needed to affirmatively consent to stand-by counsel's solo participation in a chambers conference. *Id.* at 743. Additionally, the defendant was in lock-up during the conference, therefore implied consent could not be inferred by the failure to object. *Id.* at 744.

The Wisconsin Court of Appeals was not required to evaluate these circumstances under *Frantz*, a case from the Ninth Circuit, but even so, the Court finds that *Frantz* is distinguishable from the case at bar. Unlike the defendant in *Frantz*, Boyd did not have an established practice of representing himself. But the more salient difference between *Frantz* and this case is the fact that the plea negotiation between Wallace and Paider occurred immediately after an off the record discussion between Wallace and Boyd. (Docket #12-23 at 3:10–11). After this tête-à-tête with Boyd, Wallace sought recess to "discuss maybe a resolution." *Id.* at 3:13–14. Boyd was apparently aware that a plea negotiation would occur, and there is no evidence in the record that he was denied the opportunity to participate in the discussion. A brief recess occurred, after which Wallace apprised the Court of the plea deal. The Court launched into the plea colloquy, with which Boyd was cooperative. The concern motivating the requirement of affirmative consent in *Frantz*—namely, that the defendant was in lock-up and unavailable to object—is simply not present here. To the contrary, the transcript supports the inference that Wallace spoke to Paider at Boyd's behest. The record does not suggest that Boyd was deprived of control over his defense, or even that Boyd wanted to be involved in the discussion. In sum, there is no basis for the Court to find that the Wisconsin Court of Appeals made an unreasonable finding of fact or erroneously applied precedential Supreme Court cases.

3.2 Validity of Boyd's Plea – Right to Confront Witness

At the outset, the Court must dispose of Respondent's contention that the claim is procedurally defaulted. (Docket #19 at 22–23). This Court cannot consider Boyd's habeas claim unless it has first been "fully and fairly presented...to the state appellate courts," thereby giving the courts a "meaningful opportunity to consider the substance of the claim[ ] that he later presents in his federal challenge." *Bintz v. Bertrand*, 403 F.3d 859, 863 (7th Cir. 2005); 28 U.S.C. § 2254(b)(1)(A). Fair presentment requires that the petitioner apprise the state courts of the constitutional nature of the claim, but it "does not require hypertechnical congruence between the claims made in the federal and state courts; it merely requires that the factual and legal substance remain the same." *Anderson v. Benik*, 471 F.3d 811, 815 (7th Cir. 2006) (citation omitted). The Seventh Circuit considers the following factors to determine whether the issue was adequately presented to the state judiciary:

> 1) whether the petitioner relied on federal cases that engage in a constitutional analysis; 2) whether the petitioner relied on state cases which apply a constitutional analysis to similar facts; 3) whether the petitioner framed the claim in terms so particular as to call to mind a specific constitutional right; and 4) whether the petitioner alleged a pattern of facts that is well within the mainstream of constitutional litigation.

***9** *Ellsworth v. Levenhagen*, 248 F.3d 634, 639 (7th Cir. 2001).

In his post-conviction relief motion, Boyd argued that his counsel was ineffective for failing to pursue withdrawal on the basis of the trial court's admonishment that Boyd would be afforded "no latitude" in his witness cross-examinations. Although brought in the context of a malpractice claim, the Sixth Amendment right to confrontation is inherent to the alleged misconduct. Indeed, the Wisconsin Court of Appeals directly addressed the issue of witness confrontation and latitude in its 2017 decision, albeit in the context of a malpractice claim. *State v. Boyd*, 2016AP1173, 2017 WL 3617014, at *3 (Wis. Ct. App. Aug. 23, 2017). ("Contrary to Boyd's assertion, the court was not infringing upon his constitutional right to cross-examine witnesses at trial."). The Court finds that Boyd fairly presented this claim to the state court in terms "so particular as to call to mind a specific constitutional right." *Anderson*, 471 F.3d at 815. Respondent's argument that Boyd defaulted on this argument is without merit.

Nevertheless, the Court finds that the Wisconsin Court of Appeals did not err in its determination that there was no violation of Boyd's Sixth Amendment right to confront his accusers. The Sixth Amendment provides defendants in a criminal case the right "to be confronted with the witnesses against him." U.S. Const. art. VI. This encompasses a right to probe "the believability of a witness and the truth of his testimony." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). However, this right is not absolute, and "trial judges retain wide latitude insofar as the Confrontation clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986); *State v. Rhodes*, 799 N.W.2d 850, 862–63 (Wis. 2011) (holding that a murder defendant's rights under the confrontation clause were not violated when the trial court imposed limitations on his cross-examination of his sister about prior incidents between her and the victim); *see also Alford v. United States*, 282 U.S. 687, 692 (1931) (requiring "reasonable latitude" be given to defense counsel on cross-examination and holding that failure to do so is a prejudicial error); *United States v. Manske*, 186 F.3d 770, 777 (7th Cir. 1999) (same).

In analyzing whether Boyd's Sixth Amendment rights were violated, the Wisconsin Court of Appeals explained that they were

> not persuaded that trial counsel was ineffective for failing to pursue plea withdrawal on the basis of the circuit court's "no latitude" ruling. Contrary to Boyd's assertion, **the court was not infringing upon his constitutional right to cross-examine witnesses at trial.** Rather, the record demonstrates that **the court was simply impressing upon Boyd the need to follow the rules of evidence while representing himself.** This meant that Boyd would get "no latitude" in asking questions that were

> irrelevant, prejudicial, or otherwise in violation of the rules. Thus, Boyd would not be allowed to conduct a "trial within a trial" and collaterally attack his prior conviction for sexual assault of a child. The court's ruling was proper and does not provide a basis for plea withdrawal.

***10** *State v. Boyd*, 2017 WL 3617014, at *3 (emphasis added). The Court has reviewed the transcripts in light of the parties' arguments, and concludes that the state court did not make an unreasonable determination of the facts or erroneously apply Supreme Court precedent to the question of whether Boyd's Sixth Amendment rights were not violated.

The relevant Supreme Court caselaw discussed above explains that trial courts retain considerable latitude in tailoring cross-examinations to be appropriate to the circumstances of the case. The transcript is by no means exemplary of an ideal exchange, but it does reflect that Boyd would be allowed to cross-examine the victim witness and to defend himself within the bounds of the law. However, the trial court made clear—using the term, "no latitude"—that Boyd would not be able to put his prior sexual assault conviction at issue unless he also elected to testify. The trial court further admonished Boyd that he would not be able to engage in dilatory conduct with a child witness whom he was alleged to have sexually assaulted. Finally, the trial court reminded Boyd that he would be bound to the rules of evidence in his line of questioning, and any testimony that Boyd elicited needed to be relevant, non-prejudicial, and admissible. It is clear, as the Wisconsin Court of Appeals concluded, that in this exchange, the term "latitude" describes a departure from the rules of evidence. The Wisconsin Court of Appeals correctly determined that there is nothing in this exchange that suggests that Boyd's right to confront and cross-examine his witness, or defend himself in the case, was compromised. The Court is not convinced that the trial court's extraneous on-record correction, two years later, of its understanding of the term "latitude" in the context of a cross-examination compels the conclusion that Boyd's plea was invalid.

The argument Boyd makes in his brief, regarding the line of questioning that he intended to pursue to impeach the state's witness, was never raised in the trial court. The record does not reflect that the trial court denied any motion that Boyd made on this issue. In that exchange, the trial court simply told him that he would not be afforded latitude to stray from the rules of evidence. The fact that he was not permitted to flout those rules while he represented himself *pro se* does not render his *nolo contendere* pleas involuntary, and nor can it serve as the basis for a habeas petition.

4. CONCLUSION

For the reasons stated above, the Court finds that Boyd's asserted grounds for relief are without merit. The Wisconsin state courts did not err in reaching their conclusions of law and fact regarding whether Boyd's Sixth Amendment rights were violated. The petition must, therefore, be denied.

Under Rule 11(a) of the Rules Governing Section 2254 Cases, "the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." To obtain a certificate of appealability under 28 U.S.C. § 2253(c)(2), Boyd must make a "substantial showing of the denial of a constitutional right" by establishing that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal citations omitted).

***11** As the Court's discussion above makes clear, Boyd's petition, while rigorously argued, does not compel a grant of the Great Writ. When the record is considered as a whole, and when the *nolo contendere* pleas are evaluated under the totality of the circumstances and in light of established law, no reasonable jurists could debate whether they were involuntary. As a consequence, the Court is compelled to deny him a certificate of appealability.

Accordingly,

IT IS ORDERED that Petitioner's petition for a writ of habeas corpus (Docket #1) be and the same is hereby **DENIED;**

IT IS FURTHER ORDERED that a certificate of appealability as to Petitioner's petition be and the same is hereby **DENIED; and**

IT IS FURTHER ORDERED that this action be and the same is hereby **DISMISSED with prejudice.**

All Citations

Slip Copy, 2019 WL 5298526

Footnotes

1 The trial court erroneously stated that the defendant could not fire his attorney. (Docket #12-22 at 7:12–13). This is incorrect; a defendant is not obligated to retain appointed counsel. *See Faretta v. California*, 422 U.S. 806, 807 (1975) (holding that a state may not constitutionally "hale a person into its criminal courts and there force a lawyer upon him."). The trial court rectified any prejudice this error might have caused, however, by subsequently allowing Boyd to proceed *pro se*.

2 This assertion is belied by Ms. Paider's reference to "some of his motions" regarding another sexual assault conviction. (Docket #12-22 at 14:21–23).

3 The parties clarify that Wallace was the one who said this, but the fact remains that Boyd did not object. *See* (Docket #12-22 at 11:25).

End of Document

State v. Boyd, 2017 Wisc. App. LEXIS 620

Court of Appeals of Wisconsin, District Two

August 23, 2017, Decided; August 23, 2017, Filed

Appeal No. 2016AP1173

Reporter

2017 Wisc. App. LEXIS 620 * | 2017 WI App 66 | 378 Wis. 2d 219 | 904 N.W.2d 144 | 2017 WL 3617014

STATE OF WISCONSIN, PLAINTIFF-RESPONDENT, v. VINCENT E. BOYD, DEFENDANT-APPELLANT.

Notice: SEE RULES OF APPELLATE PROCEDURE, RULE 809.23(3), REGARDING CITATION OF UNPUBLISHED OPINIONS. NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

Subsequent History: Review denied by State v. Boyd, 2018 WI 5, 2017 Wisc. LEXIS 809 (Dec. 12, 2017)

Prior History: **[*1]** APPEAL from an order of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. Cir. Ct. No. 2010CF344. State v. Boyd, 2015 WI App 28, 361 Wis. 2d 285, 862 N.W.2d 619, 2015 Wisc. App. LEXIS 150 (Feb. 26, 2015)

Disposition: Affirmed.

Core Terms

withdraw, pleas, circuit court, no contest, ineffective, latitude, postconviction motion, sexual assault, questioning, appointed, entitled to withdraw, pro se, postconviction, pressured, pled

Judges: Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Opinion

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE809.23(3).

P1 PER CURIAM. Vincent E. Boyd appeals pro se from an order denying his postconviction motion to withdraw his no contest pleas. For the reasons that follow, we affirm.

P2 In June 2010, the State charged Boyd with two counts of first-degree sexual assault of a child as a persistent repeater. The charges stemmed from allegations that he twice had sexual contact with a seven-year-old girl. Boyd was previously convicted of second-degree sexual assault of a child in 2001.

P3 The case was delayed multiple times due to Boyd's issues with appointed counsel. Boyd's first attorney was permitted to withdraw for an unspecified conflict. Boyd's second attorney was also permitted to withdraw for a conflict. Boyd's third attorney moved to withdraw after Boyd submitted several pro se filings and asked to be allowed to "act as co-counsel."

P4 At a hearing on the motion of the third attorney to withdraw, **[*2]** the prosecutor indicated that the State had obtained recordings of telephone calls made by Boyd from jail in which he talked about keeping his appointed attorneys on the case for as long as possible and then firing them at the last minute. The prosecutor argued that Boyd was trying to delay the proceedings and manipulate the system. The circuit

3 9 3 1 4 6

App C

court agreed that Boyd was "playing the game." Nevertheless, it granted the motion to withdraw, and a fourth attorney was appointed for Boyd. The court warned Boyd that it would be his last appointment.

P5 Boyd's fourth attorney was John Wallace. At a conference on the day before trial, Wallace requested a continuance on the ground that he and Boyd had been arguing over defense strategy. The circuit court denied the request, determining it to be a delay tactic by Boyd. Wallace then informed the court that Boyd did not want Wallace to represent him further. The court found Boyd competent to represent himself and agreed to allow Boyd to proceed pro se with Wallace as "standby counsel."

P6 During subsequent discussions, the prosecutor expressed concern that Boyd, while acting pro se, might seek to counter the State's other acts evidence by conducting **[*3]** a "trial within a trial." She observed:

> [A]t least one of the other acts' victims, the one from the Langlade County case, the one [Boyd] was convicted of, I know in some of his motions he is questioning that conviction and wants to have a trial within a trial. He's already pled and been sentenced. There's a Judgement of Conviction there. He can't dispute the fact that that's there, and technically, because the charge is first-degree sexual assault of a child, the fact he has been convicted of it by law is allowed to come in, so I just want him to be aware of that as well. He's not going to be able to collaterally attack that conviction at this trial.

P7 The circuit court agreed with the prosecutor's statement. However, Boyd interjected, and the following exchange took place regarding his ability to explain why he had pled to the prior sexual assault of a child charge:

> [BOYD]: I have the right to defend myself against it. I would—I would like some latitude in questioning the victim and I would talk to—
>
> THE COURT: You will get no latitude.
>
> MR. WALLACE: He's wishes [sic]—he's requesting some latitude in questioning—
>
> THE COURT: You will get no latitude. You don't—just because you're representing **[*4]** yourself doesn't mean you get to violate the rules of evidence. I mean you get to—you're right, you have a right to defend yourself within the law. That doesn't mean just because you're representing yourself you—means you get to ask questions that aren't relevant, that are prejudicial, that are hearsay. You don't get to violate the rules of evidence just because you're representing yourself.
>
> [BOYD]: No, I understand that. I just think I should be able to tell the jury—
>
> THE COURT: If you don't—if you don't know what the rules are, maybe you should reconsider whether or not you want to represent yourself.
>
> [BOYD]: I'm not allowed to explain to the jury why I pled guilty to the case?
>
> THE COURT: You are not. You don't get to explain anything unless you testify.
>
> [BOYD]: If I testify, am I allowed to tell the jury why I pled guilty to that charge?
>
> THE COURT: No. It's not relevant.

P8 The next day, Boyd pled no contest to both counts of first-degree sexual assault of a child without the persistent repeater enhancer. The circuit court accepted the pleas as knowingly, voluntarily, and intelligently entered.

P9 Prior to sentencing, Boyd filed a pro se motion to withdraw his no contest pleas. He alleged **[*5]** that Wallace had pressured him to enter the pleas. He further alleged that the circuit court had improperly pressured him by ruling that he would get "no latitude" when cross-examining witnesses at trial. The circuit court subsequently removed Wallace as counsel and appointed another attorney.

P10 Boyd's fifth attorney was Gary Schmidt. Schmidt filed a supplement to Boyd's motion to withdraw his no contest pleas. He argued that Boyd "was unduly pressured by the sudden change in circumstances the morning before his scheduled jury trial and made a hasty entry of his plea of no contest." He also argued that Wallace had pressured Boyd to enter the pleas. Following a hearing on the matter, the circuit court denied the motion.

P11 Schmidt then filed a second motion to withdraw Boyd's no contest pleas. He asserted that Boyd was entitled to withdraw his pleas because he had entered them without the benefit of the mandated colloquy under ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997), which helps ensure the validity of the waiver of the right to counsel. Schmidt also moved for a continuance "[t]o request a transcript of the plea hearing to obtain an accurate record of the questions and statements made at that hearing." The circuit court denied **[*6]** the motion and proceeded to sentencing. Afterwards, Boyd appealed.

P12 Tricia Bushnell was appointed to represent Boyd in postconviction proceedings. Like Schmidt, Bushnell asserted that Boyd was entitled to withdraw his no contest pleas because he had entered them without the benefit of the ***Klessig*** colloquy. This court determined that the remedy for the failure to conduct the ***Klessig*** colloquy was to remand for a hearing to determine whether Boyd had validly waived his right to counsel. *See* ***State v. Boyd***, No. 2013AP684-CR, unpublished op. and order (WI App Nov. 6, 2013).

P13 On remand, the circuit court held a hearing and found that Boyd had validly waived his right to counsel. Accordingly, it concluded that Boyd was not entitled to withdraw his no contest pleas. Boyd appealed, and this court affirmed. *See* ***State v. Boyd***, 2015 WI App 28, 361 Wis. 2d 285, 862 N.W.2d 619, unpublished slip op. (2015).

P14 In March 2016, Boyd filed a WIS. STAT. § 974.06 (2015-16)[1] postconviction motion to withdraw his no contest pleas based upon ineffective assistance of both trial and postconviction counsel. The circuit court denied the motion without a hearing. This appeal follows.

P15 On appeal, Boyd contends that the circuit court erred **[*7]** in denying his postconviction motion without a hearing. He renews the claims made in the motion and asks this court to either grant a hearing or vacate his convictions and permit him to withdraw his no contest pleas.

P16 To be entitled to a hearing on a postconviction motion, a defendant must allege "sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. This is a legal question, which we review de novo. ***Id.*** If the motion alleges sufficient facts, a hearing is required. ***Id.*** If the motion is insufficient, if it presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court may exercise its discretion in deciding whether to grant a hearing. ***Id.*** We review discretionary decisions under the erroneous exercise of discretion standard. ***Id.***

P17 In his postconviction motion, Boyd accused his trial counsel (Schmidt) of ineffective assistance for (1) failing to pursue an allegedly meritorious ground for plea withdrawal (i.e., that Boyd was improperly pressured by the circuit court's ruling that he would get "no latitude" when cross-examining witnesses at trial); and (2) failing to obtain **[*8]** transcripts relevant to whether he was entitled to withdraw his no contest pleas. Boyd also accused his postconviction counsel (Bushnell) of ineffective assistance for failing to challenge his trial counsel's effectiveness on these issues. A claim of ineffective assistance requires a showing of both deficient performance and prejudice. ***Id.***, ¶26.

