ORIGINAL

No. 20-8408

IN THE

SUPREME COURT OF THE UNITED STATES

SCOTT R. DEICHSEL - PETITIONER

VS.

LIZZIE TEGELS, WARDEN - RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

SCOTT R. DEICHSEL

JACKSON CORRECTIONAL INSTITUTION

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QUESTIONS PRESENTED FOR REVIEW

1. This Court should grant review to determine whether and in what circumstances such a Certificate of Appealabilty issued can be vacated.

2. This Court should grant review to determine whether an ineffective assistance of counsel claim based upon a matter of state law - specifically Wis. Stat. 971.08 and State v. bangert - violates a defendants Ferderal Constitutional right and therefore illistrative of denial of a substantial constitutional right to effective assistance of counsel, mandating grant of Certificate of Appealability in this case.

3. Wisconsin State Courts unreasonably determined that Deichsel's appellate counsel was not ineffective for failing to argue on direct appeal the nonfrivolous meritorious claim regarding the defective plea colloquy.

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Petitioner respectfully prays that a Writ of Certiorari issues to review the judgment below.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Seventh Circuit appears at Appendix B to the petition, and is unpublished

The opinion of the United States District Court for the Eastern District of Wisconsin appears at Appendix G to the petition, and is unpublished.

JURISDICTION

Deichsel's application for Certificate of Appealibility (COA) from the United states District Court for the Eastern District of Wisconsin was denied. Deichsel then made a request to the United States Court of Apeals for the Seventh Circuit, which initially granted a COA on July 11, 2017, but then on July 19, 2017, retracked the decision dated July 11, 2017. On October 19, 2020, the United States Court of Appeals for the 7th Circuit, denied Deichsel's pro se Motion/Application for a COA affirming the District Court's denial of Deichsel's petition for Writ of Habeas Corpus. On January 29, 2021, the United States Court of Appeals for the Seventh Circuit denied a timely filed motion for Rehearing, Rehearing En Banc. The jurisdiction of this Court is invoked under U.S.C. § 1254 (1).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to effective assistance of counsel, and state criminal defendants are afforded the 6th Amendment protections through the 14th Amendments to the United States Constitution. Finally, where and here, under state of Wisconsin Constitution a criminal defendant is constitutionally entitled to a direct appeal from his conviction or sentence, See Wis. Const. art. 1 § 21 that too must afford due process of law.

Claims presented herein are also governed by 28 U.S.C. § 2253 (c)(2) and 2254.

STATEMENT OF THE CASE

Deichsel pled no-contest to Attempted First Degree Intentional Homicide. On June 18, 2001, the trial court sentenced Deichsel to 40 years of initial confinement followed by 20 years of extended supervision. Deichsel sought postconviction relief, his attorney, Len Kachinsky (Kachinsky), filed a no-merit report pursuant to Wisconsin § 809.32 (1) and **Anders v. California**, 386 U.S. 738 (1967), assering that he found no basis for seeking postconviction relief on Deichsel's behalf. Deichsel filed a pro se response to the no-merit report. The Wisconsin Court of Appeals reviewed the no-merit report, Deichsel's response, and the record, the court concluded that there was no arguable merit to any issue that could be raised on appeal. The court affirmed Deichsel's conviction. Deichsel appealed to the Wisconsin Supreme Court, which denied review. Deichsel filed a habeas petiton in Federal Court but asked that the case be stayed to give Deichsel time to exhaust his avaiable state court remedies.

Deichsel then filed a petition for Writ of Habeas Corpus with the Wisconsin Court of Appeals, pursuant to **State v. Knight**, 168 Wis.2d 509, 484 N.W.2d 540 (1992), arguing his appellate counsel was ineffective by failing to discover and brief issues of arguable merit related to flaws in Deichsel's plea colloquy. The Wisconsin Court of Appeals denied petition finding that attorney Kachinsky provided the level of representation constitutionally required. Deichsel then petitioned the Wisconsin Supreme Court, which was denied on December 16, 2013. Deichsel then on march 27, 2014 filed an amended petition in the Federal Court. The District Judge re-opened the case, and the parties briefed the issues presented on the merits.