P18 Here, we are not persuaded that trial counsel was ineffective for failing to pursue plea withdrawal on the basis of the circuit court's "no latitude" ruling. Contrary to Boyd's assertion, the court was not infringing upon his constitutional right to cross-examine witnesses at trial. Rather, the record demonstrates that the court was simply impressing upon Boyd the need to follow the rules of evidence while representing himself. This meant that Boyd would get "no latitude" in asking questions that were irrelevant, prejudicial, or otherwise in violation of the rules. Thus, Boyd would not be allowed to conduct a "trial within a trial" and collaterally attack his prior conviction for sexual assault of a child. The court's ruling was proper and does not provide a basis for plea withdrawal.

P19 Likewise, we are not persuaded that trial counsel **[*9]** was ineffective for failing to obtain transcripts relevant to whether Boyd was entitled to withdraw his no contest pleas. As noted, counsel did move for a continuance to request the transcript of the plea hearing before Boyd's sentencing. The circuit court denied the motion. Even if counsel should have requested this or other transcripts earlier, Boyd has not shown that he was prejudiced by the failure to do so. That is, Boyd has not alleged sufficient facts to support a claim that, but for the absence of transcripts, there is a reasonable probability that he would have been permitted to withdraw his pleas. His allegations in this regard are conclusory and therefore insufficient to warrant a hearing.

P20 Given our determination that Boyd's challenges to trial counsel's performance lack merit, we conclude that postconviction counsel was not ineffective for failing to raise them. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel's failure to raise a legal issue is not deficient performance if the issue would have been rejected). In any event, Boyd's claims are not "clearly stronger" than the one that counsel actually brought. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶¶45-46, 360 Wis. 2d 522, 849 N.W.2d 668 (to prevail in a claim that postconviction counsel was ineffective for failing to pursue an **[*10]** issue, the ignored issue must be clearly stronger than the one counsel actually pursued).

P21 For these reasons, we conclude that the circuit court properly denied Boyd's postconviction motion to withdraw his no contest pleas without a hearing.[2]

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

Footnotes

[1] All references to the Wisconsin Statutes are to the 2015-16 version.

[2] To the extent we have not addressed an argument raised by Boyd on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP837-CR Cir. Ct. No. 2010CF344

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VINCENT E. BOYD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Affirmed.*

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Vincent Boyd appeals his judgment of conviction and a circuit court order denying his motion to withdraw his no contest plea before sentencing. Boyd argues on appeal that he established fair and just reasons to withdraw his plea before sentencing and that, therefore, he is entitled to plea

App D

withdrawal. For the reasons set forth below, we affirm the judgment and order of the circuit court.

BACKGROUND

¶2 Boyd was charged in June 2010 with two counts of sexual assault of a child under thirteen years of age as a persistent repeater. *See* WIS. STAT. §§ 948.02(1), 939.62(2m)(b)2. (2013-14).[1] In November 2010, Boyd's first appointed attorney was permitted to withdraw for an unspecified conflict. In February 2011, Boyd's second appointed attorney withdrew, alleging that she, too, had a conflict, that Boyd had been verbally abusive with her and her staff, and that Boyd no longer wanted her to represent him. In August 2011, Boyd's third appointed attorney moved to withdraw after Boyd submitted several *pro se* filings, including a letter in which Boyd asked the court to be allowed to "act as co-counsel." The motion to withdraw asserted that Boyd was receiving legal advice from an unnamed third party and that Boyd was insisting that his attorney follow the advice.

¶3 At a hearing on the motion of the third attorney to withdraw, the prosecution indicated that the State had obtained recordings of calls made by Boyd from jail in which he talked about keeping his appointed attorneys on his case for as long as possible and then firing them at the last minute. The State argued at the hearing that Boyd was trying to delay the proceedings and manipulate the system. The circuit court agreed that Boyd was "playing the game," but nonetheless

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

granted the motion to withdraw and agreed to appoint a fourth attorney for Boyd, warning him that this would be his last appointment.

¶4 After the appointment of a fourth attorney, John Wallace, Boyd requested a continuance of the trial date, but the court denied the request. Wallace renewed the request for a continuance at a final pretrial conference on March 26, 2012, the day before trial. Wallace explained that he and Boyd had been arguing over defense strategy. The State objected. The court again denied the request for a continuance, determining it to be another "delay tactic" by Boyd.

¶5 Wallace immediately informed the court that Boyd "has now fired me as his attorney" and "does not want me to be representing him any further." Addressing Boyd directly, the court told Boyd that he could not fire Wallace but, rather, the court had to permit him to withdraw. The court then stated that it would not let Wallace "get off the case." The court engaged in an exchange with Boyd, after which the court agreed to allow Boyd to proceed *pro se* with Wallace as "standby counsel." Boyd did not object. The court then addressed the issue of Boyd's competence to proceed *pro se*, and found that Boyd was competent to represent himself. However, the court did not engage Boyd in a colloquy to ascertain the validity of Boyd's waiver of the right to counsel. *See generally* ***State v. Klessig***, 211 Wis. 2d 194, 204-07, 564 N.W.2d 716 (1997).

¶6 The next day, Wallace informed the court that Boyd wished to enter a no contest plea. The court engaged Boyd in a plea colloquy on the record, after which the court found that Boyd had entered his plea freely, voluntarily, and intelligently. After the plea hearing, Boyd filed a *pro se* motion to withdraw his plea, alleging that Wallace had "pressured him to enter a plea" and "refused to allow Boyd to handle the proceeding himself" even though Wallace was supposed

to be acting only as standby counsel. Wallace also filed a motion for plea withdrawal on behalf of Boyd, alleging that after the court denied the request for a continuance of the trial date, Boyd felt he had "no option but to accept the plea" because the defense was unprepared for trial.

¶7 The court removed Wallace as counsel and appointed a fifth attorney, who filed a new motion for plea withdrawal on Boyd's behalf. The court denied the motion after a hearing, on the basis that Boyd had failed to demonstrate a fair and just reason for plea withdrawal. Then, on the day before the scheduled sentencing hearing, Boyd's counsel filed another motion for plea withdrawal, stating as grounds the court's failure to conduct a ***Klessig*** colloquy at the pretrial conference where Wallace was allowed to withdraw and act as standby counsel. The motion also argued that the court's determination that Boyd was competent to proceed *pro se* was inadequate. The court denied the motions and proceeded to sentence Boyd to thirty years of incarceration and twenty years of extended supervision on each count, to be served consecutively.

¶8 Boyd appealed. In a summary opinion and order, this court remanded the matter to the circuit court for an evidentiary hearing on the issue of whether Boyd's waiver of the right to counsel was knowing, intelligent, and voluntary. The circuit court proceeded to hold the hearing and, at its conclusion, made factual findings and concluded that Boyd's waiver of the right to counsel was valid. Boyd now appeals following the court's decision on remand.

STANDARD OF REVIEW

¶9 We review a circuit court's decision to grant or deny a motion to withdraw a plea before sentencing under the erroneous exercise of discretion standard. ***State v. Jenkins***, 2007 WI 96, ¶30, 303 Wis. 2d 157, 736 N.W.2d 24.

¶10 Whether a defendant was denied the constitutional right to self-representation presents a question of constitutional fact, which this court determines independently. ***State v. Imani***, 2010 WI 66, ¶19, 326 Wis. 2d 179, 786 N.W.2d 40. We apply constitutional principles to the facts of the case in order to determine whether a defendant knowingly, intelligently, and voluntarily waived the right to counsel. ***Id.***

DISCUSSION

¶11 A circuit court should grant a motion for plea withdrawal prior to sentencing if it finds a fair and just reason for the request, unless withdrawal would substantially prejudice the prosecution. ***Jenkins***, 303 Wis. 2d 157, ¶28. Boyd argues on appeal that he established fair and just reasons. Specifically, he argues that, when the circuit court permitted Wallace to serve as standby counsel, it violated Boyd's right to self-representation, that Boyd's decision to waive his right to counsel was not voluntary and deliberate, that the record fails to demonstrate that he was competent to proceed *pro se*, and that the totality of the circumstances warrants plea withdrawal.

Appointment of standby counsel

¶12 Boyd argues on appeal that Boyd's right to self-representation was violated by the manner in which standby counsel was appointed and utilized. Boyd asserts that the court appointed Wallace in an "acrimonious environment" and that the court did not define Wallace's role or give Boyd any input into that role. The State counters that, to the extent the court may have been frustrated with Boyd, that frustration was brought about by Boyd's numerous delays in the proceedings over the course of nearly two years, during which he went through multiple appointed attorneys. For the reasons discussed below, we conclude that

Boyd's right to self-representation was not violated by the appointment and use of standby counsel.

¶13 A defendant has a "constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so." ***Faretta v. California***, 422 U.S. 806, 807 (1975). The United States Supreme Court has concluded that the appointment of standby counsel, even over a *pro se* defendant's objection, does not violate the right to self-representation, and that "[p]articipation by counsel with a *pro se* defendant's express approval is ... constitutionally unobjectionable." ***McKaskle v. Wiggins***, 465 U.S. 168, 176-77, 182 (1984). The Wisconsin Supreme Court has recognized that the "role of standby counsel can vary over a wide spectrum, ranging from a warm body sitting beside the defendant throughout trial to participation that is tantamount to that of defense counsel." ***State v. Campbell***, 2006 WI 99, ¶66, 294 Wis. 2d 100, 718 N.W.2d 649.

¶14 Here, it is significant to note that Boyd did not object to the appointment of Wallace as standby counsel. When the court told Boyd that Wallace was "still going to be sitting there" even if Boyd represented himself, Boyd replied, "That would be fine with me." Boyd asked questions about what he would and would not be permitted to do, and his questions were answered. He asked whether he would be permitted to file the motions that he had asked Wallace to prepare, and Wallace confirmed that he could assist Boyd with the motions. Boyd asked whether he, personally, would be permitted to question witnesses. The court confirmed that Boyd could question witnesses, but told him that he would be bound by the rules of evidence in terms of what testimony would be allowed.

¶15 We agree with the State that Boyd has not pointed to any applicable legal authority that would require the court to define the scope of representation of standby counsel. However, even if such a requirement existed, the record demonstrates that Boyd did ask for and receive guidance about the scope of what he would do and what Wallace would do. We are satisfied, based on the record before us, that the court did not deprive Boyd of his right to self-representation under ***Faretta***, 422 U.S. at 807, by the manner in which it appointed Wallace as standby counsel.

¶16 We turn next to Boyd's argument that the conduct of Wallace and the court at the plea hearing violated Boyd's right to represent himself. Specifically, Boyd argues that he was unrepresented during the plea negotiations that took place on the day of the hearing because he was not personally present in negotiations with the district attorney. Although Wallace was present in the negotiations, Boyd argues that Wallace was no longer his legal representative at the time.

¶17 The State points out that the record is silent as to whether Boyd was, in fact, present during negotiations between Wallace and the district attorney. The transcript of the plea hearing shows that, at the beginning of the hearing, Wallace requested a moment to confer with Boyd, and that Boyd and Wallace conferred off the record. Immediately after his off-record discussion with Boyd, Wallace asked the court for five minutes to speak with the district attorney about a resolution. Upon conclusion of that discussion, Wallace and the district attorney informed the court of the terms of the plea agreement. The court then engaged Boyd in a plea colloquy, after which it found that Boyd's no contest plea was made freely, voluntarily, and intelligently, and accepted the plea.

¶18 The circuit court reaffirmed its finding that Boyd's plea was made freely, voluntarily, and intelligently at the hearing on his plea withdrawal motion. In making that finding, the court rejected Boyd's argument that he felt pressured by Wallace into entering the plea agreement. The court stated that Boyd "would not allow any attorney to push him around or make a decision for him. He's clearly exhibited throughout these proceedings that he is the one in charge...." Implicit in the court's finding that the plea was valid is the reasonable inference that Boyd authorized Wallace to engage in plea negotiations on his behalf. Given the facts in the record and the reasonable inferences to be drawn from them, we conclude that the circuit court did not erroneously exercise its discretion in finding that Boyd's plea was knowingly, voluntarily, and intelligently entered. *See* ***State v. Lopez,*** 173 Wis. 2d 724, 729, 496 N.W.2d 617 (Ct. App. 1992) (we will uphold the decision of the circuit court if it is supported by credible evidence or reasonable inferences that can be drawn from this evidence).

¶19 We also reject Boyd's argument that his right to represent himself was violated by the way that Wallace interacted with the court during the plea hearing. Boyd objects to the fact that Wallace explained the plea agreement to the court and gave his opinion that Boyd was entering the plea knowingly, intelligently, and voluntarily. However, we are satisfied that these actions were consistent with Wallace's role as standby counsel. "[T]he 'chief purpose' of standby counsel in most cases is to 'serve the interests of the [circuit] court.'" ***Campbell,*** 294 Wis. 2d 100, ¶76 (quoted source omitted). In these interactions, Wallace was providing information that was helpful to the court, based on his experience with Boyd. Boyd has not demonstrated that Wallace's involvement as standby counsel prevented Boyd from having "actual control" over his own

defense. *See* ***McKaskle,*** 465 U.S. at 178. Thus, we conclude that Boyd's right to self-representation was not violated by the appointment or use of standby counsel.

Waiver of right to counsel

¶20 Next, Boyd argues that the State has not established that Boyd made a valid waiver of the right to counsel. Ordinarily, a circuit court establishes a valid waiver of the right to counsel by conducting an in-court colloquy to establish that the defendant: (1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed. ***Klessig***, 211 Wis. 2d at 206.

¶21 On appeal, Boyd does not contest that he was aware of the difficulties and disadvantages of self-representation, the seriousness of the charges against him, or the general range of penalties. Rather, Boyd asserts that the pre-plea transcripts do not establish that his choice to proceed without counsel was voluntary and deliberate. He argues that the decision resulted from pressure placed upon him by Wallace's lack of preparation and the court's refusal to grant a continuance of the trial date.

¶22 The State asserts that the facts adduced at the hearing on remand and the circuit court's findings demonstrate that Boyd's decision to proceed *pro se* was a voluntary and deliberate one. We agree with the State's position. At the evidentiary hearing on remand, the prosecution elicited testimony from Boyd that, prior to entry of his plea, he had submitted multiple filings to the court under his own name while he was still represented by appointed counsel. In one of those motions, Boyd requested that the court allow him to act as "co-counsel." Boyd

testified that if he disagreed with his attorney's strategy or argument, Boyd took it upon himself to present it to the court.

¶23 At the hearing on remand, the prosecutor also reviewed the transcripts of phone calls made by Boyd from jail, in which Boyd discussed his plans to fire his attorneys only after they'd gotten him the information he wanted. Boyd said that he planned to fire his first attorney, but not "'until her investigator completes their investigation.'" Regarding his second attorney, Boyd talked about getting her to withdraw so that she would not count against his three-attorney limit. Boyd also stated that he planned to wait until the last minute before firing his second attorney. Boyd made similar statements about his third attorney, saying that he would let him get all the information and then would fire him the day before trial.

¶24 The prosecution also had Boyd read the transcript of a phone conversation Boyd had with his mother in June 2011 in which he discussed preparing his own filings and speaking for himself in court because his attorneys were making him believe that he would be better off by himself. Boyd and his mother discussed Boyd representing himself and keeping his attorney on as an advisor. When asked on direct examination by his own attorney whether Boyd had ever seriously considered representing himself prior to the final pre-trial hearing on March 26, 2012, Boyd replied, "Never. No, I did not." He stated that his decision to represent himself "was a panicky thing" and "a reflex."

¶25 At the conclusion of the hearing, the circuit court found that the State had established by clear and convincing evidence that Boyd's waiver of the right to counsel was knowingly, intelligently, and voluntarily made. The court stated that "clearly this defendant chose to represent himself, wanted to represent

himself, was going to represent himself." The court based its ruling on a finding that Boyd's testimony that he did not want to represent himself was not credible. Implied in the court's ruling is that Boyd's contention that he was not aware of the difficulties and disadvantages of self-representation, the seriousness of the charges against him, and the range of penalties was also not credible. We will not overturn credibility determinations on appeal unless the testimony upon which they are based is inherently or patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts. ***Global Steel Prods. Corp. v. Ecklund Carriers, Inc.***, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269. Boyd has failed to establish that that is the case here. Therefore, we affirm the circuit court's ruling that Boyd's choice to represent himself and waive his right to counsel was knowing, intelligent, and voluntary.

Competency

¶26 Boyd further argues that the court did not adequately address the issue of whether Boyd was competent to proceed *pro se*. Our supreme court has explained that the question of a defendant's competence to proceed *pro se* "is 'uniquely a question for the [circuit] court to determine.'" ***Imani***, 326 Wis. 2d 179, ¶37 (quoted source omitted). A circuit court's competency determination must be upheld on review unless it is "'totally unsupported by the facts apparent in the record.'" ***Id.*** (quoted source omitted).

¶27 Here, the circuit court made its competency finding about Boyd "based upon [its] experiences with him." At that point, the court had received at least eight *pro se* filings from Boyd, including one in which he asked to be recognized as co-counsel. These filings addressed a number of complex issues pertinent to Boyd's case, including the admissibility of other acts evidence and

expert witness testimony. Boyd also demonstrated, in the phone calls he made from jail, that he had a deep understanding of the public defender appointment process. We are satisfied that the record supports the circuit court's finding that Boyd was competent to represent himself, and Boyd does not now make any allegation to the contrary. *See* ***State v. Gracia***, 2013 WI 15, ¶38, 345 Wis. 2d 488, 826 N.W.2d 87 (a challenge to a circuit court's decision to allow a defendant to proceed *pro se* based on the court's failure to adequately assess competency must include the allegation that the defendant was actually incompetent at the time).

Totality of the circumstances

¶28 Boyd argues that, even if none of his arguments individually establishes a fair and just reason for plea withdrawal, the totality of the circumstances requires that he be allowed to withdraw his plea. As stated above, whether to grant or deny a presentence motion for plea withdrawal is a discretionary decision. *See* ***Jenkins***, 303 Wis. 2d 157, ¶30. The circuit court has wide "latitude" in assessing what is fair and just under the circumstances. ***Id.***, ¶29. Boyd has failed to persuade us, given the totality of the circumstances, that the circuit court erroneously exercised its discretion in determining that Boyd did not demonstrate a fair and just reason for plea withdrawal.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

November 6, 2013

To:

Hon. Scott C. Woldt
Circuit Court Judge
Winnebago County Courthouse
P.O. Box 2808
Oshkosh, WI 54903-2808

Christian A. Gossett
District Attorney
P.O. Box 2808
Oshkosh, WI 54903-2808

Melissa M. Konrad
Clerk of Circuit Court
Winnebago County Courthouse
P.O. Box 2808
Oshkosh, WI 54903

Marguerite M. Moeller
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Tricia J. Bushnell
Frank J. Remington Center
Wisconsin Innocence Project
975 Bascom Mall
Madison, WI 53706

You are hereby notified that the Court has entered the following opinion and order:

2013AP684-CR State of Wisconsin v. Vincent E. Boyd (L.C. #2010CF344)

Before Brown, C.J., Reilly and Gundrum, JJ.