On April 20, 2017, the District Court under case No: 03-cv-1050 issued a decision and order denying the petition. The District Court also would not issue a COA after Deichsel filed a timely notice of appeal, the District Court allowed Deichsel to proceed on appeal.

On July 11, 2017, the Seventh Circuit Court of Appeals, granted Deichsel's pro se Motion/Application for COA, but then eight days later, on July 19, 2017 withdrew its decision, dated July 11, 2017, granting COA. Therefore, Deichsel's request for a COA remand pending.

On October 19, 2020, the United States Court of Appeals for the Seventh Circuit denied Deichsel's request for a COA, his motion for counsel, and motion to amend.

Deichsel then filed a petition for panel Rehearing, Rehearing En Banc, which was denied on January 29, 2012.

ARGUMENTS FOR GRANTING WRIT

THE COURT SHOULD GRANT THE PETITION TO RESOLVE A CONFLICT BETWEEN SEVERAL CIRCUITS OF THE UNITED STATES COURT OF APPEALS, NAMELY THE 3RD, 6TH, 7th, 9TH, 10TH, AND 11TH CIRCUITS.

In the Seventh Circuit Court of Appeals, initially granted Deichsel's application for COA, but then vacated its original decision, which raises the question, on which § 2253 is silent, whether and in what circumstances such a certificate once issued can be vacated.

After extensive research, Deichsel discovered a conflict amongst the decisions issued from the 3rd, 6th, 7th, 9th, 10th, and 11th circuits.

U.S. v. Doe, 810 F.3d 132, 145 (3rd cir. 2015), (While a defendant must

Certificate of Appealability (COA) from the denial of a motion to vacate sentence, this is satisfied even of the claim is only debatedly a constitutional claim).

Dillard v. Burt, 134 Fed. Appx. 365, 368 (6th cir 2006), (Certificate of Appealability from dismissal of habeas petition was improvidently granted); **Bradley v. Birkett**, 156 Fed. Appx. 771, 772 (6th cir 2005) (Same).

In **Phelps v. Alameda**, 336 F.3d 722 (9th cir 2004), the Nineth Circuit found that "[a]lthough issuance of Certificate of Appealability (COA) is a prerequisite to Court of Appeals' assertion of jurisdiction in Federal Habeas Corpus proceedings; once COA is issued, Court of Appeals has jurisdiction even if COA was arguably improvidently granted." **id at 726**

In **Hunter v. U.S.**, 559 F.3d 1188, 1190 (11 cir. 2009), the Eleventh Circuit denied a COA because Begey was not a constitutional decision. However, the Supreme Court vacated that judgment in light of the position in the Soliciters General's Brief, which argued the proper approach would "encompass [ ] review of debatably constitution claims." **Hunter v. United States**, NO. 09-122, 2009 WL 4099534 (Nov. 25, 2009); **Hunter v. United States**, 558 U.S. 1134 (2010).

In **Young v. United States**, 124 F.3d 794, 799 (7th cir. 1997), cert. denied, 524 U.S. 928 (19998), the Court of Appeals for the Seventh Circuit held that on erroneously issued COA satisfied the requirement of § 2253 (c)(2) regardless of whether it was properly issued, reasoning as follows:

> "The certificater is a screening device, helping to conserve judicial (and prosecutorial) resources ... Once a certificate has issued, however, the case proceeds to briefing and decision; the resources have been invested. It is too late to narrow the issues or screen out week claims. Perhaps a motion to dismiss an appeal on the ground that a certificate was improperly issued would serve some function. But once the briefs have been written and the case heard, there is little point in

> scrutining the certificate of appealability. An obligation to determine whether a certificate should have been issued, even if the parties do not present this issue for decision - a step entailed by the conclusion that a proper certificate is a judicial requirement - would increase the complexity of appeals in collateral attacks and the judicial effort required to resolve them - the opposite of the legislative plan. So we proceed to the merits as the parties have presented them. id at 799"