Vincent E. Boyd appeals from a judgment convicting him of two counts of first-degree sexual assault of a child. Boyd entered no-contest pleas while proceeding pro se but without the benefit of a *Klessig*[1] colloquy. The dispositive issue is whether we should reverse the judgment and remand with instructions that he be permitted to withdraw his no-contest pleas, as Boyd requests, or, as the State urges, reverse and remand for an evidentiary hearing to determine

---

[1] *State v. Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997).

App. E

if Boyd knowingly, intelligently, and voluntarily waived his right to the assistance of counsel. We are persuaded that the State is correct. We therefore reverse and remand for an evidentiary hearing. Based upon our review of the briefs and the record, we conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[2]

The day before his trial was to begin, Boyd filed a pro se motion to have a new lawyer appointed on grounds that his current one, Attorney John Wallace, was unprepared for trial and that communication had broken down between them. When the circuit court denied the motion, Boyd asked to represent himself. The court agreed and, based only on its "experiences" with Boyd, found Boyd competent to proceed pro se. It did not engage Boyd in a colloquy to assess whether he knowingly, intelligently, and voluntarily waived the right to counsel. The court also directed Wallace to act as standby counsel without defining the role to Wallace or Boyd. The next day, Wallace worked out a plea deal with the State, presented it to the court, assisted Boyd with the plea questionnaire, signed it as Boyd's attorney, and answered questions during the plea colloquy. Despite saying he felt "pressured," Boyd entered no-contest pleas.

A few weeks later, Boyd—not yet sentenced—filed a pro se motion to withdraw his pleas, alleging that they were coerced and not knowingly, intelligently, and voluntarily made, and that counsel was ineffective. New counsel, appointed shortly thereafter, filed a similar motion. He also argued at the motion hearing that Wallace overstepped the boundaries of standby counsel. The court refused to allow Boyd to withdraw his pleas and proceeded to sentencing. This appeal followed.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

While Boyd raises issues regarding the contours of the role of standby counsel and a court's duty to inform a pro se defendant of those limits, our disposition of this case turns on the circuit court's failure to ascertain whether Boyd's waiver of counsel was knowing, intelligent, and voluntary. A defendant has a constitutional right to conduct his or her own defense. *State v. Klessig*, 211 Wis. 2d 194, 203, 564 N.W.2d 716 (1997). First, however, the circuit court must ensure that the defendant is competent to do so and has knowingly, intelligently, and voluntarily waived the right to counsel. *Id.* To demonstrate a valid waiver, the court must verify that the defendant deliberately chose to proceed without counsel and was aware of the difficulties and disadvantages of self-representation, the seriousness of the charges, and the general range of potential penalties. *Id.* at 206. This colloquy is mandatory. *Id.*

The State concedes that the circuit court did not conduct a *Klessig* colloquy. The parties' views of the proper remedy differ, however. Boyd argues that the court's failures to conduct a *Klessig* colloquy, to establish Boyd's competence to represent himself, and to delineate the contours of the role of standby counsel, and Wallace's exceeding the bounds of the role plainly constitute "fair and just reasons" to withdraw his pleas. *See State v. Jenkins*, 2007 WI 96, ¶28, 303 Wis. 2d 157, 736 N.W.2d 24. He contends we should address all issues on the record before us, reverse the judgment, and remand with instructions that he be permitted to withdraw his no-contest pleas. The State asserts that we must remand for an evidentiary hearing to determine the validity of Boyd's waiver of counsel. We agree with the State.

When a circuit court fails to conduct a *Klessig* colloquy, a reviewing court cannot assess the validity of the waiver from the record. *See Klessig*, 211 Wis. 2d at 206. Rather, the appropriate remedy is a remand for an evidentiary hearing on whether the waiver of the right to counsel was knowing, intelligent, and voluntary. *See id.* at 206-07; *see also State v. Imani*, 2010

WI 66, ¶¶41, 43, 326 Wis. 2d 179, 786 N.W.2d 40 (Crooks, J., concurring). Nonwaiver is presumed unless the State establishes by clear and convincing evidence that the waiver was knowing, intelligent, and voluntary. *Klessig*, 211 Wis. 2d at 204, 207. If the State can satisfy its burden, Boyd's conviction will stand. *See id.* at 207. If not, he will be entitled to withdraw his plea. *See id.*

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily reversed and cause remanded, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 2 | WINNEBAGO COUNTY

For Official Use Only

State of Wisconsin vs. Vincent E. Boyd

Date of Birth: 11-25-1981

Judgment of Conviction

Sentence to Wisconsin State Prisons and Extended Supervision

Case No. 2010CF000344

FILED
06-15-2012
Clerk of Circuit Court
Winnebago County, WI

The defendant was found guilty of the following crime(s):

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
1	1st Degree Sexual Assault of Child	948.02(1)	No Contest	Felony B	04-01-2003		03-27-2012
2	1st Degree Sexual Assault of Child	948.02(1)	No Contest	Felony B	04-01-2003		03-27-2012

IT IS ADJUDGED that the defendant is guilty as convicted and sentenced as follows:

Ct.	Sent. Date	Sentence	Length	Agency	Comments
1	06-15-2012	State Prison w/ Ext. Supervision	50 YR	Department of Corrections	751 days credit.
2	06-15-2012	State Prison w/ Ext. Supervision	50 YR	Department of Corrections	751 days credit.

Total Bifurcated Sentence Time

	Confinement Period				Extended Supervision			Total Length of Sentence		
Ct.	Years	Months	Days	Comments	Years	Months	Days	Years	Months	Days
1	30	0	0		20	0	0	50	0	0
2	30	0	0	Conditions listed on count 1 apply also to count 2.	20	0	0	50	0	0

Sentence Concurrent With/Consecutive Information:

Ct.	Sentence	Type	Concurrent with/Consecutive To Comments
1	State prison	Concurrent	Counts 1 and 2 are concurrent to each other, but consectutve to any other sentence.
1	Extended Supervision	Concurrent	Counts 1 & 2 are concurrent to each other, but consecutive to any other sentence.
2	State prison	Concurrent	Counts 1 & 2 are concurrent to each other, but consecutive to any other sentence.
2	Extended Supervision	Concurrent	Counts 1 & 2 are concurrent to each other, but consecutive to any other sentence

RECEIVED
JUN 18 2012
Gary J. Schmidt

APP. F

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 2 | WINNEBAGO COUNTY

For Official Use Only

State of Wisconsin vs. Vincent E. Boyd

Date of Birth: 11-25-1981

Judgment of Conviction

Sentence to Wisconsin State Prisons and Extended Supervision

Case No. 2010CF000344

FILED
06-15-2012
Clerk of Circuit Court
Winnebago County, WI

Conditions of Extended Supervision:

Obligations: (Total amounts only)

Fine	Court Costs	Attorney Fees	☐ Joint and Several Restitution	Other	Mandatory Victim/Wit. Surcharge	5% Rest. Surcharge	DNA Anal. Surcharge
	742.90		TBD	10.00	140.00		

Ct.	Condition	Agency/Program	Comments
1	Restitution		State has 30 days to submit request for restitution
1	Costs		Extradition fees due to Winnebago County Sheriff's Department, 4311 Jackson St., Oshkosh WI 54903 of $547.50
1	Other		Follow assessment recommendations. Follow rules and pay fees of supervision. DNA sample and fee waived. Comply with Sexual Offender Registration Program (SORP). Maintain full time employment. No contact with anyone under 18 years of age. No contact with victims or their families. Contact allowed with biological child as long as there is supervised contact by someone approved by defendant's social worker.
2	Costs		

Conditions of Sentence or Probation

Obligations: (Total amounts only)

Fine	Court Costs	Attorney Fees	☐ Joint and Several Restitution	Other	Mandatory Victim/Wit. Surcharge	5% Rest. Surcharge	DNA Anal. Surcharge
			TBD				

Pursuant to §973.01(3g) and (3m) Wisconsin Statutes, the court determines the following:

The Defendant is ☐ is not ☒ eligible for the Challenge Incarceration Program.

The Defendant is ☐ is not ☒ eligible for the Substance Abuse Program.

IT IS ADJUDGED that **751** days sentence credit are due pursuant to §973.155, Wisconsin Statutes

IT IS ORDERED that the Sheriff shall deliver the defendant into the custody of the Department.

Distribution:

Scott C Woldt, Judge
Tracy A Paider, District Attorney
Gary J Schmidt, Defense Attorney
Wis State Prison
P/P-EF
Jail
Defendant

BY THE COURT:

Electronically signed by
Hon. Scott C. Woldt, Circuit Court Branch 2
Circuit Court Judge/Clerk/Deputy Clerk

June 15, 2012
Date

STATE OF WISCONSIN, CIRCUIT COURT, WINNEBAGO COUNTY

For Official Use

MAR 27 2012
CIRCUIT COURT BR. II
WINNEBAGO COUNTY

State of Wisconsin, Plaintiff,
-vs-
Vincent E. Boyd Defendant Case No. 10CF344
Name

Plea Questionnaire/ Waiver of Rights

I am the defendant and intend to plea as follows:

Charge/Statute	Plea	Charge/Statute	Plea
948.02 x2	☐ Guilty ☒ No Contest		☐ Guilty ☐ No Contest
	☐ Guilty ☐ No Contest		☐ Guilty ☐ No Contest

☐ See attached sheet for additional charges.

I am 30 years old. I have completed 12 years of schooling.

- I ☒ do ☐ do not have a high school diploma, GED or HSED.
- I ☒ do ☐ do not understand the English language.
- I ☒ do ☐ do not understand the charge(s) to which I am pleading.
- I ☐ am not ☐ am currently receiving ~~treatment~~ for a mental illness or disorder.
- I ☐ have not ☐ have had any alcohol, medications, or drugs within the last 24 hours.

~~Benad~~ Benadryl

Constitutional Rights

I understand that by entering this plea, I give up the following constitutional rights:

- ☒ I give up my right to a trial.
- ☒ I give up my right to remain silent and I understand that my silence could not be used against me at trial.
- ☒ I give up my right to testify and present evidence at trial.
- ☒ I give up my right to use subpoenas to require witnesses to come to court and testify for me at trial.
- ☒ I give up my right to a jury trial, where all 12 jurors would have to agree that I am either guilty or not guilty.
- ☒ I give up my right to confront in court the people who testify against me and cross-examine them.
- ☒ I give up my right to make the State prove me guilty beyond a reasonable doubt.

I understand the rights that have been checked and give them up of my own free will.

Understandings

- I understand that the crime(s) to which I am pleading has/have elements that the State would have to prove beyond a reasonable doubt if I had a trial. These elements have been explained to me by my attorney or are as follows: See elements Sheets attached ☐ See Attached sheet.
- I understand that the judge is not bound by any plea agreement or recommendations and may impose the maximum penalty. The maximum penalty I face upon conviction is: 60 years x2
- I understand that the judge must impose the mandatory minimum penalty, if any. The mandatory minimum penalty I face upon conviction is: _____
- I understand that the presumptive minimum penalty, if any, I face upon conviction is: _____

The judge can impose a lesser sentence if the judge states appropriate reasons.

Understandings

- I understand that if I am placed on probation and my probation is revoked:
  - if sentence is withheld, the judge could sentence me to the maximum penalty, or
  - if sentence is imposed and stayed, I will be required to serve that sentence.
- I understand that if I am not a citizen of the United States, my plea could result in deportation, the exclusion of admission to this country, or the denial of naturalization under federal law.
- I understand that if I am convicted of any felony, I may not vote in any election until my civil rights are restored.
- I understand that if I am convicted of any felony, it is unlawful for me to possess a firearm.
- I understand that if I am convicted of any violent felony, it is unlawful for me to possess body armor.
- I understand that if I am convicted of a serious child sex offense, I cannot engage in an occupation or participate in a volunteer position that requires me to work or interact primarily and directly with children under the age of 16.
- I understand that if any charges are read-in as part of a plea agreement they have the following effects:
  - Sentencing – although the judge may consider read-in charges when imposing sentence, the maximum penalty will not be increased.
  - Restitution – I may be required to pay restitution on any read-in charges.
  - Future prosecution – the State may not prosecute me for any read-in charges.
- I understand that if the judge accepts my plea, the judge will find me guilty of the crime(s) to which I am pleading based upon the facts in the criminal complaint and/or the preliminary examination and/or as stated in court.

Voluntary Plea

I have decided to enter this plea of my own free will. I have not been threatened or forced to enter this plea. No promises have been made to me other than those contained in the plea agreement. The plea agreement will be stated in court or is as follows: ☐ See Attached.

Plea – Counts 1+2 w/o persistent repeater /
Also – Langlade cnty case – plea + read in /
20 years minimum / [illegible] as can be worked out

Defendant's Statement

I have reviewed and understand this entire document and any attachments. I have reviewed it with my attorney (if represented). I have answered all questions truthfully and either I or my attorney have checked the boxes. I am asking the court to accept my plea and find me guilty.

[signature] 3/20/12

Signature of Defendant Date

Attorney's Statement

I am the attorney for the defendant. I have discussed this document and any attachments with the defendant. I believe the defendant understands it and the plea agreement. The defendant is making this plea freely, voluntarily, and intelligently. I saw the defendant sign and date this document.

[signature] 3/20/12

Signature of Attorney Date

STATE OF WISCONSIN CIRCUIT COURT WINNEBAGO COUNTY

BRANCH 2

STATE OF WISCONSIN,

Plaintiff,

-vs-

CASE NO. 10-CF-344

VINCENT E. BOYD,

Defendant.

FINAL PRETRIAL CONFERENCE

BEFORE: **HONORABLE SCOTT C. WOLDT**

DATE: March 26, 2012

PLACE: Winnebago County Courthouse
Circuit Court Branch 2
415 Jackson Street
Oshkosh, Wisconsin

APPEARANCES: Assistant District Attorney Tracy Paider Appearing on Behalf of the Plaintiff, the State of Wisconsin

Attorney John Wallace III Appearing on Behalf of and With the Defendant, Vincent Boyd

PM 10/12/12

APP. H

PROCEEDINGS

THE COURT: State of Wisconsin versus Vincent Boyd, Case No. 2010-CF-344. Mr. Wallace on behalf of defendant who appears in person. Ms. Paider on behalf of the State. We're here today for final pretrial. The jury trial's tomorrow, two days scheduled for. Where are we at?

MS. PAIDER: I think it's actually scheduled for four --

THE COURT: Four days.

MS. PAIDER: -- but I don't think we're going to need all four days.

THE COURT: Scheduled for four days then.

MR. WALLACE: Your Honor --

THE COURT: Yes.

MR. WALLACE: -- I had, at the pretrial, indicated to you that I might need more time for the case. Last week I filed a motion for continuance. The defendant and I have met, discussed the case, and some of the things that he has presented me has merit, some of them -- some of the items he has presented to me I would argue with him about using, and we have argued over that matter.

THE COURT: Welcome to the club. He argues with everybody.

MR. WALLACE: Well --

THE COURT: He's smarter than the rest of us.

MR. WALLACE: -- I'm looking at fairness to the defendant, Your Honor.

THE COURT: So am I. So am I. He's had every opportunity in the world to get this case resolved, and he's gone through numerous attorneys and -- and I see the stuff that he files. He just thinks he's smarter than you and thinks he's smarter than every attorney and thinks he's smarter than me, and nothing's going to change.

MR. WALLACE: Well --

THE COURT: More time is not going to change that.

MR. WALLACE: -- if --

THE COURT: It's going to be exactly the same.

MR. WALLACE: Well, if I may, Your Honor?

THE COURT: Go ahead.

MR. WALLACE: Thank you. I received the bulk of the file from a previous attorney in December, and I've met with the defendant three or four times, two times extensively, two times not so extensively. I was in the midst of a different trial. Out of fairness to him, I would ask for one continuous. I do not believe that he has asked but for one continuance previous to this. All the previous attorneys have either -- well, I think they resigned. I don't know necessarily if he fired any of them.

(Discussion held off the record between Mr. Wallace

and the defendant.)

MR. WALLACE: Two of them --

(Discussion held off the record between Mr. Wallace and the defendant.)

MR. WALLACE: Two of them were conflicts. He's facing life without parole if convicted of the charge, and I prefer to have every single witness tracked down that he would propose, and the specific time period when this took place he's been limited to, I believe, 68 days. He has provided supplemental information to me which he obtained on his own and from the -- inheriting the file that had been pending for almost two years when I got it, there had been little done on the file up to that point. So out of fairness to him, I filed a motion for adjournment, and we're requesting at least on my -- my taking of the case, a first adjournment.

THE COURT: The State's position?

MS. PAIDER: Your Honor, the State objects to a new adjournment. This case has been adjourned for years. This case was set for trial in October for this March date. And the defense motion indicates that there's no prejudice to the State. I would disagree with that. As time goes on, witnesses memories fade, they get more and more apprehensive, which is completely understandable, and the victims want this to go forward, and we're ready to go forward. We have lined up two other acts' victims, an expert.

In terms of the witnesses that Attorney Wallace had indicated providing, one was the probation agent, one was a marshal arts' instructor, and one was the defendant's mother, who are all on the witness list, presumably ready to go. I don't understand why we would need an adjournment at this point. I would strongly object to an adjournment. This case has been pending for quite some time and is set for trial tomorrow for the next four days. It just needs to be done, Your Honor. I don't think that there's anything time is going to do.

As I indicated at the last hearing when Mr. Boyd fired -- fired Attorney Zilles, I had resuscitated some jail phone calls that we had listened to between Mr. -- or excuse me, between Mr. Boyd and family members where he indicated he would take the case to the end and then fire his attorney to keep prolonging the case, and I think this is simply a delay tactic, and would ask that the court deny the motion for an adjournment.

THE COURT: I -- I agree. I think it's nothing but a delay tactic, and this case has been pending for an inordinate length of time. I think it needs to be trialed -- tried, the matter needs to be resolved one way or another, and we'll start at 8:30 tomorrow morning.

MR. WALLACE: If I may, Your Honor --

(Mr. Wallace files paperwork with the court.)

MR. WALLACE: The defendant wished that to be filed. He has now fired me as his attorney of record on the matter. He does not want me to be representing him any further. And there's, I guess, a case up on appeal right now where -- *State versus Rory Kuenzi*, Waupaca County, where that issue is the primary, whether or not the court can force an attorney. I -- there's an OWI case where the case law says you cannot force an attorney on a defendant, and once they are fired, I think they are terminated from representation, and his mother is attempting to hire an attorney privately today to represent him.

THE COURT: See, the thing is is that he can't fire you.

MR. WALLACE: Well, he has fired me.

THE COURT: I can do that. I'm the only one that can with -- allow you to not represent him. You can't. Only me. And guess what? I'm not letting him get off the case. He's still on the case, he's still your attorney, so you have an obligation to work with him, and I will not allow him off this case. As Miss Paider said, from the phone calls which she has, I think it's a ploy for you to try to prolong this matter, and that's not going to happen.

THE DEFENDANT: Can you consider my reasons for not wanting to have him as my attorney anymore?

THE COURT: Well, you've been sitting here talking

to him all day long.

MR. WALLACE: Insufficient time for preparation.

MS. PAIDER: The first time he came to talk to me about this case was just 11 days ago. That's why my alibi evidence isn't even allowed to be presented to the court.

THE COURT: Well, the thing is just because he's just seeing you doesn't mean that --

THE DEFENDANT: I asked him --

THE COURT: -- he's not working on the case.

THE DEFENDANT: -- but he hasn't. I've asked him to contact 20 witnesses, and he hasn't contacted a single one of them yet. He threatened to hit me. He told me to shut up over a dozen times.

THE COURT: Well, maybe you need to be told.

THE DEFENDANT: He thinks -- he's not even familiar with this case, Your Honor. He thinks that the -- that woman back there is my ex-girlfriend. She's my aunt.

THE COURT: You're smarter than him, right?

THE DEFENDANT: No, I never said that, but I know this case better than him and 11 days isn't enough time--

THE COURT: You know this case better than anybody?

THE DEFENDANT: Yeah. Yeah.

THE COURT: I figured. All right. See you

tomorrow. He's still on the case. I'm not granting your motion.

MS. PAIDER: Your Honor, there are -- and I don't know if the court wants to deal with this now or tomorrow. One of the witnesses that's listed on the witness list -- and I'm not objecting to any of them, but I'm presuming it's for something similar to alibi, it's the probation-parole agent. If the probation-parole agent testifies -- and that's concerning the 2000 conviction from the Langlade County case -- I would like something on the record that the defendant is in agreement with putting forth his probation status in front of the jury because I believe the reason he would be having his probation agent testify was because one of the rules of his supervision was that he not have contact with minors which, obviously, we are alleging that he was having contact with minors and, if he puts forth that status, there are other conditions that he was violating during the term of his probation which I think I would be entitled to go into. So I just want it clear on the record that Mr. Boyd wants his probation agent on the witness list and wants that status brought out in front of the jury.

THE COURT: Mr. Boyd, is that what you want? Why don't I let you two --

MR. WALLACE: More articulately, what Miss Paider is referencing is, if we bring in the probation

officer for a specific reason which she may not have stumbled onto yet, we open the door to any other items that are on the chronological history report and open the door to anything else that the probation agent would know and --

THE COURT: You're opening up the door to the fact that he was on supervision at the time.

MR. WALLACE: He was on maximum supervision, high-risk supervision, as a sex offender, and it may or may not open the door to that, and it may or may not open the door to other items contained in some of the areas of his supervision. We discussed that privately in the jail, and we can take that still under advisement between now and tomorrow.

THE COURT: Okay. So you two can discuss it and --

MR. WALLACE: We can.

THE COURT: -- then we'll address it tomorrow morning as to whether or not -- so we have -- just so he understands that that's a potential issue.

THE DEFENDANT: I understand that.

MR. WALLACE: He understands that.

THE COURT: Yep.

MR. WALLACE: He understood it before.

THE COURT: All right. All right. We'll see you tomorrow morning. Is someone bringing clothes for him?

THE DEFENDANT: My mom is bringing them today.

THE COURT: Someone is bringing clothes?

MR. WALLACE: Yes.

THE COURT: Thank you.

MR. WALLACE: The jail will have them.

THE COURT: Well, he can change them here, right?

TRANSPORT OFFICER: Yeah.

THE DEFENDANT: Judge, I thought I had the right to represent myself.

THE COURT: You can represent yourself if you'd like to.

THE DEFENDANT: But I can't have the opportunity to hire my own attorney of my choice --

THE COURT: That's not representing yourself.

THE DEFENDANT: Well, I have the right to an attorney of my choice too, though.

THE COURT: Well, as we've discussed on numerous occasions before --

THE DEFENDANT: Can I just represent myself on this case then?

THE COURT: Mr. Wallace is still going to be sitting there.

MR. WALLACE: That would be fine with me.

THE COURT: And you want to do your own openings and closings and all that?

THE DEFENDANT: I would like to completely represent myself on this case.

THE COURT: Okay, and Mr. Wallace will be at your side for standby counsel.

MR. WALLACE: The PD will not pay for that. I will just let you know that.

(Attorney Bryan Keberlein is present from the Public Defender's Office and is shaking his head up and down.)

THE COURT: What -- what are you shaking your head up and down for?

MR. KEBERLEIN: My understanding is the Public Defender's Office won't pay for standby counsel. I can verify that.

THE COURT: Then the -- then the County will pay for it. One way or the other you're going to be here as standby counsel.

THE DEFENDANT: All right, and if I'm allowed to represent myself, can I have an opportunity to file the motions that I've asked be filed --

MR. WALLACE: We can take 'em -- he can take 'em up chronologically a couple of 'em; we can do 'em, yes. I know exactly what he wants to do but -- I can -- I can assist him, so for the record, he has terminated me, he is

proceeding pro se, and I have been appointed standby counsel. I will assist him in his defense, and I will advise him on what and what not to do.

THE COURT: Well, he hasn't fired you. You're standby counsel, but he has a right to represent himself.

THE DEFENDANT: Will I be allowed to question the witnesses myself?

THE COURT: You will be able to question --

MS. PAIDER: Your Honor, I want Mr. Boyd to be reminded, though, that the pretrial orders that the court did order are still in effect --

THE COURT: They are.

MS. PAIDER: -- and he is going to be bound by the rules of evidence just like anybody else would in terms of what he is and is not allowed to ask the witnesses.

MR. WALLACE: I will advise him accordingly.

THE COURT: You understand that?

MR. WALLACE: I will advise him accordingly too.

MS. PAIDER: And if in any way -- and I know that the court is really good at this and won't let this happen, but I'm very familiar with Mr. Boyd, and I know the tactics he's going to take, especially with the children involved in this case.

MR. WALLACE: He -- he will not -- if I'm present, he will not undertake any dilatory tactics with the children.

That was not his --

THE DEFENDANT: That's not my --

MR. WALLACE: That was not his intent from the beginning.

8:30 tomorrow morning as standby counsel -- or 8 o'clock.

THE COURT: Okay. We're bringing him in at 8:30, so be here before that.

MR. WALLACE: Okay.

THE COURT: I guess I'll find that he's competent to represent himself.

MS. PAIDER: That's what I was going to ask the court next, if the court was going to do any sort of finding on the record that the defendant --

THE COURT: I will find, based upon my experiences with him, that he is competent to represent himself. He seems to know all the games to try to play, so I guess he can represent himself.

MS. PAIDER: Well, Your Honor, then in terms of the -- at least one of the other acts' victims, the one from the Langlade County case, the one he was convicted of, I know in some of his motions he is questioning that conviction and wants to have a trial within a trial. He's already pled and been sentenced. There's a Judgment of Conviction there. He can't dispute the fact that that's there, and technically,

because the charge is first-degree sexual assault of a child, the fact he has been convicted of it by law is allowed to come in, so I just want him to be aware of that as well. He's not going to be able to collaterally attack that conviction at this trial --

(Defendant speaks but is inaudible.)

THE COURT: That's true.

THE COURT REPORTER: I didn't hear him.

THE DEFENDANT: I have the right to defend myself against it. I would -- I would like some latitude in questioning the victim and I would talk to --

THE COURT: You will get no latitude.

MR. WALLACE: He's wishes -- he's requesting some latitude in questioning --

THE COURT: You will get no latitude. You don't -- just because you're representing yourself doesn't mean you get to violate the rules of evidence. I mean you get to -- you're right, you have a right to defend yourself within the law. That doesn't mean just because you're representing yourself you -- means you get to ask questions that aren't relevant, that are prejudicial, that are hearsay. You don't get to violate the rules of evidence just because you're representing yourself.

THE DEFENDANT: No, I understand that. I just think I should be able to tell the jury --

THE COURT: If you don't -- if you don't know what the rules are, maybe you should reconsider whether or not you want to represent yourself.

THE DEFENDANT: I'm not allowed to explain to the jury why I pled guilty to the case?

THE COURT: You are not. You don't get to explain anything unless you testify.

THE DEFENDANT: If I testify, am I allowed to tell the jury why I pled guilty to that charge?

THE COURT: No. It's not relevant.

MR. WALLACE: If he testifies.

THE COURT: "If he testifies."

MR. WALLACE: If he testifies.

THE COURT: Anything else?

MR. WALLACE: 8:30.

MS. PAIDER: No, Your Honor.

THE COURT: See you tomorrow.

(Proceedings adjourned.)

* * * * *

consider. Not only did he answer those specific questions affirmatively, based upon reviewing of this entire file, clearly -- I mean I'll give you an example: four boxes of information which he has which he picked through specific documents to file in this case which were pertinent to his case, clearly this defendant chose to represent himself, wanted to represent himself, was going to represent himself, and was aware of the difficulties, the advantages of self-representation, the seriousness of the charges, the general range of penalties. He knew all that so this -- this court will find that the State has established by clear, satisfactory, convincing evidence that the waiver of counsel was knowingly, intelligently, and voluntarily made and, therefore, Mr. Boyd's conviction will stand and he will not be entitled to withdraw his plea.

And as far as Mr. Zilles smelling like alcohol and shaking, I can't believe for one second, if this defendant would have noticed that, that he wouldn't have said it at a hearing because it's clear from all of the submissions -- and like I said earlier, I knew that this was going to happen. It's not that I'm a fortuneteller or anything like that or I can read into the future or have any type of powers like that. It's just -- there's a reason I keep this up here. *(The court picks up a rubber duck.)* If it walks like a duck, talks like a duck, quacks like a duck, it's a duck, and he walked like an attorney, talked

APP I

like an attorney, wrote briefs like an attorney, and wanted to be his own attorney, plain and simple. It's easy. It's that easy. All right.

MS. BARNES: Your Honor --

MS. PAIDER: Your Honor --

THE COURT: Go ahead.

MS. PAIDER: Your Honor, I'm assuming it's implicit in the court's ruing that the defendant's assertion on the stand that his -- his decision was never to go forward without an attorney is not something that the court is finding credible?

THE COURT: Oh, without a doubt. The only portion of the testimony that -- well, the portion of the testimony that was the most credible is when he answered your questions exactly about what you had to ask and he answered those yes because he really wasn't thinking about it and it was the truth. He wanted to represent himself. The only thing that's not credible is that, when he answers the question did you want to -- did you -- is it true that you did not want to represent himself, I don't believe that for a second, and I will find his testimony not credible on that issue.

MS. PAIDER: Thank you.

THE COURT: Counsel?

MS. BARNES: Your Honor, apart from the *Klessig*

issue, there are a couple of issues that we believe need to be addressed upon remand here today. In the Court of Appeals we raised two issues related to standby counsel. For the court's benefit, the essence of those claims, the first is that Boyd's Sixth Amendment right to self-representation was violated when standby counsel acted beyond his role when he negotiated the plea deal on Mr. Boyd's behalf and interfered with Mr. Boyd's ability to represent himself. The second is that an explanation and colloquy on the role of standby counsel should be required to ensure that both standby counsel and the defendant understand what standby counsel can and cannot do for the defendant. The State's brief asks that these issues be addressed on remand, and for this reason we would ask you to rule on them today.

THE COURT: I'm not going to rule on them because the Court of Appeals didn't tell me to. If they send 'em back to me, we'll have another hearing but I -- I found it interesting that when we were -- I just remember that the day before, when he wanted to represent himself and he wanted the court to give him more latitude and I told him I wouldn't the day before and -- I did some research on that, and he was exactly right. So he obviously researched it because the case law says exactly what he said, for latitude. So the next day, when he comes in, I was going to say you have more latitude while we're doing the trial, but then he wanted to take a plea.

So I think even at that point standby counsel would have been there but he would have tried the case. He just -- in essence, what he did was he weighed his options, of which he knew plenty of, and he made an intelligent choice. He weighed the pros and cons, made a good choice as to the plea because he didn't want to run the risk of spending the rest of his life in prison.

All right. Send it back to the Court of Appeals.

MS. BARNES: Thank you, Your Honor.

THE COURT: You're welcome.

(Proceedings adjourned.)

* * * * *

State of Wisconsin Circuit Court Winnebago County

State of Wisconsin,

Plaintiff,

v.

Case No. 10-CF-344

Vincent E. Boyd,

Defendant

Motion For Appointment of New Counsel

The above named defendant, hereby moves this court to appoint new counsel for the defendant in the above referenced matter.

This request is for the following reasons:

1. Communication between himself and Wallace has totally broken down.

Particularly, Boyd has not received a single piece of paper from Wallace in reference to this case, despite Boyd's numerous mailings and phone calls. Wallace first met with Boyd to discuss this case on March 15, 2012, the day before the Pre-trial conference, and only 12 days before trial. Prior to that, Wallace visited Boyd twice, only to inform him that he was not prepared to discuss the case with him yet, due to a trial in Wausau.

2. Wallace has made threats to Boyd's safety.

Particularly, on March 15, 2012, Wallace told Boyd, "I should hit you," as he waived his fist in Boyd's face, after Boyd stated that he didn't know the answer to Wallace's question, "What is the most important question to ask the victim?" During this meeting Wallace told Boyd to "shut-up" more than 10 times, while raising his hand as if to backhand Boyd for attempting

App. J.

to answer Wallace's questions.

Wallace told Boyd that he wanted to allow the 'other acts' to come in. When Boyd asked "why", Wallace stated, "Because I want to see them hang you. If you don't like it, fire me."

3. Wallace has inadequately investigated the case.

A.) On March 15, 2012, Wallace stated that he had not read the discovery items pertaining to the 'other acts', and refused to read them. Boyd sent Wallace numerous letters asking him to talk to certain potential witnesses, but Wallace was so intent on convincing him to take a plea bargain that he failed to do so.

B.) Wallace has not contacted a single witness in this case, despite the fact that Boyd supplied him with a list of 20 potential witnesses.

C.) Wallace has done nothing to become familiar with the layout of the home.

D.) Wallace waited until 12 days before trial to even begin discussing Boyd's case with him. Boyd expressed concern that his alibi evidence would not be accepted now, because it was not submitted at least 15 days before trial. Wallace said, "So fire me."

E.) Wallace thought Tina Moore was Boyd's ex-girlfriend when he spoke to Boyd on the 15th. Tina Moore is Boyd's aunt.

F.) Wallace has told Boyd that he refuses to obtain an expert to rebut the state's expert. This directly contradicts Wallace's own motion for a continuance, in which he claims to have told Boyd otherwise.

G.) Wallace has not even attempted to obtain Alison's school records for review.

H.) Wallace has not permitted Boyd to view the recorded interviews, or the audio recordings in the discovery.

I.) Boyd told Wallace about potentially exculpatory phone records,

Department of Motor Vehicle records, work records, and other records, but Wallace has not attempted to obtain any of this information.

4. Boyd disagrees with Wallace's approach to defending him.

Boyd faces a charge that, if convicted, carries a mandatory life sentence. Boyd has maintained his innocence and wants to go to trial, but Wallace is pressing him to plead guilty. Moreover, Wallace's trial strategy is a passive one. He wants to present minimal evidence, if any, and simply argue that the state has not met its burden. Boyd, reasonably fearing a conviction if the jury is not given a reason to disbelieve the 'other acts' witnesses and Alison, wants to explore a more active defense that would likely involve expert testimony, and a significant amount of documented proof.

5. Boyd is clearly not trying to delay trial. Boyd has offered legitimate reasons for his motions, Boyd himself, has only requested one continuance so that his pre-trial motions could be filed, and so that proper investigation could be done. Wallace has failed to do both. Given that Wallace failed to communicate with Boyd until just 12 days before trial on serious charges, the timing of Boyd's motion is understandable. Moreover, Boyd has remained in jail from the time of his arrest and thus, other than being able to proceed with effective counsel who will not threaten Boyd with physical harm or deliberate ineffectiveness, has nothing to gain by delaying the trial.

6. Neither the State nor Alison would be harmed or even inconvenienced.

Neither Alison nor her mother have asked for an early trial date. No doctor or counselor has indicated that a brief delay would cause Alison to become anxious. Alison is a teenager, not a young child, and therefore would be able to understand a brief continuance. Alison did not come forward with the accusation until 5 years after the assault allegedly occurred, which makes clear that she could remember relevant information at a later date. And victim rights do not limit any right of the accused.

7. Any adjustments to the court's calendar that granting the motion would require, would be minimal, certainly paling in significance as to what is at stake for Boyd. At worst, granting Boyd's motions would require the court to do non-courtroom work for three days, whereas the charges against Boyd involve mandatory life imprisonment.

8. Boyd's first two attorneys were forced to withdraw due to actual conflicts that existed, which should have prevented their appointment as counsel in the first place. Private investigator Sue Dedering had an actual conflict with Boyd's brother, requiring Linda Meier to withdraw. Jennifer Thompson previously represented the lead detective in this case, requiring her removal.

Not holding Boyd accountable for those conflicts, Boyd has been denied effective representation twice now. It is Boyd's position that the state's attorney Tracy Paider, intentionally presented to the court an inaccurate summary of Boyd's phone calls regarding his attorneys. Attorney Meier could testify that Boyd specifically asked her to stay on as his attorney, but that she was required to withdraw due to the actual conflict not involving Boyd.

For the reasons stated above, the defendant respectfully asks and prays that this court appoint a new attorney to represent him.

I declare under penalties of punishment and perjury that the foregoing is true and correct.

Dated at Oshkosh, Wisconsin this 23rd day of March, 2012.