The Court of Appeals for the Tenth Circuit reached the same conclusion and relied on the Young reasoning. See **U.S. v. Talk**, 158 F.3d 1064, 1065 (10th cir. 1998), cert. denied, 525 U.S. 1164 (1999). Similarly, the Court of Appeals for the Second Circuit adopted this reasoning in SOTO v. U.S., 185 F.3d 48 (2nd cir. 1999), emphasizing that "certificate is a screeing devise" and that it had previously intimated the same "gate-keeping" view of the certificate of appealability requirement in **Lozada** v. U.S., 107 F.3d 1011, 1015 (2nd cir. 1997). It reasoned that "dismissing an appeal after a certificate of appealability has already issued would be of little utility, in stalling this court as a gate keeper would be redundant." **Soto**, 185 F.3d at 52.

The United States Court of Appeals for the Tenth Circuit said in , **Chaney v. Brown**, 712 F.2d 441 (10th cir. 1983), held that "Certificate of Probable Cause for appeal from denial of habeas relief having been granted, petitioner had to be afforded opportunity to address merits, and Court of Appeals was obligated to decide merits appeal." id at 442; **Lefever v. Gibson**, 182 F.3d 705, 710-711 (10th cir. 1999), (noting that blanket COA's are improper but that once COA is granted, even if erroneously, this court must review the merits).

When a preceived conflict arises in decisions of United States Court of Appeals, a certiorari petition to the United States Supreme Court that points out the preceived conflict will best serve the public interest and will also

aid this Court in its law developing and clarifying functions.

The aforementioned cases indicated that a United States Circuit Court of Appeals here rendered a decision in conflict with decisions of other United States Circuit Court of Appeals on the same matter. Since jurisdiction to bring up cases by certiorari from the Circuit Court of Appeals was given to this Court in order to secure uniformity of decisions. See **Magnum Import Co. v.** Coty, 262 U.S. 159, 163 (1923).

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAD REASON TO GRANT THE CERTIFICATE OF APPEALABILITY IN THIS CASE, DID SO, BUT THEN ON JULY 19, 2017 WITHDREW THAT DECISION

According to Rule 11 (a) of the Rules goverening § 2254 cases, the District Court must issue or deny a certificate of Appealability "when it enters a final order to the applicant." A Certificate of Appealability may issue "only if the appellant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253 (c)(2). To make a substantial showing of the denial of a constitutional right, the petitioner must demonstrate that "reasonable jurist could debate whether (as, 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." **Slack v. McDanials**, 529 U.S. 473. 484 (2000) (quoting **Barefoot v. Estelle**, 463 U.S. 880, 893 n.4 (1983).

In the case at bar, Deichsel filed a notice of appeal from the denial of his habeas petition filed pursuant to 28 U.S.C. §2254, and an application for a Certificate of Appealability.

At issue is whether Deichsel made a substantial showing of the denial

of his habeas petition filed pursuant to 28 U.S.C. 2254, and an application for a Certificate of Appealability.

At issue is whether Deichsel made a substantial showing of the denial of a constitutional right as to whether Deichsel's counsel was ineffective (surely a 6th amendmend claim) for failing to litigate claims of ineffective assistance of trial counsel (also dealing with a 6th amendment claim) for failing to ensure Deichsel's plea was entered knowingly, voluntary, and intelligently. Nevertheless, the District Court denied Deichsel's Federal Habeas relief, and both the District Court and the United States Court of Appeals for the Seventh Circuit declined to grant Deichsel a COA.

Over the years the 7th Circuit Court of Appeals has continuously wranggled over whether a COA can and should be issued in situations where, as here, the application for COA indentifies a constitutional issue, predicated on an issue of state law. See **Buie v. McAdory**, 322 F.3d 980 (7th cir. 2003).