Vincent E. Boyd
Defendant

STATE OF WISCONSIN CIRCUIT COURT WINNEBAGO COUNTY

BRANCH 2

STATE OF WISCONSIN,

Plaintiff,

-vs-

CASE NO. 10-CF-344

VINCENT E. BOYD,

Defendant.

PLEA HEARING

BEFORE: **HONORABLE SCOTT C. WOLDT**

DATE: March 27, 2012

PLACE: Winnebago County Courthouse
Circuit Court Branch 2
415 Jackson Street
Oshkosh, Wisconsin

APPEARANCES: Assistant District Attorney Tracy Paider Appearing on Behalf of the Plaintiff, the State of Wisconsin

Attorney John Wallace III Appearing on Behalf of and With the Defendant, Vincent Boyd

PM 10/12/12

APP K

PROCEEDINGS

THE COURT: State of Wisconsin versus Vincent E. Boyd, Case No. 2010-CF-344. Mr. Boyd appears, as does Mr. Wallace. Ms. Paider on behalf of the State. We're here today for jury trial. Before we start, Mr. Boyd, I just want to go over with you once again your request to represent yourself in this matter.

MR. WALLACE: One moment, Your Honor.

THE COURT: Go ahead.

(Discussion held off the record between Mr. Wallace and the defendant.)

MR. WALLACE: If I could have five minutes, Your Honor, to speak with the district attorney and discuss maybe a resolution, I would be willing to do so.

THE COURT: Take five minutes.

MR. WALLACE: Thank you, Your Honor.

THE COURT: You're welcome.

MR. WALLACE: Unfortunately, Your Honor -- thank you for your patience because I was in jail last night until about 10 to 4 and it took 'em 10, 15 minutes to get the door open to get me out so -- and then I tracked counsel down in Branch 6 yesterday. Of course, that was about --

THE COURT: Don't worry about it.

MR. WALLACE: But I apologize.

THE COURT: Take your time.

MR. WALLACE: Thank you, Your Honor.

THE COURT: Take what time you need.

(Brief recess.)

(Proceedings resume.)

THE COURT: Going back on the record on State of Wisconsin versus Vincent E. Boyd, Case No. 2010-CF-344. Same appearances. Where are we at?

MR. WALLACE: Well, the situation is is the State would be amending the Information to delete the persistent repeater so that the maximum on both counts would be 60 years times 2. The State is then requesting a Pre-Sentence. The State would be free to argue, and the defense would be free to argue.

Additionally, the defendant has the option of having Langlade -- the case that's pending there either -- a couple of things might happen to it -- dismissed and read in, plead and read in, or the defendant can choose to contest that if he so wishes in Langlade. There was -- the situation yesterday was plea to one count, and then the same recommendation would have been made; unfortunately, given the status of the date of the day and four in the afternoon, now two counts the day of trial. So under the circumstances the defendant's reluctantly taking that, but that would be the situation with the Langlade case. I may very well call the district attorney over there today and find out that they're willing to dismiss

that case given the case he pled to here, but that, I think, is an accurate recitation of the plea agreement.

MS. PAIDER: In terms -- in terms of Langlade County, yes, I don't have any authority to do -- whatever Langlade County wants to do with their case is their decision. It is plea to both counts, open sentencing. It's an accurate recitation as it relates to that. I wouldn't necessarily need a Pre-Sentence Investigation, but obviously, if the court wants to order one, the court can.

THE COURT: We'll order one.

MS. PAIDER: Okay. Then other than that, yes, plea to both, open sentencing, that's an accurate recitation of the agreement.

THE COURT: Mr. Boyd, do you understand that, if you're not a citizen of the United States, a plea of guilty or no contest may result in deportation, exclusion from admission to this country, or denial of naturalization under federal law? Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that I'm not bound by any plea agreements, I could sentence you to the maximum, and in this case it would be 60 years in prison on each of the two counts? Do you understand that?

(No response.)

THE COURT: Do you understand that?

THE DEFENDANT: Yes.

THE COURT: I see that you're taking some medication. Does that medication at all hinder your ability to understand these proceedings?

THE DEFENDANT: No.

THE COURT: Do you understand that -- or your plea to the two counts of first-degree sexual assault of a child without the persistent repeater -- your plea to those two charges are no contest?

THE DEFENDANT: Yeah. I feel a lot of pressure, but yeah, I feel I don't really have any other option but to do that.

THE COURT: Well, obviously, I understand how you feel pressure, and I just want you to understand that -- or agree that I'm not pressuring you, you don't feel pressure from me, do --

THE DEFENDANT: Pressure that I -- since coming in yesterday, I feel pressured today.

THE COURT: You -- you feel pressure based upon the rulings I made?

THE DEFENDANT: Yes. I don't feel I'm going to be able to get a fair trial here.

THE COURT: You don't -- pardon me?

THE DEFENDANT: I don't feel like I would be able to get a fair trial. I don't -- and I didn't have -- I don't know

how to represent myself at trial.

THE COURT: Well, you do.

THE DEFENDANT: No, sir, so I'm going to plead no contest.

THE COURT: You could have Mr. Wallace represent you. You understand that?

(Defendant nods head up and down.)

THE COURT: I mean you've had numerous attorneys, and as you said yesterday, you feel that you know this case better than anybody, but you've had an opportunity to -- and obviously, this case has been going on a long time -- you've had an opportunity to become familiar with this case and you've had attorneys working on this case; you understand?

THE DEFENDANT: Nothing's been done. I mean there's not a single motion that's been filed on my behalf.

THE COURT: Sure there has been. We've had many motion hearings on this case. Do you understand also that by entering this plea you'd be giving up these rights: the right to a trial? You're giving up the right to have a trial here today; you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand you're giving up your right to remain silent? You're not remaining silent because you say -- you're pleading no contest. Do you

understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that you're giving up the right to present evidence? Obviously, without having a jury trial, you're not telling your side of the story. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that you're giving up the right to have a jury of 12 find you guilty or not guilty? Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Also, the fact you're giving up the right to confront your accusers, people who say you did this, ask them questions up here on the witness stand, and you're also giving up the right to have the State prove that you were guilty beyond a reasonable doubt. Do you understand you're waiving or giving up all those rights?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand what the State would have to prove in order to convict you on this case --

THE DEFENDANT: No.

THE COURT: -- is that you had sexual contact with Alison B. W. and that Alison B. W. was under 13 years of age at the time of the alleged sexual contact. Sexual contact is the intentional touching of the vagina of Alison B. W. by you,

and the touching may be of the vagina directly or may be through the clothing. The touching may not be done by any body part or any object, but it must be an intentional touching. Sexual contact also requires that you acted with the intent to become sexually aroused or gratified. Do you understand that those are what -- that's what the State would have to prove?

THE DEFENDANT: Yeah, I do now.

THE COURT: Okay. Has anyone made any promises or threats -- other than the promise of the plea agreement -- did anyone make any promises or threats to get you to enter a plea today?

THE DEFENDANT: No, just a lot of pressure.

THE COURT: Okay, and part of the pressure you feel, I would assume, is the fact that I also didn't grant you yet another continuance, correct?

THE DEFENDANT: Yes, because I wasn't ready to go.

THE COURT: All right.

THE DEFENDANT: And I only ever met with my attorney twice.

THE COURT: Meeting with him in person?

THE DEFENDANT: Right.

THE COURT: All right. What the court is going to do is find that the defendant is entering his plea freely,

voluntarily, and intelligently, and I guess, Mr. Wallace, are you of the opinion that Mr. Boyd is entering his plea freely, voluntarily, and intelligently?

MR. WALLACE: I've asked him about four times, two times briefly, two times extensively. Under the circumstances, he's entering a plea of no contest, and it's difficult for him.

THE COURT: Part -- part of the pressure too, sir, is I would agree that -- or I would believe that it would be you're facing life in prison? That's part of the pressure too, correct?

THE DEFENDANT: Yes.

THE COURT: That factors into your decision?

THE DEFENDANT: Yes, sir.

THE COURT: All right. The court will find that the defendant's entering his plea freely -- freely, voluntarily, and intelligently, find there's a factual basis for the pleas and, therefore, accept the same and will adjudicate him guilty. Both the persistent repeaters will be dismissed, and we'll order a Pre-Sentence Investigation Report. How long do you think we're going to need for sentencing?

MR. WALLACE: Two hours --

MS. PAIDER: I would -- that's what I was going to say, about two hours.

THE COURT: Two hours it is.

THE CLERK: Okay. How about June 15th at 10

a.m.?

MR. WALLACE: Your Honor, you would need -- I'd ask that the court fire me from County representation and withdraw that petition or that appointment so that I can proceed to obtain any other funding I need from the State in representing the defendant.

THE COURT: So you're back to the Public Defender's Office, you're saying?

MR. WALLACE: No, I just -- I -- I would decline the Court's appointment of me at County expense for representation done yesterday due to the fact that I need funding which is not normally available through this county.

THE COURT: I understand. Do you want Mr. Wallace to represent you again through the Public Defender's Office?

MR. WALLACE: For sentencing purposes.

THE COURT: "For sentencing purposes?"

THE DEFENDANT: Yes, sir.

THE COURT: Okay. All right. We'll withdraw the representation from the County, and then I think you'll probably have to reapply again. Just --

MR. WALLACE: He won't. He's indigent. It's not been 60 days.

THE COURT: All right.

MR. WALLACE: I'm sure with Linda Meier -- I'm

sure it's going to be okay.

THE COURT: Yeah. Just make sure you do that so -- if there's any issues, make sure you get that -- get that information to me as soon as possible so --

MR. BOYD: Is it necessary?

MR. WALLACE: It's necessary.

MS. PAIDER: And Your Honor, I understand that these are collateral consequences, but I'm sure Mr. Boyd is aware and Attorney Wallace went through with him in terms of implication for entering a plea to a sexual assault charge in terms of registry, the prohibition against working with children, and the Strike Law in Wisconsin.

THE COURT: All right. In light of your previous conviction, I would believe he already understands his collateral consequences, but sir, you understand just what Miss Paider said, you're giving up those rights, and those are effects of convictions of these? Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Thank you.

MS. PAIDER: And Your Honor, just in terms of -- I understand Mr. Boyd's reluctancy. However, the court and -- did also allow Mr. Wallace an opportunity for approximately an hour to talk with him this morning concerning his right to enter a plea.

THE COURT: Yeah. As I mentioned, I would give

you as much time as needed, and we were more than patient, there was no rush. We got it resolved and it's -- and I understand the pressures on both sides with respect to victims, family, testifying, and the defendant facing life imprisonment, it's a tough decision, so there is pressure there on both sides.

Anything else we need put on the record?

MS. PAIDER: I don't believe so, Your Honor.

THE COURT: Mr. Wallace, anything from the defense we need to put on the record?

MR. WALLACE: No.

THE COURT: All right. We'll see you in June.

(Proceedings adjourned.)

* * * * *

CERTIFICATION PAGE

STATE OF WISCONSIN)
COUNTY OF WINNEBAGO) SS:

I, TAMARA WATERS-RUEDINGER, official court reporter for Circuit Court Branch 2, Winnebago County Courthouse, Oshkosh, Wisconsin, do hereby certify that I have carefully compared the foregoing 13 pages with my stenographic notes and that the same is a true and correct transcription of said notes.

Dated at Oshkosh, Wisconsin, this 1st day of August, 2012.

My Notary commission expires 10/11/2015.

Tamara Waters-Ruedinger, RPR, CRR

State of Wisconsin | Circuit Court | Winnebago County

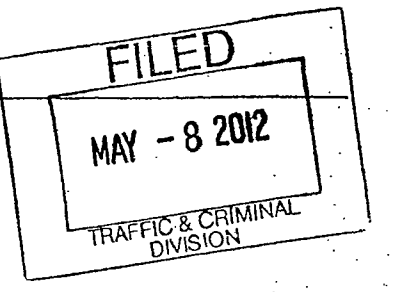
State of Wisconsin,

Plaintiff,

v. Case No. 10-CF-344

Vincent E. Boyd,

Defendant.



Defendant's Motion to Withdraw Plea and Appoint New Counsel

The above named defendant, hereby moves this court to appoint new counsel and allow the defendant to withdraw the no contest plea which was entered on March 27, 2012, for the reasons that the plea was not made knowingly, intelligently, and voluntarily, the plea was coerced, and he received ineffective assistance of counsel.

"Fair and Just" Standard

In order to withdraw a plea prior to sentencing, the defendant must show a fair and just reason. Libke v. State, 60 Wis. 2d 121, 124-28 208 N.W.2d 331 (1973). Fair and just reasons for plea withdrawal include a genuine misunderstanding of the pleas consequences, haste and confusion in entering the plea, and coercion by counsel. State v. Shimek, 230 Wis. 2d 730, 739, 601 N.W.2d 865 (CA 1999). A trial court must allow a defendant to withdraw his plea prior to sentencing for any fair and just reason. The exercise of discretion requires the court to take a liberal, rather than a rigid, view of the reasons given for plea withdrawal. State v. Bollig, 2000 WI 6, 232 Wis. 2d 561, 605 N.W. 2d 199.

DD L

1.) The plea was not made knowingly, intelligently, and voluntarily.

On March 27, 2012, Attorney John Wallace approached Boyd and pressured him to enter a plea. Boyd did not want to plead and has insisted on having a fair trial all along. Wallace then approached Boyd's mother and discussed a possible resolution with her. After speaking with her, Wallace then informed Boyd that Boyd's mother agreed that he should plead to the terms discussed.

Wallace filled out a plea questionaire and ordered Boyd to sign it. However, Wallace had written that the pending case in Langlade County would either be dismissed and read-in, or ran concurrent. Boyd specifically told Wallace that he would not agree to those terms, and actually crossed-off that portion of the agreement, as it was the only portion Boyd had read.

The agreement between Boyd and Wallace, as well as Boyd's mother and Wallace, was that Boyd would enter a plea of no contest to (1) one count of First Degree Sexual Assault, and that the state would ask for 20 years total, 10 years initial confinement, followed by 10 years extended supervision, ~~the defense would be free to argue, and the Langlade case would be~~ dismissed. Boyd signed the questionaire upon this belief.

Boyd was supposed to be appearing pro se, with Wallace as standby counsel, but Wallace acted as though he was still representing Boyd, and refused to allow Boyd to handle the proceeding himself; and Wallace himself then told the court that Boyd was pleading no contest to (2) two counts of First Degree Sexual Assault of a Child, that the state would be free to argue, and that the Langlade case would be dismissed and read-in, or ran concurrent. These were not the terms Boyd agreed to plead to, nor were these the terms Wallace discussed with Boyd's mother.

A general misunderstanding of a plea's consequences is a fair and just reason for a plea withdrawal. *State v. Shanks*, 152 Wis. 2d at 290.

These misrepresentations on Wallace's behalf easily amount to coercion by counsel. Wallace lied to Boyd in order to get Boyds signature onto the plea questionaire, and then ordered Boyd to remain silent as he informed the court of a completely different set of terms than those in which Boyd agreed to, and he did so even after Boyd crossed-out the portion pertaining to the Langlade county case. That case has not been dismissed.

On the record during the plea hearing, Boyd also informed the court that he felt alot of pressure to plead out, despite the fact that he did not want to. Wallace had previously informed Boyd that he could easily win this trial, however on March 27, 2012, he said that Boyd would lose, and ultimately gave Boyd less than 2 hours to consider the plea Boyd thought he was entering into, and refused to pick the case back up and go to trial.

To further add to these coersive pressures, on March 26, 2012, the day prior, Judge Waldt specifically informed Boyd that he will get "NO LATITUDE" in cross-examining witnesses, despite the judge's responsibility to afford defendants "WIDE LATITUDE" in cross-examination. It is not unreasonable to conclude that Boyd also felt coerced by the judge himself in light of the fact that a defendant *is entitled* to wide latitude in cross-examining witnesses, but the court stated that Boyd would receive *no* latitude, infringing upon Boyds Confrontation Rights completely, and eliminating any possibility of a fair trial.

The general misunderstanding of the pleas consequences, and the coersive pressures involved, state a fair and just reason to warrant the withdrawal of Boyds plea.

2.) <u>Boyd received ineffective assistance of counsel.</u>

A motion to withdraw a plea on the basis of ineffective

assistance of counsel must show that counsel's representation was deficient and that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To satisfy the prejudice aspect of Strickland, 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. Strickland 466 U.S. at 694.

Boyd's prior attorney, Paul Zilles, failed to object to the state's use of expert testimony on the grounds that he intended on hiring a defense expert of his own. The State Public Defender's Office approved the funds, but the expert was not pursued.

Attorney Wallace, in his written motion for a continuance, acknowledged his lack of preparedness, including his need to obtain an expert in this case. However, as evidenced by the late witness list that Wallace submitted, no expert was obtained.

The state was offering Dr. Huebner's testimony to explain the reasons for delayed reporting, among several other purposes. In this case, Wallace's failure to obtain an expert, after assuring Boyd that one would be provided, would have forced him to proceed blindly in trying to elicit favorable expert testimony from Dr. Huebner. This is deficient performance in these circumstances.

An expert was needed to rebut Dr. Huebner's proposed testimony, and to explain that children do make false allegations. Wallace's failure to obtain the expert severely undermined Boyd's confidence in his chances of winning at trial and contributed heavily on his request to proceed pro se, and ultimately enter a plea.

Furthermore, Wallace failed to conduct any independant investigation in this case, particularly he failed to interview *any* of Boyd's ~20 alibi witnesses. Instead, he submitted a witness list with (3) names, of which only (1) ~~was~~ have ultimately been allowed to testify, because the list did not comply

with Wis. Stats. 971.23(8) Notice of Alibi requirements.

The witness list listed Pat Malone, Linda Johns, and Linda Zdeb as potential witnesses. However, Pat Malone was strictly an alibi witness who would testify as to Boyds whereabouts during the majority of the alleged timeframe. Wallace never provided the district attorney with a notice of alibi regarding this witness, and in fact, submitted the witness list less than 12 days before trial.

Linda Zdeb was largely intended to be an alibi witness also. Wallace never provided the district attorney with a notice of alibi regarding this witness, and in fact, submitted the witness list less than 12 days before trial, containing incorrect contact information for Zdeb. Linda Zdeb has never resided at the address on the witness list, rather she has resided in the state of Tennessee for more than 7 years.

The district attorney could have easily prevented these two witnesses from testifying, due to Wallace's deficient performance, in failing to conduct an independent investigation, and failing to file a proper witness list, or a notice of alibi.

The prospect of only having potentially (1) witness to testify, without any alibi evidence whatsoever, severely impacted Boyds request to proceed pro se, and ultimately enter a plea.

It is not unreasonable to conclude that, were it not for Wallace's errors, as well as Boyds reasons in his Request for Appointment of New Counsel, Boyd would not have requested to proceed pro se, nor would Boyd have entered a no contest plea in this case.

Because Boyd can show by clear and convincing evidence that Wallace coerced his no contest plea and, therefore, was ineffective, the court must allow Boyd to withdraw his plea.

[illegible] this Motion

The grounds for this motion include involuntariness based on the actions of counsel, involuntariness based on coercion, pressure to enter the plea, the pressure of the time constraints within which Boyd had to act, and pressure from the totality of the circumstances, as well as confusion and misunderstanding as to the plea itself. New counsel is needed because Wallace would be a necessary witness testifying on Boyd's claim that he overbore his will and thus coerced Boyd's request to proceed pro se, and his no contest plea.

For the reasons stated above, the defendant respectfully asks that this court appoint a new attorney for an evidentiary hearing, and allow the defendant to withdraw his plea.

Dated at Oshkosh, Wisconsin this 4th day of May, 2012.

Vincent E. Boyd

Plaintiff

Vincent E. Boyd
4311 Jackson St.
Oshkosh, WI 54901

STATE OF WISCONSIN CIRCUIT COURT WINNEBAGO COUNTY

STATE OF WISCONSIN,
Plaintiff

-vs-

VINCENT E. BOYD,
Defendant

SUPPLEMENT TO DEFENDANT'S MOTION TO WITHDRAW GUILTY/ NO CONTEST PLEA

Case No. 10-CF-344

The defendant, appearing specially by his attorney and reserving his right to challenge the court's jurisdiction, moves the court for an order authorizing the defendant to withdraw his plea of guilty/no contest entered on March 27, 2012. This motion is brought pursuant to sec. 971.08, Stats., and State v. Bangert, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), Ernst v. State, 43 Wis. 2d 661, 170 N.W.2d 713 (1969), and State v. Reppin, 35 Wis. 2d 377, 151 N.W.2d 9 (1967).

AS GROUNDS, defendant asserts the following:

For info see SBW Cr. Def. Manual Form 9.15, W.S.971.08, Wis Prac Vol 9, Sec 23.33

1. The defendant was unduly pressured by the sudden change in circumstances the morning before his scheduled jury trial and made a hasty entry of his plea of no contest because the jury was assembled in the courthouse, thus violating the requirements of section 971.08(1), Wis. Stat.,

2. The defendant asserts that the sudden confusion of acting pro se for his jury trial caused him confusion and anxiety relating to his pending jury trial and resulted in a hasty decision on his part to enter a no contest plea to the charges in this case without sufficient time to thoroughly reflect on his whole situation and make a informed and well thought out decision;

3. The defendant made a timely request to the court to withdraw his plea by contacting the court and advising the court within a couple weeks after the plea hearing that he wished to change his status in this case;

4. The defendant wrote a pro se motion to the court to withdraw his plea and explained several additional reasons to request to withdraw his plea and the document was file stamped on May 8th.

5. Three affidavits from Linda Zdeb, the mother of the defendant, datedf May 29, 2012 and June o4, 2012, are attached to this motion and supports the motion of the defendant for a new trial date.

6. The defendant believes that Attorney John Wallace never prepared for the jury trial because he believed that the defendant would plead guilty at the end in order to avoid the possible penalty of lifetime imprisonment without parole;

7. The defendant has attached copies of documents from the jail to support his claim that

APP. M

Attorney Wallace did not prepare for a trial by showing that Attorney Wallace only visited him four times during his whole case and only two of these times were before the plea hearing;

8. The defendant has also attached the mail transaction history showing that he has written to Attorney Wallace thirteen times and never received a reply in writing since the log shows both outgoing and incoming mail;

THEREFORE the defendant asks the court to find:

A. That he has presented to the court a fair and just reason to withdraw his plea by a preponderance of the evidence;

B. That he be allowed to withdraw his plea of no contest or guilty and to be allowed to have his case placed back on the calendar for a jury trial.

Dated this 06 day of June 2012.

Le Grand Kaukaulin Law Firm
Attorney for the defendant

By Gary J. Schmidt
Gary J. Schmidt
State Bar No. 1004166

Administration Building, Suite B
1033 West College Avenue
Appleton, Wisconsin 54914
920-882-9454

Encl. 6

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

VINCENT E. BOYD,	)	
Petitioner,	)	
v.	)	N0. 18-CV-275-JPS
WARDEN SCOTT ECKSTEIN,	)	The Honorable District Judge J.P. Stadtmueller, Presiding.
Respondent.	)	

BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Vincent E. Boyd, *pro se*, respectfully submits this brief in support of his petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Petitioner Vincent E. Boyd is in custody pursuant to a state court judgment of conviction. His conviction, sentence, and confinement are unlawful and were unconstitutionally obtained in violation of his Sixth Amendment rights. In particular, this federal habeas petition asserts two claims. The first claim asserts that Vincent Boyd's Sixth Amendment right to self-representation was violated by his standby counsel's unauthorized pursuit of a plea agreement and solo participation in the plea negotiations. The second claim asserts that Boyd's Sixth Amendment rights to confrontation and compulsory process were violated when the circuit court prematurely restricted his cross-examination of the state's witnesses.

App. N

Statement of Facts

The charges against Vincent Boyd stemmed from allegations that he had sexual contact with Alison B.W. sometime in 2003. Boyd had previously been convicted of having sexual contact with F.M.W. in 2001. (Doc. 12-1:2) Of the state's two "other acts" witnesses, F.M.W. was the only one present on the morning of trial.

On March 26, 2012, at the Final Pretrial Conference, Boyd filed a motion for the appointment of new counsel. The motion asserted that Boyd's attorney, John Wallace, was not prepared for trial and had repeatedly pressured Boyd to plead guilty against his wishes. (Exhibit 1:2-3).[1] Boyd further asserted that Wallace had "threatened to hit [Boyd]" and had "told [Boyd] to shut up over a dozen times." (Doc. 12-22:8). The trial court denied Boyd's motion.

During the same hearing, Boyd asked, "Can I just represent myself on this case then?" (Doc. 12-22:11). When the trial court told Boyd that "Wallace is still going to be sitting there" even if Boyd represented himself, Wallace interjected his own approval of such an arrangement, stating, "That would be fine with me." (Doc. 12-22:11). The court asked Boyd if he wanted to do his "own openings and closings", and Boyd replied unequivocally, "I would like to completely represent myself on this case." (Doc. 12-22:12). The trial court allowed Boyd to

represent himself but appointed Wallace as standby counsel, despite the objections Boyd had just made concerning Wallace's further involvement in this case. (Doc. 12-22:12-13). The court did not explain the role or limitations of standby counsel at that or any other time.

With less than twenty-four hours to prepare for trial, Boyd initiated an inquiry with the

[1]Motion for the Appointment of New Counsel is attached hereto as Exhibit 1.

trial court concerning his cross-examination of the state's witnesses, asking, "Will I be allowed to question the witnesses myself?" (Doc. 12-22:13). Before the court could articulate a response to Boyd's question, the prosecutor, Ms. Paider, interrupted to voice her own concerns that Boyd be reminded that he would be bound by the rules of evidence. Ms. Paider further speculated that Boyd was questioning his prior conviction and wanted to have a trial within a trial. (Doc. 12-22:14). Contrary to Ms. Paider's concerns, Boyd had not filed any motions seeking to have a trial within a trial.

Nonetheless, Boyd requested "some latitude in questioning the victim." (Doc. 12-22:15). However, the trial court immediately cut Boyd off without considering the testimony Boyd was seeking to introduce, and ruled, "You will get no latitude." (Doc. 12-22:15). Even when Wallace attempted to assist the court in ascertaining the nature of the evidence Boyd sought to introduce, the trial court immediately cut him off as well, and reaffirmed its ruling, "You will get no latitude." (Doc. 12-22:15) The trial court did not engage in a balancing of competing interests at that or any other time.

The next day, March 27, 2012, trial was scheduled to begin at 8:30 a.m. Almost immediately, Wallace interrupted the proceedings to request a moment to speak to Boyd. (Doc. 12-23:3). After a discussion held off the record between Wallace and Boyd, Wallace requested permission to speak with the prosecutor about a possible resolution. (Doc. 12-23:3). The court gave Wallace five minutes in which Wallace negotiated a plea agreement with the prosecutor outside the courtroom where Boyd was seated. (Doc. 12-23:3-4). At no time did the trial court ask if Boyd had requested a plea agreement or if he had authorized Wallace to engage in plea negotiations outside Boyd's presence, and Boyd was not given an opportunity to speak on the matter. (Doc. 12-23:3-4).

Upon returning from the plea negotiations with the prosecutor, Wallace immediately published a plea agreement to the court, which included plea terms regarding a possible resolution to a pending Langlade county case. (Doc. 12-23:4-5). However, the prosecutor quickly clarified that those were not the terms and that she has no authority over that case, stating, "Whatever Langlade County wants to do with their case is their decision. It is plea to both counts, open sentencing." (Doc. 12-23:5).

Without addressing whether standby counsel could act on behalf of the now *pro se* defendant, the trial court entered into a plea colloquy. (Doc. 12-23:5-9). During the colloquy, Boyd informed the court that he felt "a lot of pressure" and that he felt like he didn't have "any other option but to [plead no contest]." (Doc. 12-23:6). Boyd further stated, "[...] since coming in yesterday, I feel pressured today" and that he didn't think he could get a fair trial." (Doc. 12-23:6).

Later in the colloquy, the court directed questions to ~~Wall~~ace, asking, "[...] Mr. Wallace, are you of the opinion that Mr. Boyd is entering his plea freely, voluntarily, and intelligently?" (Doc. 12-23.10). Wallace replied, "[...] Under the circumstances, he's entering a plea of no contest and it's difficult for him." (Doc. 12-23:10). Despite Boyd's stated reluctance to enter the no contest plea, the trial court accepted Boyd's plea as being valid. (Doc. 12-23:10).

Following the hearing, Wallace filled out the plea questionnaire, writing the plea terms, and signing it as Boyd's attorney, even though he was only standby counsel. (Doc. 12-2:73). Further, he included the plea terms regarding the Langlade County case that the prosecutor had just said were not part of the plea agreement, as well as ~~a reference~~ to "20 years" which was also never mentioned ~~as part of the agreement~~. (Doc. 12-2:73). Boyd

crossed out the portion concerning the Langlade County case and signed the plea questionnaire. (Doc. 12-2:73).

On May 8, 2012 Boyd filed a *pro se* Motion to Withdraw Plea and Appoint New Counsel, arguing that "Wallace approached Boyd and pressured him to enter a plea," and that Wallace "refused to allow Boyd to handle the proceeding himself." (Exhibit 2:2).[2] The motion further argued that the trial court's no latitude ruling on the eve of trial violated his constitutional rights. (Exhibit 2:3).

On May 14, 2012, Wallace filed a separate Motion to Withdraw Plea, signing it as Boyd's counsel. (Doc. 12-13:98). At a hearing held on the motion the next day, May 15, 2012, the trial court, refusing to rule on the motion at that time, told Wallace, "You're not on the case anymore. You're no longer needed as standby counsel." (Doc. 12-24:7). A court order for Wallace to withdraw as counsel was issued the same day. All of Boyd's subsequent plea withdrawal efforts were unsuccessful.

On March 27, 2014, an evidentiary hearing was held concerning the validity of Boyd's waiver of the right to counsel. (Doc.12-27:3). At the close of the hearing, the trial court revealed that it had researched its no latitude ruling prior to the entry of Boyd's plea and had discovered that it was inconsistent with the governing case law. The court stated that it was prepared to reverse that ruling but did not tell Boyd about this because "he wanted to take a plea." (Exhibit 3:76).[3]

Procedural History

On June 21, 2010, in Winnebago County, the State of Wisconsin filed a criminal

[2]Motion to Withdraw Plea and Appoint New Counsel is attached hereto as Exhibit 2
[3]Page 76 of the Evidentiary Hearing transcript is absent from Doc. 12-27. Therefore, Pages 75-77 of this transcript are attached hereto as Exhibit 3.

complaint charging Vincent E. Boyd with two counts of first-degree sexual assault of a child as a persistent repeater. On March 26, 2012, Boyd filed a Motion for the Appointment of New Counsel. At the Final Pretrial Conference held on the same day the trial court denied the motion. At the same hearing, Boyd requested to proceed *pro se*. The trial court allowed Boyd to proceed *pro se* but appointed Wallace as standby counsel. Also at the same hearing, Boyd requested some latitude in cross-examining the state's witnesses. The trial court issued an oral ruling denying Boyd's request for latitude in cross-examination.

On March 27, 2012, Boyd entered a no contest plea to two counts of first-degree sexual assault of a child. On May 8, 2012 Boyd filed a Motion to Withdraw Plea and Appoint New Counsel, alleging that standby counsel had overstepped his bounds, and that the trial courts' no latitude ruling violated Boyd's confrontation rights. On May 14, 2012, Wallace filed a Motion to Withdraw Plea on Boyd's behalf. On May 15, 2012, the circuit court issued a written order for the withdrawal of Attorney Wallace as counsel.

On May 23, 2012 Attorney Gary Schmidt was appointed by the State Public Defender's Office to represent Boyd. On June 7, 2012, Schmidt filed a Supplement to Defendant's Motion to Withdraw Guilty/No Contest Plea. After a hearing, the circuit court issued a written order denying Boyd's motion to withdraw plea. On June 15, 2012, Schmidt filed a Defendant's Second Motion to Withdraw No Contest Plea on Boyd's behalf, arguing that the trial court did not follow legal requirements when it allowed Boyd to represent himself. After a hearing held the same day, the trial court issued an oral ruling denying the motion.

Boyd appealed both the standby counsel and the procedural claim to the Wisconsin Court of Appeals, which remanded for an evidentiary hearing due to the lack of Wisconsin's

mandatory *Klessig* colloquy in a written decision on November 6, 2013.

On March 27, 2014, the circuit court conducted an evidentiary hearing. On April 3, 2014, the circuit court issued a written order denying post-conviction relief. The Wisconsin Court of Appeals affirmed both claims on the merits in a per curiam decision on February 26, 2015. The Wisconsin Supreme Court denied Boyd's timely Petition for Review on June 12, 2015.

On March 16, 2016, Boyd filed a post-conviction motion in the circuit court, arguing that his no contest plea was not valid because it was influenced by the circuit court's no latitude ruling, which violated his Sixth Amendment rights. The circuit court denied the motion without an evidentiary hearing in a written order on May 31, 2016.

Boyd appealed and the Wisconsin Court of Appeals affirmed the circuit court's ruling in a per curiam opinion on August 23, 2017. The Wisconsin Supreme Court denied Boyd's timely Petition for Review on December 12, 2017.

STANDARD OF REVIEW

Under §2254(d) of the Anti-Terrorism and Effective Death Penalty Act, a writ of habeas corpus may be granted when the state court's adjudication of the petitioner's claim on the merits:

> (1) Resulted in a decision that was contrary to, or involved and unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States, or
> (2) Resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C.§2254(d)(1)-(2). Under §2254(d)(1), a state court decision is contrary to clearly established federal law "if the state court applies a rule different from the governing law set forth in [U.S. Supreme Court] cases" – in other words, if it applied the wrong legal standard.

Premo v Moore, 131 S.Ct. 733, 743 (2011); *Conner v. Mcbride*, 375 F.3d 643, 649 (7th Cir. 2004) (a state-court decision is contrary to clearly established Federal law "if the state court incorrectly laid out governing Supreme Court precedent"). A state court decision involves an unreasonable application of clearly established federal law "if the state court identifies the correct governing legal rule from [Supreme Court] cases but unreasonably applies it to the facts of the particular state prisoner's case." *Williams v. Taylor*, 120 S.Ct.1495, 1520 (2000). Under §2254(d)(2), a state court's decision "involves an unreasonable determination of the facts if it rests upon fact-finding that ignores the clear and convincing weight of the evidence." *Ward v. Stevens*, 334 F.3d 696, 704 (7th Cir. 2003).

While it is true that AEDPA mandates a degree of deference to the state courts, such deference does not by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). Instead, federal courts have an "independent obligation to say what the law is." *Williams*, 120 S. Ct. at 1517 (O'Conner, J., concurring). AEDPA "directs federal courts to attend to every state-court judgement with utmost care, but it does not require them to defer to the opinion of every reasonable state-court judge on the content of federal law. If, after carefully weighing the reasons for accepting the state court's judgement, a federal court is convinced that a prisoner's custody... violates the Constitution, that independent judgement should prevail." *Id.* At 1511(Maj. Op.).

Following the U.S. Supreme Court's decision in *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), a federal district court considering a habeas petition under § 2254 must engage in a two-step analysis. *Mosley v. Atchison*, 689 F.3d 838, 849-51(7th Cir. 2012) (describing this analysis); *Pidgeon v. Smith*, 2013 U.S. Dist. LEXIS 174629 (W.D. Wis. Dec. 13, 2013)

(following the analysis set out in *Mosley*)[4]. First, it must examine whether the state court acted unreasonably under §2254(d)(1) or (d)(2) on the basis of the record as developed in state court. If that standard is met, the federal court must then conduct an independent, *de novo* review of the constitutional issues to determine whether relief is warranted under §2254(A). To aid its §2254(A) analysis, the federal court may conduct an evidentiary hearing.

§2254(d) ARGUMENT: UNSOLICITED PARTICIPATION BY STANDBY COUNSEL

I. The Wisconsin Court of Appeals' decision was an unreasonable application of clearly established Federal law – the actual control test outlined in *McKaskle v Wiggins* – when it concluded that Wallace's involvement did not prevent Boyd from having actual control over his defense.

In the Wisconsin state courts, Boyd raised Attorney Wallace's unsolicited participation as a violation of his Sixth Amendment right to self-representation under *Faretta v. California*, 422 U.S. 806 (1975); and *McKaskle v. Wiggins*, 465 U.S. 168 (1984). In *Faretta*, the U.S. Supreme Court established a defendant's right to represent himself under the Sixth Amendment. 422 U.S. at 807. The right to self-representation means that a defendant may not, consistent with the Sixth Amendment, have counsel forced upon him against his wishes. "To thrust counsel upon the accused, against his considered wish, thus violates the logic of the amendment." *Id.* at 820.