In **Buie**, the court says "But there is a third type of case illustrated by this case, in which briefing has not yet begun but the certificate has identified a constitutional issue of dubious substantiality. It is probable that **Buie's** appeal presents only therefore futilely an issue of Illinous evidence law, but it is not certain; state evidence ruling can violate a defendant's federal constitutional right, E.g. **Rock v. Arkansas**, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1998); **Webb v. Texas**, 409 U.S. 95, 93 S.Ct. 352, 34 L.Ed.2d 330 (1972) (per curiam). In these circumstances, it will conserve judicial resources in the long run to allow the case to be briefed rather than to worry the issue of substantiality. The motion to vacate the certificate of appealability is therefore DENIED." **id at 982-83.**

Buie was treated well by the Court of Appeals. Deichsel, on the other hand, was treated very poorly by the Court of Appeals. First, Deichsel filed

a **Knight** petition, complaining that his appellate counsel was ineffective by failing to litigate a claim if ineffective assistance of trial counsel for failing to ensure Deichsel understood all essential elements of the charged offense. Deichsel's petition was deneid. Deichsel then filed a federal Habeas petition. That petition was also denied finding no prejudice by attorney, Kachinskv's failure to raise ineffective assistance of counsel as related to a **Bangert** challenge. Additionally in **Mason v. Hanks**, 97 F.3d 887 (7th cir. 1996); Where this court held:

> We pause to clarify one point. Whether Terell's testimony amounted to inadmissible heresay presents a question of state law, of course; but this possesses no impediment to Mason's claim of ineffectiveness. True it is not ordinarily our province on habeas review to concern ourselves with errors of state law... our concern instead is with federal constitutional error... But the constitutional right at stake here is the right to the effective assistance of counsel on appeal, and in that context we may consider the state, as well as the federal issues that the petitioner's counsel did not pursue... **Mason**, 97 F.3d at 894.

Its worth noting that Deichsel's ineffective assistance claim was not simply upon state criminal procedure expressed in Wis. Stat. § 971.08 and **State v. Bangert**, but upon Deichsel's state and ferderal rights to due process as well. As the court recognized in **Bangert**, 389 N.W.2d at 19, "the constitutional validity of a plea must be measured in terms of whether it was entered knowingly, voluntary, and intelligent." And for a plea to be knowing, voluntary, and intelligent, the trial court must explain to the defendant all essential elements of the crime. See **State v. Brown**, 2006 WI ¶ 46, 293, WI 2d 594, 622, 716 N.W.2d 920 (2006), (A circuit court may establish the defendant's understanding of the charges to which he is pleading guilty by summarizing the elements of the crime charged by reading from the appropriate jury instructions or from the applicable statute).

In reviewing the constitutionality of a valid plea, the Wisconsin State

Supreme Court adopted a standard as mandated by Federal Rule of Criminal Procedure 11, in accordance with the mandated of **McCarthy v. United States**, 394 U.S. 459 (1969); **Boykin v. Alabama**, 385 U.S. 238 U.S. 238, 243 (1969); **Henderson v. Morgan**, 426 U.S. 637, 645 (1976); and **Bradshaw v. Stumpf**, 545 U.S. 175 (2005).

The constitutional requirement for a valid plea cannot be met where the record fails to accurately reflect that the nature of the charge and elements of the crime were not explained to the defendant.

The plea colloquy in Deichsel's case is devoid of any mention of the elements of Attempted First Degree Intentional Homicide. During the plea hearing, the following exchange took place between the court and Deichsel:

> THE COURT: Mr. Deichsel, whats your plea to the charge of attempted first degree intentional homicide?
>
> THE DEFENDANT: No contest, Your Honor.
>
> THE COURT: Has anyone promised you anything, forced you in any way or made you enter this plea here today?
>
> THE DEFENDANT: No.
>
> THE COURT: Are you making the plea of your own free will?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Do you understand if I except the plea I'll find you guilty?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Do you understand I'm not bound-- well, there aren't any negotiations here and I can sentence you to the maximum penalty which is up to 60 years imprisonment. Do you understand that?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Do you understand when plead-- is no contest or guilty? What was the plea? No contest or guilty?
>
> THE DEFENDANT: No contest.