In *McKaskle*, the U.S. Supreme Court recognized that the actions of standby counsel can violate the right to self-representation. 465 U.S. at 177. Accordingly, the Court stated that the right to self-representation "must impose some limits on the extent of standby counsel's unsolicited participation." *Id.* In general, "In determining whether a defendant's *Faretta* rights have been respected, the primary focus must be on whether the defendant had a fair chance to

[4]*Pidgeon v. Smith*, 2013 U.S. Dist. LEXIS 7469 (W.D. Wis. Dec 13, 2013) is attached hereto as Exhibit 4

present his case in his own way." *Id.*

Boyd argued in the Wisconsin state courts that Wallace's actions violated the standard set forth in *McKaskle v. Wiggins.* He argued there, as he does here, that the role of standby counsel does not permit the overly intrusive course of conduct that Wallace engaged in, which included repeatedly pressuring Boyd to plead guilty – despite his protestations of innocence and desire to go to trial – and then engaging in, and excluding Boyd from, plea negotiations that Boyd did not request or authorize, and signing the plea agreement as Boyd's counsel. Rather, standby counsel may assist in two ways: (1) "in overcoming routine procedure or evidentiary obstacles to the completion of some specific task, such as introducing evidence or objecting to testimony, that the defendant has clearly shown he wishes to complete," and (2) by "help[ing] to ensure the defendant's compliance with basic rules of courtroom protocol and procedure." *McKaskle*, 465 U.S. at 183. Boyd further argued that Wallace's intrusions resulted in Boyd pleading no contest, insofar as each of Wallace's actions highlighted the fact that although the trial court had determined that Boyd could represent himself, Boyd was nonetheless being denied the right to do so.

The Wisconsin Court of Appeals rejected Boyd's arguments concerning Wallace's conduct. In doing so, however, it unreasonably applied *McKaskle* under §2254(d)(1). *McKaskle* makes clear that the right to self-representation may be violated by overly intrusive "unsolicited participation" by standby counsel. 465 U.S. at 183. Without discussing whether Wallace's actions were "unsolicited" – and without attempting to defend them – the Wisconsin Court of Appeals simply concluded that "Boyd has not demonstrated that Wallace's involvement as standby counsel prevented Boyd from having 'actual control' over his own defense." (Doc. 12-9:8-9). Additionally, in assessing the circumstances giving rise to

Boyd's no contest plea, the Wisconsin Court of Appeals acknowledged that Boyd did not request Wallace's participation. Rather, "[...] at the beginning of the hearing, Wallace requested a moment to confer with Boyd [...]" (Doc. 12-9:7). The Wisconsin state court also acknowledged that "the record is silent as to whether Boyd was, in fact, present during negotiations between Wallace and the district attorney", but then went on to find that "Given the facts in the record and the reasonable inferences to be drawn from them, we conclude that the circuit court did not erroneously exercise its discretion in finding that Boyd's plea was knowingly, voluntarily, and intelligently entered." (Doc. 12-9:7-8). These applications of *McKaskle* are unreasonable.

First, there can be no doubt that Wallace's actions were overly intrusive, unsolicited, and violated Boyd's *Faretta* rights. The law is clearly established that standby counsel may not substantially "*interfere* with any *significant tactical decisions* ... or *speak instead of the defendant* on [critical issues]." *McKaskle*, 465 U.S. at 178 (emphasis added). Wallace's interference with Boyd's decision to go to trial was made known to the trial court on March 26, 2012, when Boyd requested the appointment of new counsel. Boyd's motion clearly asserted that Wallace "was so intent on convincing him to take a plea bargain" that he failed to contact any of Boyd's witnesses, and that "Boyd has maintained his innocence and wants to go to trial, but Wallace is pressing him to plead guilty." (Exhibit1:2-3). Other courts have held that the decision to accept a plea offer is generally "the most important decision to be made in a criminal case." *United States v Gordon,* 156 F.3d 376, 380 (2nd Cir.1998) (quoting *Boria v Keane,* 99 F.3d 492, 496-7 (2nd Cir.1996); *see also Patterson v. LeMaster,* 21 P.3d 1032, 1036 (N.M.2001) (citing Gordon). Yet, on the morning of trial, Wallace continued to take real, actual, concrete steps to interfere with Boyd's decision to go to trial, including interrupting

the start of the proceedings in order to continue his selfish pursuit of a plea agreement. Under no possible line of reasoning does *McKaskle* permit such repeated and extreme steps by standby counsel toward the conviction of a *pro se* defendant. The decision to request and then solely negotiate a plea agreement does not involve the "routine procedure or evidentiary obstacles" or "basic rules" recognized by *McKaskle* as appropriate for intercession by standby counsel. A lawyer may advise a client that it is in his best interest to seek a plea agreement, but standby counsel may not force, pressure, or coerce a *pro se* defendant who is asserting his innocence to plead guilty. *See e.g. Jones v. Barnes,* 463 U.S. 745, 751 (1993) (the decision to plead guilty belongs only to the accused). Such actions intrude upon the defendant's ability to control his defense and present his case in his own way. They are not and cannot be consistent with the Sixth Amendment right to self-representation.

Second, it is also clear that Boyd's unauthorized exclusion from the plea negotiations violated his *Faretta* rights. The U.S. Supreme Court has emphasized the central importance of plea negotiations in a criminal case. *Lafler v. Cooper,* 123 S. Ct. 1376, 1388 (2012) ("the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences.") *Lafler* makes clear that when a plea bargain is offered, the defendant is entitled to the effective assistance of counsel in responding to it. *Id.* At 1384 ("During plea negotiations defendants are entitled to the effective assistance of competent counsel")(internal quotations and citations omitted). Accordingly, a *pro se* defendant has the right to participate in plea discussions. Not only was Boyd unrepresented at a critical stage of the case by being excluded from the plea discussions, but he was also denied the opportunity to object to the terms being offered and to suggest an alternative agreement. Thus, Boyd's exclusion from the plea negotiations is wholly

inconsistent with *McKaskle's* mandate that standby counsel may not "speak instead of the defendant on any matter of importance." *McKaskle,* 465 U.S. at 178.

Other courts have repeatedly held, in an analogous situation, that excluding a *pro se* defendant from a critical stage of the case can violate the *Faretta* right by infringing upon the defendant's ability to control his own defense. *See e.g. Hearn v. Schriro,* 2011 U.S. Dist. LEXIS 36587*37 (D. Ariz. March 31, 2011) ("Petitioner's non-participation in jury-note conferences violated his *Faretta* rights...")[5]; *Frantz v. Hazey,* 533 F.3d 724, 742(9th Cir. 2008)(participation in chambers conference involving the admission of a 911 tape was central to *Frantz's Faretta* right to control his defense); *United States v. McDermott,* 64 F.3d 148, 1454 (10th Cir. 1995) (holding that a defendant's *Faretta* rights were violated by his exclusion from bench conferences addressing issues including admissibility of testimony and other evidence); *Oses v. Massachusetts,* 961 F.2d 985, 986 (1st Cir.1992)(per curiam)(*Faretta* rights violated by exclusion from bench conferences covering "important issues"). In each case, the rationale was that a *pro se* defendant must not go unrepresented at any critical stage of the case, regardless of when that stage occurs or who else is present for it.

It is pure fiction to suggest that Boyd ever had a fair chance to present his case in his own way when Wallace never stepped aside in the first place. At the end of the hearing when the trial court needed to know if there was anything "the defense" wanted to put on the record, it asked Wallace, not Boyd. (Doc. 12-23:13). It is hard to imagine a more troubling way in which standby counsel's involvement could have prevented a defendant from having "actual control" over his own defense. In concluding otherwise, the Wisconsin Court of Appeals unreasonably applied *McKaskle* under §2254(d)(1).

[5]*Hearn v. Schriro,* 2011 U.S.Dist. LEXIS 36587(D. Ariz. March 31, 2011) is attached hereto as Exhibit 5

II. The Wisconsin Court of Appeals made an unreasonable determination of fact under §2254(d)(2) when it concluded that "Boyd authorized Wallace to engage in plea negotiations on his behalf," when the record contains no evidence to support it.

Before the Wisconsin state courts, Boyd argued that his exclusion from the plea discussions violated his Sixth Amendment right to self-representation. In rejecting this claim, the Wisconsin Court of Appeals made a factual determination that Boyd approved Wallace's solo participation in the plea negotiations: "Implicit in the court's finding that the plea was valid is the reasonable inference that Boyd authorized Wallace to engage in plea negotiations on his behalf." (Doc. 12-9:8). Any review of the record, however, reveals that this factual finding is unreasonable under §2254(d)(2).

No one in this case – not the trial court, the prosecutor, Wallace, or Boyd – ever stated or even alluded to the notion that Boyd authorized Wallace's solo participation in the plea negotiations. The Wisconsin Court of Appeals drew that inference from the trial court's comments in denying Boyd's plea withdrawal motion: "The court stated that Boyd 'would not allow any attorney to push him around or make a decision for him. He's clearly exhibited throughout these proceedings that he is the one in charge.'" (Doc. 12-9:8). These statements, however, are far too general to make a reasonable inference regarding whether Wallace was authorized to exclude Boyd from the plea negotiations. If anything, these statements imply that Boyd *would not* and *did not* authorize Wallace to negotiate a plea on his behalf.

Boyd made it perfectly clear that he was not interested in plea negotiations and that he did not want Wallace pressuring him to plead guilty. (Doc. 12-22:7-8, Exhibit 1:2-3, Doc. 12-25:10-11). It was Wallace, not Boyd, who interrupted the proceedings on the morning of trial to seek plea discussions. (Doc. 12-23:3). Further, Wallace was so intent on getting Boyd to plead no contest that he published a plea agreement to the trial court that included a possible

resolution to a pending Langlade County case, which neither Boyd nor the prosecutor had agreed to. (Doc. 12-23:4-5). The prosecutor clarified that those were not the terms, stating, "...in terms of Langlade County, yes, I don't have any authority to do... whatever Langlade County wants to do with their case is their decision." (Doc. 12-23:5). Nonetheless, Wallace filled out the plea questionnaire and included the terms regarding the Langlade County case that the prosecutor had just said was not part of the agreement. Further, Wallace included a reference to "20 years", which was also never part of the agreement, and signed it as Boyd's attorney. (Doc. 12-2:2). According to the prosecutor, the plea terms were "plea to both, open sentencing, that's an accurate recitation of the agreement." (Doc. 12-23:5). From the mass confusion concerning the plea terms, there can be no doubt that Boyd had not authorized or agreed to Wallace's solo participation in the plea negotiations.

The record plainly shows that Boyd was an active participant in all aspects of this case, except the plea discussions. Boyd submitted a number of *pro se* pretrial motions. (Doc. 12-27:70-71). The trial court stated that Boyd "walked like an attorney, talked like an attorney, wrote briefs like an attorney, and wanted to be his own attorney, plain and simple." (Doc. 12-27:74-75). Boyd wanted to "question the witnesses [himself]." (Doc. 12-22:13). And when the trial court asked Boyd if he wanted to do his "own openings and closings and all that," Boyd answered unequivocally, "I would like to completely represent myself on this case." (Doc. 12-22:12). Boyd's active participation prior to the plea discussions strongly suggests that Boyd did not impliedly wave his *Faretta* rights at such an important stage of the case. *See e.g. Hearn,* 2011 U.S. Dist. LEXIS 36587*47 (finding nothing to suggest that Petitioner "impliedly waived his *Faretta* rights" when he "was an active participant in all aspects of his trial"); *Frantz*, 533 F.3d at 745 (finding implied consent unlikely where

defendant was an active participant in the proceedings). If the Wisconsin Court of Appeals had considered these facts, then it would have determined that there is nothing in the record to suggest that Boyd authorized Wallace's solo participation in the plea negotiations.

The Wisconsin Court of Appeals acknowledged that the record is silent concerning what Boyd and Wallace discussed at the beginning of the hearing and whether or not Boyd was present for the plea discussions. (Doc. 12-9:7). Relief has been granted when the record was as silent as it is in this case. In *Frantz v Hazey*, for example, the *pro se* defendant, having fully participated throughout the case, was excluded from an in-chambers conference concerning a jury question. 533 F.3d at 729. The Ninth Circuit Court of Appeals held that this "unconsented-to exclusion" so "substantially reduce [d the defendant's] ability to shape and communicate his own defense as to violate his *F*aretta rights. *Id* at 740. However, the Court held that the record was "far from complete" and remanded to the district court for an evidentiary hearing concerning "whether *Frantz* was accurately informed of the purpose for the conference and given the opportunity to appear but declined to do so [...]." *Id.* at 745.

It is plain that the Wisconsin Court of Appeals, as in *Frantz*, was without "specific evidence concerning the circumstances giving rise to [standby counsel's] solo participation" in the plea negotiations. *Id.* at 746. Thus, as far as the existing record goes, Boyd did not authorize Wallace to negotiate a plea on his behalf and, therefore, Boyd was, in fact, unrepresented at a critical stage of the case. In sum the Wisconsin Court of Appeals was unreasonable under §2254(d)(2) – and, indeed, had absolutely no basis in the record – to find that Boyd authorized Wallace to engage in plea negotiations on his behalf.

III. The Wisconsin Court of Appeals made an unreasonable determination of fact when it found that "Boyd did not object to the appointment of Wallace as standby counsel" and that he said, "That would be fine with me," when the record plainly shows that Boyd objected to Wallace's further involvement in

this case, and that it was Wallace – not Boyd – who said, "That would be fine with me."

The Wisconsin Court of Appeals found, as a factual matter, that Boyd did not object to having Wallace appointed as standby counsel but had actually given his express approval: "Here, it is significant to note that Boyd did not object to the appointment of Wallace as standby counsel. When the court told Boyd that Wallace was "still going to be sitting there" even if Boyd represented himself, Boyd replied, "That would be fine with me." (Doc. 12-9:6). This finding of fact – which was "significant" to the Wisconsin state court's decision – was unreasonable under §2254(d)(2). Indeed, this factual determination can be refuted by a straight forward review of the final pretrial conference transcript. The record plainly shows that it was Wallace – not Boyd – who stated, "That would be fine with me" when the trial court indicated that Wallace "would still be sitting there" even if Boyd represented himself. (Doc. 12-22:11).

As argued above, Boyd made it abundantly clear that he objected to any and all participation on Wallace's part when he asked the trial court to remove Wallace from the case. (Doc. 12-22:7). Boyd's Motion for the Appointment of New Counsel stated that Wallace had "threatened to hit [Boyd]", had "told [Boyd] to shut up over a dozen times", and that Wallace was "pressing him to plead guilty" against his wishes. (Exhibit 1:1-3). Boyd specifically told the trial court, "I would like to *completely represent myself* on this case." (Doc. 12-22:12) (emphasis added). No reasonable person would conclude that Boyd did not object to the appointment of Wallace as standby counsel. Regardless, when standby counsel is appointed only to advise, the initial invocation of the right to self-representation is generally sufficient to establish that any participation by standby counsel other than for the routine matters mentioned in *McKaskle* is "over the defendant's objection." *Id.* at 178, *see generally*

United States v. Lorick, 753 F.2d 1295, 1299 (4th Cir. 1985) (a defendant's assertion of "the right [to self-representation] at the outset of trial proceedings constituted an express and unambiguous request that standby counsel be silenced").

The Wisconsin Court of appeals stated that it was "significant" that Boyd did not object to the appointment of Wallace as standby counsel. (Doc. 12-9:6). Its error is equally significant. Without an accurate factual appreciation of the ways in which Boyd clearly objected to Wallace's involvement in this case, the Wisconsin Court of Appeals was unable to reasonably apply *McK*askle's "actual control" test, which required it to determine whether Boyd had a fair chance to present his case in his own way – not whether Boyd objected to the initial appointment of standby counsel. 465 U.S. at 177; *see also Faretta,* 422 U.S. at 834 n. 46 ("[O]f course, a state may - even over objection by the accused – appoint a 'standby counsel' to aid the accused if and when the accused requests help [...]"). If the state court had fully understood the degree to which Boyd had vehemently objected to *any* involvement by Wallace, it would have been compelled to conclude that Wallace's conduct was, in fact, beyond the role of standby counsel, and grant relief under *McKaskle.*

§2254(d) ARGUMENT: RIGHT TO CONFRONTATION AND COMPULSORY PROCESS

IV. The Wisconsin Court of Appeals acted contrary to Federal law or, alternatively, it unreasonably applied clearly established Federal law when it failed to engage in a balancing of interests in considering Boyd's Sixth Amendment rights.

Whether rooted in the Fourteenth Amendment's Due Process Clause or in the Compulsory Process and Confrontation Clauses of the Sixth Amendment, there can be no doubt that the federal constitution provides the accused a meaningful opportunity to confront his accusers and present a complete defense. *Washington v. Texas,* 388 U.S. 14 (1967); *Davis*

v Alaska, 415 U.S. 308 (1974); *Crane v Kentucky,* 476 U.S. 683 (1986). Because the accused is entitled to defend himself against the state's accusations, "[f]ew rights are more fundamental than that of the accused to present [evidence] in his own defense." *Chambers v Mississippi,* 410 U.S. 284, 294 (1973). Denial of the accused's right to present a defense "calls into question the ultimate integrity of the fact-finding process." *Id.* at 295.

The essence of the right to present a defense is the entitlement to present the "defendant's version of the facts as well as the prosecutions to the jury so it may decide where the truth lies." *Washington,* 388 U.S. at 19. "[W]here constitutional rights directly affecting the ascertainment of truth are implicated [evidence rules] may not be applied mechanistically to defeat the ends of justice." *Chambers,* 410 U.S. at 313. Exclusion of evidence is unconstitutionally arbitrary where it infringes on a weighty interest of the defense – where it "significantly undermined fundamental elements of the defendant's defense." *United States v. Scheffer,* 523 U.S 303, 308 (1998).

The prosecution in this case was allowed tremendous latitude in presenting evidence, while Boyd was effectively barred from repudiating a vast majority of that evidence. Boyd was prevented from mounting a reasonable defense by the trial court's pretrial ruling that Boyd would "get no latitude" in his cross-examination of the state's witnesses. (Doc. 12-22:15). This prohibited latitude was essential for Boyd to present a defense, and his inability to do so substantially interfered with his constitutional rights. Boyd's Confrontation and Compulsory Process rights were primarily infringed by mechanistic application of state evidentiary rules in the face of a substantial and demonstrated need for the introduction of critical and impeaching evidence.