THE COURT: When you plead no contest to this charge you're giving up a number of rights. First, of all, you're giving up the right to have a trial to a jury where all 12 members of that jury would have to agree that they believed beyond a reasonable doubt that you committed this offense. Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: And specifically, all 12 members of that jury would have had to have agreed that they believed beyond a reasonable doubt that you did attempt here to cause the death of Shantel Quick and that was done with intent to kill her. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you understand that when you plead no contest to this charge, you're giving up a number of rights at that trial and that includes, first, the right to present any witnesses?

If you had any witnesses that you thought would be favorable to you, you could have subpoenaed them to testify at the trial; and if they had not wanted to come by subpeonaing them, you could have compelled them to come here but when you plead no contest, you give up that right. Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: You also would have the right to crossexamine the State's witnesses. As indicated, the State would have had the burden of proof here. They would have had to have proven this so they would have had to presented witnesses.

You would have the right to question or crossexamine those witnesses to test the truth of what they were testifying about but when you plead no contest, you give up that right too. Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: You also could have testified if you wanted to but nobody could have made you testify against yourself. When you plead no contest, you're giving up those rights too. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now, you've gone through the plea questionnaire with Mr. Hildebrand, correct?

THE DEFENDANT: Yes.

THE COURT: Did you understand everything you covered on that form?

THE DEFENDANT: Yes.

THE COURT: Do you have any questions either for Mr. Hildebrand or for me with regard to the implications of your plea?

THE DEFENDANT: No.

THE COURT: Do you understand when you plead no contest to this charge you will be a convicted felon? You'll never be able to possess a firearm again, to do so, you would face a $10,000 fine, five years imprisonment or both?

THE DEFENDANT: Yes.

THE COURT: Do you understand as well if you are not a citizen of the United States a plea of guilty or no contest to the offense for which you are charged here could result in deportation, exclusion from admission to this country or denial of naturalization under federal law? Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now, have you had enough time to talk to Mr. Hildebrand with regard to the implications of this plea?

THE DEFENDANT: Yes.

THE COURT: Do you need anymore time at all?

THE DEFENDANT: No.

THE COURT: Do you still wish to plead no contest?

THE DEFENDANT: Yes,

THE COURT: Mr. Hildebrand, have you had enough time to discuss this matter with your client?

MR. HILDEBRAND: Yes, Your Honor.

THE COURT: Do you believe that his plea is freely, voluntary and intelligently made?

MR. HILDEBRAND: Yes, Your Honor.

THE COURT: Is there anything else about these proceedings,

Mr. Deichsel. that you don't understand?

THE DEFENDANT: No.

THE COURT: You've had no alcohol or drugs within the last 24 hours, correct?

THE DEFENDANT: No, Your Honor.

THE COURT: The Court will accept the plea. Find it to be freely, voluntary, and intelligently made and will be entered on the record.

As to a factual basis, there was a preliminary examination with bindover and plus based upon that and the Court's review of the complaint, I take it you're not contesting that there is a factual basis here, correct, Mr. Hildebrand?

MR. HILDEBRAND: That's correct, Your Honor.

THE COURT: Mr. Deichsel, do you basically agree with what's in the complaint?

THE DEFENDANT: Yes.

THE COURT: The Court will find sufficient factual basis for the entry of the plea and will find Mr. Deichsel guilty of the charge of attempted first degree intentional homicide contrary to Section 940.01 (1)(a) and 932.32 (1)(a). Presentence will be ordered. Sentencing will be scheduled for...

THE CLERK: June 12, 3 p.m.

MR. PAULUS: I've got a conflict.

THE CLERK: Just for that day or...

MR. PAULUS: If we could do it earlier in the day.

THE CLERK: It's an intake day. We can do it at say 8:30.

MR. PAULUS: That would work for me.

MR. HILDEBRAND: That would be fine.

THE COURT: Anything further at this time?