Like the state, Boyd's case relied on oral testimony; he had no physical or

documentary evidence with which to exonerate himself. Thus, his defense strategy hinged entirely on destroying the credibility of the state's witnesses. The case, and Boyd's freedom, rested entirely on the word of the witnesses against him. It was thus imperative that Boyd be allowed to test the reliability of the state's witnesses in any reasonable manner. "The importance of the right of cross-examination is heightened when the testimony of the witness in question is the only evidence directly linking the defendant to the crime." *Searcy v Jaimet,* 332 F.3d 1081, 1093 (7th Cir. 2003) (Cudahy, C.J., dissenting) (citing *Olden v Kentucky,* 488 U.S. 227, 233 (1998), *Davis,* 415 U.S. at 317-20). In particular, Boyd needed to discredit the state's "other acts" witness, F.M.W., whose testimony had been permitted to prove motive pursuant to the state's Offer of Proof For Other Crimes Evidence. F.M.W. was the only "other acts" witness present on the morning of trial. The outright cancellation of Boyd's defense is detailed herein, but the crucial facts that were never considered by the Wisconsin state courts will be simply outlined here:

- F.M.W. had previously accused Boyd of four counts of 2nd Degree Sexual Assault. Count 1 alleged that Boyd had contact with F.M.W.'s breast, while counts 2-4 each alleged intercourse (Cr. Cmplt. 00-CF-113, attached as Exhibit 6). Boyd was convicted on Count 1 and sentenced to 9 months in county jail plus 38 months probation. However, the three charges alleging intercourse were dismissed (Circuit Court Access Program, Case No. 00-CF-113, attached as Exhibit 7). F.M.W.'s anger at both the dismissal of these charges and what she perceived to be a lenient sentence provides a motive for her testimony in the present case. Accordingly, Boyd had a constitutional right to fully explore each potential motive or source of bias in attacking F.M.W.'s credibility. *United States v Martin,* 618 F.3d 705, 728 (7th Cir. 2010). The

Seventh Circuit Court of Appeals has consistently held that exposing a witness's motivation in testifying is always relevant, and "parties should be granted reasonable latitude in cross-examining target witnesses." *United States v. Manske,* 186 F.3d 770, 777 (7th Cir. 1999); *United States v. Thompson,* 359 F.3d 470, 479 (7th Cir. 2004).

- F.M.W. lied to both law enforcement and while under oath regarding her allegations against Boyd. Initially, she alleged that an incident occurred in one location, but the very next day, she gave a second statement to law enforcement alleging multiple incidents in two locations (Preliminary Hearing, 1/5/00, at 13, attached as Exhibit 8). F.M.W. told Cpl. Kevin Ison that she "thought that Vincent had an orgasm." (Inv. Rpt. Of Cpl. Ison, at π 4; attached as Exhibit 9). However, just two months later, she testified under oath that she did not know the meaning of the word "orgasm" and would not have said that as describing things to law enforcement (Ex. 7:25).
- The only DNA evidence in the case, which was a mixture from two people found on Boyd's boxer shorts, eliminated F.M.W. as a possible contributor (Rpt. Of Lab. at 2, attached as Exhibit 10).

This evidence presents serious credibility issues. Here, the repeated evidence that F.M.W. lied about allegations of intercourse with Boyd and had a motive to do so again, directly impeaches her credibility concerning Boyd's motive in the present case. Indeed, not only did F.M.W. lie to law enforcement, but she admitted to doing so immediately prior to lying under oath as well. "[W]hile 'generally applicable evidentiary rules limit inquiry into specific instances of conduct through the use of extrinsic evidence and through cross-examination with respect to general credibility attacks, ... no such limit applies to credibility attacks based upon motive or bias...'" *Redmond v. Kingston,* 240 F.3d 590, 593 (7th Cir.

2001)(quoting *Quinn v. Haynes,* 234 F. 3d 837, 845 (4th Cir. 2000); *White v. Coplan,*399 F. 3d 18, 26 (1st Cir. 2005) ("Evidence suggesting a motive to lie has long been regarded as powerful evidence undermining credibility, and its importance has been stressed in Supreme Court confrontation cases.") The Seventh Circuit Court of Appeals has noted that "a propensity to lie to police officers, prosecutors, and even judges "is especially damaging to a witness's credibility." *Crivens v. Roth,* 175 F. 3d 991, 998 (7th Cir. 1999).

In light of its importance to Boyd's constitutional right to present a defense, this evidence must come in under a constitutional theory even if it could be argued that no state evidentiary provisions would escort it. *Chambers,* 410 U.S. at 313. This type of testimony was critical to Boyd's defense as it would have shown that F.M.W. was biased, had a motive to testify falsely, and had a propensity to lie to police officers, attorneys, and even judges. This testimony would have effectively destroyed the state's only avenue of proving that Boyd had a motive to engage in similar conduct with Alison B.W. in the present case.

The evidence of bias, motive to testify falsely, and other instances of untruthfulness on F.M.W.'s part are relevant and useful to impeach her credibility. Boyd was entitled to a higher level of constitutional protection because the evidence of the dismissed charges and the sentence imposed was essential to show F.M.W.'s potential motive and animus toward Boyd. *See Redmond,* 240 F.3d at 593 (noting that credibility attacks based upon motive or bias are not subject to the limitations of generally applicable evidentiary rules). Given that the Wisconsin state court failed to consider the argument that the evidence Boyd sought to introduce through latitude in cross-examination was relevant to F.M.W.'s bias or motive, it acted contrary to or, in the alternative, unreasonably applied federal law under §2254(d)(1).

Before the Wisconsin Court of Appeals, Boyd argued that the trial court's "no

latitude" ruling was both premature and so overbroad that it violated the Sixth Amendment to the United States Constitution. He argued that under clearly established U.S. Supreme Court precedent, a court imposing restrictions on cross-examination or the introduction of evidence must engage in a balancing of competing interests, taking into consideration the principles animating the Sixth Amendment. *Davis,* 415 U.S. at 319, *Delaware v. Van Arsdall,* 475 U.S. 673, 679 (1986), *Olden v. Kentucky,* 488 U.S. at 227, 232 (1988); *Michigan v. Lucas,* 500 U.S. 145 (1991); *See Chambers*, 410 U.S. at 295. In so arguing, Boyd emphasized that under clearly established federal law, defendants are entitled to reasonable latitude in their cross-examination of the state's witnesses, especially on issues of motive and bias. *See Alford v. United States,* 282 U.S. 687. 692 (1931) ("It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop.") The importance of permitting a defendant broad scope in cross-examining the witnesses against him was reaffirmed by the Supreme Court in *Van Arsdall,* 475 U.S. at 67-79, and *Olden,* 488 U.S. at 231.

A trial court may place restrictions on a defendant's introduction of evidence so long as those restrictions are neither arbitrary, *see Washington,* 388 U.S. at 23; *see also Chambers,* 410 U.S. at 297, nor "disproportionate to the purposes they are designed to serve." *Rock v Arkansas,* 483 U.S. 44, 55-56 (1987). To justify limiting a defendant's right to confront his accusers on issues of motive and bias, the competing interest must be concrete and articulable, not based on surmise or speculation. *Olden,* 488 U.S. at 232. Accordingly, when a trial court makes a ruling limiting the introduction of evidence, the test applied to that ruling is whether the legitimate interests advanced by the state outweigh the defendant's right to introduce exculpatory evidence. Balancing must be performed. *See White,* 399 F.3d at 24 (finding that

prohibiting defendant from cross-examining accusers about prior allegations of sexual assault was an "unreasonable application" of "clearly established federal law" and noting that Supreme Court precedent requires a balancing of interests).

Factors that the Supreme Court has deemed relevant in such an analysis are [1] the importance of the evidence to an effective defense, [2] the scope of the ban involved and [3] the strength *vel non* of the state's interests weighing against admission of the evidence. *White*, 399 F.3d at 24 (numbered brackets supplied).

Here, the Wisconsin Court of Appeals concluded that the trial court's "no latitude" ruling did "not infringe [ ] upon [Boyd's] constitutional right to cross-examine witnesses at trial" – but it did so without any mention of the balancing required by *Davis* and *Van Arsdall*, the Supreme Court cases from which *White* draws the factors of its three-part test (Doc. 12-16:3). In fact, nowhere in its entire decision did the state court even mention a single factor that the Supreme Court has deemed relevant in such an analysis. Such a glaring failure cannot withstand review under §2254(d)(1), regardless of whether the Wisconsin state court's failure to balance the interests that *White* and clearly established federal law call for is treated as a decision contrary to existing federal law or, alternatively, whether its failure to balance the competing interests without so much as a mere reference to the constitutional law principles involved is treated as an unreasonable application of federal law. *See e.g. Sussman v. Jenkins*, 636 F.3d 329, 358 (7th Cir. 2011) ("by construing the task of evaluating the admissibility of [the witness's testimony] ... without any reference, much less a plenary reference to the principles of the Confrontation Clause, the state courts applied unreasonably the applicable federal constitutional guarantees as construed by the Supreme Court of the United States.")

By refusing to consider the evidence Boyd sought to introduce when he requested "some latitude in questioning the victim" and focusing solely on the state's interest in avoiding a trial within a trial, neither the circuit court nor the Wisconsin Court of Appeals could have properly examined the way in which the trial court's blanket no-latitude ruling impacted Boyd's Sixth Amendment rights. In particular, the Wisconsin state court's decision does not explain how Boyd's request for the latitude in cross-examination that he was already entitled to under clearly established federal law, as opposed to the state's use of F.M.W,'s testimony, was unique, setting it apart from typical impeachment on cross-examination and requiring such a far-reaching "no latitude" ruling. F.M.W.'s motive in testifying against Boyd is especially relevant and Boyd should have been allowed reasonable latitude in his cross-examination in this area. Instead, the trial court went to the extreme, and ruled that Boyd would get "no latitude" in any cross-examination, period. (Doc. 12-22:15).

The Wisconsin state court's decision also fails to explain why it concluded that the trial court was within its discretion to issue such an overbroad ruling at such an early stage in the case. (Doc. 12-16:3). It is only after the motive has been established that the court has discretionary authority to impose "reasonable" restrictions on cross-examination. *Van Arsdall,* 475 U.S. at 679; *see also United States v. Davis,* 393 F.3d 540, 548 (5th Cir. 2004) (trial judge's discretionary authority to limit cross-examination "comes into play only after there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment.") Yet any consideration of whether the testimony Boyd sought to introduce would have been admissible, or whether the trial court even had discretion to bar all latitude in Boyd's cross-examination before any testimony had even been given is completely absent from the Wisconsin state court's decision.

The Wisconsin Court of Appeals interpreted the trial court's ruling to mean that Boyd would "get no latitude in asking questions that were irrelevant, prejudicial, or otherwise in violation of the rules." (Doc. 12-16:3). This implies that state rules of evidence automatically trump Boyd's Sixth Amendment rights, regardless of what evidence Boyd sought to introduce or for what purpose, thus, no balancing was required. However, the Wisconsin Court of Appeals' interpretation of the trial court's no latitude ruling simply cannot be reconciled with the abundant precedent establishing that defendants are entitled to reasonable latitude in cross-examination in certain areas and requiring a balancing of competing interests. Indeed, the entire rationale of *Chambers, Davis, Van Arsdall, Olden,* and *Lucas* is crystal clear – state rules of evidence *can* be circumscribed by a defendant's Sixth Amendment rights. Thus, balancing must be performed on a case by case basis. *See White,* 399 F.3d at 24 ("Such language, clear although general, calls for a balancing of interests depending on the circumstances of the case.")

There was evidence in this case that the state's "other acts" witness, F.M.W., lied, perjured, brought false allegations against Boyd in the past, and had a clear motive to repeat those allegations in the present case. These facts clearly demonstrate substantial credibility issues. Whether the state rules of evidence precluded examination into these areas or not, the result is the same: Boyd's Sixth Amendment rights to confront the witnesses against him and present a complete defense were violated when the trial court ruled that Boyd would get no latitude in questioning the state's witnesses and did so without balancing the competing interests.

In *Davis,* the U.S. Supreme Court made clear that when the right of the accused to examine a witness is compared to the state's policy interest, "the right of confrontation is

paramount to the state's policy" which "must fall before the right of petitioner to seek out the truth in the process of defending himself." 415 U.S. at 320-21. In failing to consider this well-established principle of law, and in failing to engage in a balancing of interests, the Wisconsin Court of Appeals' decision was contrary to or, alternatively, an unreasonable application of *Davis* and its progeny under §2254(d)(1).

V. The Wisconsin Court of Appeals' decision was based on an unreasonable determination of facts because it failed to consider key aspects of the Plea Hearing and Evidentiary Hearing transcripts in concluding that the trial court's no latitude ruling simply meant that Boyd must "follow the rules of evidence" and, therefore, did not provide a basis for plea withdrawal.

Before the Wisconsin state courts, Boyd argued that the trial court's no latitude ruling was so overbroad that it violated the Sixth Amendment to the United States Constitution. In rejecting this claim, the Wisconsin Court of Appeals minimized the plain meaning of the trial court's ruling by interpreting it to mean that "the court was simply impressing upon Boyd the need to follow the rules of evidence while representing himself. This meant that Boyd would get "no latitude' in asking questions that were irrelevant, prejudicial, or otherwise in violation of the rules." (Doc. 12-16:3). A simple review of the plea hearing and evidentiary hearing transcripts, however, reveals that the state court's interpretation of the trial court's no latitude ruling was both incorrect and unreasonable.

At the evidentiary hearing held on March 27, 2014, two years after Boyd was sentenced, the trial court plainly revealed that it had researched its no latitude ruling prior to the entry of Boyd's no contest plea and had discovered that it was not consistent with the governing case law. The trial court explained that it was prepared to reverse the no latitude ruling had Boyd proceeded to trial, but that it intentionally withheld this information from Boyd in order to secure his no contest plea:

> THE COURT: I just remember that the day before, when he wanted to represent himself and he wanted the court to give him more latitude and I told him I wouldn't the day before and – I did some research on that, and he was exactly right. So he obviously researched it because the case law says exactly what he said, for latitude. So the next day, when he comes in, I was going to say you have more latitude while we're doing the trial, but then he wanted to take a plea.

(Ex. 3:76). This excerpt does not reveal a mere "impressing upon Boyd the need to follow the rules of evidence," it reveals the trial court's own admission that the ruling was not consistent with the governing case law. Realizing this, the trial court was prepared to reverse the ruling. *See Lucas,* U.S. at 151 (In a criminal case, restrictions on a defendant's rights "to confront adverse witnesses, and to present evidence may not be arbitrary or disproportionate to the purposes they were designed to serve") (quoting *Rock,* 483 U.S. 44)). Moreover, this excerpt plainly reveals that the trial court knew that Boyd was not entering his plea voluntarily. *See Brady v. United States,* 397 U.S. 742, 755 (1970) (holding that a guilty plea or no contest plea is not voluntary unless the defendant is "fully aware of the direct consequences [of his plea], including the value of any commitments made to him *by the court,* prosecutor, or his own counsel.") (emphasis added). By intentionally withholding such critical information from Boyd, the trial court completely undermined the integrity of Boyd's no contest plea. *Brady* makes clear that "to be valid, a guilty or no contest plea must be entered knowingly, voluntarily, and intelligently." 397 U.S. at 748. Without knowing the actual value of the trial court's no latitude ruling, Boyd could not have entered a valid no contest plea. By ignoring this excerpt from the evidentiary hearing transcript, the Wisconsin Court of Appeals' decision was unreasonable under §2254(d)(2).

The same can be said of the plea hearing transcript. During the plea colloquy, Boyd explicitly informed the trial court that he felt "a lot of pressure", to plead no contest as a direct result of the trial court's no latitude ruling. Most strikingly, however, is the fact that this

occurred when the trial court specifically wanted Boyd to agree that he was not being pressured by the court:

> THE COURT: Do you understand that – or your pleas to the two counts of first-degree sexual assault of a child without the persistent repeater –your plea to those two charges are no contest?
> THE DEFENDANT: Yeah, I feel a lot of pressure, but yeah, I feel I don't really have any other option but to do that.
> THE COURT: Well, obviously I understand how you feel pressure, and I just want you to understand—or agree that I'm not pressuring you, you don't feel pressure from me, do—
> THE DEFENDANT: Pressure that I – since coming in yesterday, I feel pressured today.
> THE COURT: You – you feel pressure based upon the rulings I made?
> THE DEFENDANT: Yes. I don't feel I'm going to be able to get a fair trial here.

(Doc. 12-23:6). Yet nowhere in the entire plea hearing transcript did the trial court ever bother to mention that the no latitude ruling would be reversed if Boyd proceeded to trial. There can be no doubt that the trial court withheld this information from Boyd because it knew that, with it, Boyd would have gone to trial:

> THE COURT: [...] so I think even at that point standby counsel would have been there, but he would have tried the case.

(Ex. 3:77). In sum, The Wisconsin Court of Appeals was unreasonable under §2254(d)(2) when it closed its eyes to the plain meaning of the trial court's no latitude ruling as revealed in these key aspects of the plea hearing and evidentiary hearing transcripts.

§2254(A) ARGUMENT AND REQUEST FOR RELIEF

VI. Boyd's unsolicited participation by standby counsel and right to confrontation and compulsory process claims meet the burden set out in §2254(d), so this Court must conduct an independent review of these constitutional claims under §2254(a).

Having shown that the state court made unreasonable determinations of fact, acted contrary to clearly established federal law, and unreasonably applied clearly established federal law, Boyd's claims survive the threshold review set out in §2254(d)(1) and (d)(2). The

merits of his unsolicited participation by standby counsel and right to confrontation and compulsory process claims must therefore be reviewed under §2254(a) *de novo* without deference to the state court's decision-making, in order to determine whether a constitutional violation has occurred. *See Mosley v. Atchison,* 689 F. 3d 838, 849-51 (7th Cir. 2012) (setting out this two-step analysis).

Boyd hereby incorporates the arguments made above regarding the merits of his unsolicited participation by standby counsel claim and his right to confrontation and compulsory process claim and, on the basis of those arguments and the factual record as developed in state court, respectfully requests that this court grant him a writ of habeas corpus so that he may be discharged from his unconstitutional confinement and restraint. Alternatively, because much of the evidence presented herein was not considered by the state courts due to the failure to provide a requested evidentiary hearing, this Court can assume its truth in assessing the issue on a *de novo* basis and, in its discretion, conduct an evidentiary hearing on both claims under the dictates of *Cullen v. Pinholster, supra.*

Respectfully submitted this 31st day of August, 2018,

Petitioner

Vincent E. Boyd
G.B.C.I.
P.O. Box 19033
Green Bay, WI 54307