MR. HILDEBRAND: Judge, we would like to have the no contact mdified to the extent that we would like some contact but indirectly through the District Attorney's

> Office with the victim. I've discussed this with Mr. Paulus.
>
> MR. PAULUS: Apparently, the Defendant wants to submit a letter of some sort to the victim. It would go to his lawyer and then to me and then to the victim.
>
> I've consulted with her this afternoon. She has no objection to that. So that would be the only exception to the no contact that we would be requesting.
>
> THE COURT: The bond will remain in effect can the the conditions as previously imposed and the exception will be made for the one letter to be first reviewed by Mr. Hildebrand and Mr. Paulus.
>
> Anything further at this time?
>
> MR. HILDEBRAND: No, Your, Honor.
>
> MR. PAULUS: No, Your, Honor. Thank you.
>
> THE COURT: Thank you.

A properly conducted plea colloquy assures that the defendant understands the nature of the charge and elements that the state would be required to prove at trial... and that the defendant understands the trial rights he is giving up.

> A circuit court must establish that a defendant understands every element of the charge to which he pleads... This opinion is intended to revitalize **Bangert** which allows a court to tailor a plea colloquy to the individual defendant. In customizing a plea colloquy, however, a circuit court must do more than merely record the defendant's affirmation of "understanding". **Bangert**, at 267. As we stated in **Bangert**, it is no longer sufficient for a trial judge merely to perfunctorily question the defendant about his understanding of the charge. Likewise, a perfunctory affirmation response by the defendant that he understood the nature of the charge of the offense, without an affirmative showing that the nature of the crime has been communicated to him or that the defendant has at some point expressed his knowledge of the nature of the charge will satisfy the requirement of Sec. 971.08 stats. **Brown** at ¶58.

The defect in the plea colloquy was the trial court's failure to inform Deichsel on the nature of the charge, specifically the essential elements of the offense.

> Due process requires that a plea be knowingly, voluntary, and intelligent. See **State v. Bollig**, 2006 WI 6 at ¶ 47, a plea violates due process unless the defendant has a full understanding of the nature of the charges. Id. A defendant's understanding of the nature of the charge must include an awareness of the essential elements of the crime. See **State v. Brandt**, 594 N.W.2d 759 (Wis. 1999); **Bangert**, 389 N.W.2d 12, at 23; and **State v. Lange**, 2003 WI App 2 at ¶ 17.

Moreover, United States Supreme Court precedent in **McCarthy v. United States**, 394 U.S. 459 (1969) held:

> As a matter of fundamental due process a pleading defendant must possess an adequate understanding of the nature of the offense including the elemental composition of the crime. A plea cannot be truly voluntary unless the defendant possess an understanding of the law in relation to the facts.

Wis. Stat. 971.08 (1)(a) requires that a trial court, in accepting a guilty plea or no contest plea, must address the defendant personally and determine that the plea is made voluntary with understanding of the nature of the charges, specifically the essential elements. **Bangert** outlines three methods that full fill this obligation:

> First, the trial court may summarize the elements of the crime charged by reading from the appropriate jury instructions, or from the applicable statute. Second, the trial judge may ask defendant's counsel whether he explained the nature of the charge to the defendant, and request him to summarize the extent of the explanation, including a reiteration of the elements at the plea hearing. Third, the trial judge may expressly refer to record or other evidence of defendant's knowledge of the nature of the charge established prior to the plea hearing.

The three methods in **Bangert** have been reaffirmed in **Brown**, 2006 WI 100 at ¶ 46-48, and **Howell**, 2007 WI 75 at § 51, complying with the requisite standards is not optional. **Bangert** requires that the trial judge: 1) ascertain that the defendant possess accurate information about the essential elements of the charge; 2) ascertain the defendant's understanding of the essential elements of the charge; and 3) establish that the defendant

understands every essential element.

The trial court did not employ any of the methods outlined, 1) the trial judge never summarized the elements of the crime by reading from the appropriate jury instructions or applicable statute, 2) the court never asked Deichsel's attorney whether he had explained the elements, and requested counsel to summarize the extent of the explanation including a reiteration of the elements of attempted as defined in Wis. Stat. 932.32 and intent defined in Wis. Stat. 932.23 and 940.01. The court just failed to ascertain that Deichsel understood the elements of the charge at the time of the plea hearing.

In fact, the waiver form, including the plea transcript is completely void of any reference to the specific elements. The adequacy of a plea colloquy is judged by the words of the colloquy itself as preserved in the transcript, and if applicable, by the information contained in a plea questionnaire waiver form that appears in the record. See State v. Sigmon, 2006 WI App 31. Thus, the record is barren as to any explanation of or detailing to Deichsel of the elements of the offense.

To further demonstrate the nature and gravity of appointed counsel's ineffectiveness in failing to discover and litigate the nonfrivolous meritorious issue regarding the defective plea colloquy, Deichsel draws this Court's attention to a decision where the Wisconsin Court of Appeals reversed and remanded the defendant's claim to withdraw his plea of no contest to attempted first degree intentional homicide becuase the trial court failed to explain the element of "attempt" as defined in Wis. Stat. 932.32, and "intent" as defined in Wis. Stat. 932.23 and 940.01, in State v. Caplenas, 526, N.W.2d 280 (Wis. Ct. App. 1994).

Deichsel posits that this case is analogous to the facts and law

governing claims. Caplenas's attorney filed a postconviction motion pursuant 809.30 (2)(H) Wis. Stats., on direct appeal seeking to withdraw his no contest plea on the grounds of a defective plea colloquy. The Court of Appeals agreed and held:

> At the plea hearing, the trial court did not ask Caplenas's counsel whether he had explained the nature of the charge to Caplenas, and did not ask him to summarize the extent of the explanation, including a reiteration of the elements. **Bangert**, 389 N.W.2d at 23. The trial court did not expressly refer to the record or other evidence of Caplenas's knowledge of the nature of the charge established prior to the plea hearing. Id. The trial court did not summarize the elements of attempted first degree intentional homicide by reading from the appropriate jury instructions or from the applicable statute.
>
> Wis. JI-Criminal 1070 (1990) sets out the required elements of attempted first degree intentional homicide as follows: 1) that the defendant intended to kill; and 2) that the defendant's acts demonstrated unequivocally, under all the circumstances, that he intended to kill and would have killed except for the intervention of another person or some extraneous factor. Sec 939.32 Stats. 1991-92, defines attempt as 3) an intent to perform acts and attain a result which, if accomplished, would constitute such crime and that he does acts which demonstrate unequivocally, under all the circumstances, that he formed that intent and would committ the crime except for the intervention of another or some other extraneous factor.
>
> The three methods articulated in **Bangert** to determine a defendant's understanding of the nature of the charge are not exhaustive. But the method employed by the trial court was not an acceptable alternative... An understanding of the nature of the charge must include an awareness of the essential elements of the crime... The trial court was not required to read directly from either 939.32 Stats. or Wis. JI Criminal 1070 (1990) but did have to inform Caplenas in some way of each of the essential elements required for the crime of attempted first degree intentional homicide... The trial court had an obligation not only to inform Caplenas of the nature of the charge, but also ascertain his understanding of the nature of the charge... The court did not do this... Caplenas has shown a prima facie violation of 971.08 (1)(A) Stats., and the mandatory duties established in **Bangert**, and alleges that he did not know or understand the elements of the crime.

Deichsel's plea transcripts indisputably demonstrate that the trial court never even mentioned the word "**element** during the entire colloquy. Deichsel posits appointed counsel objectively unreasonably failed to discover this nonfrivolous issue and file a merits brief raising them in a 809.30 (2)(H) **Bangert** motion. See **Brown**, 2006 WI 100 ¶ 39.

Because the last state court decisions concluded Deichsel's appeal had no arguable merit to any issue that could be raised on appeal and that counsel provided the level of representation constitutionally required, specifically including the validity of the no contest plea, the last state court decisions involved an unreasonable application of the deficient and prejudice priciples announced in **Strickland v. Washington**, 466 U.S. 668, 687 (1984), to the facts and law governing his case similarly set forth in **Caplenas**.

Deichsel's plea transcript establishes a prima facie violation of Wis. Stats. 971.08, **Bangert**, and its progeny cases entitles him to an evidentiary hearing to withdraw his plea.

It is indisputable that the defect in Deichsel's plea colloquy was the trial court's failure to inform Deichsel on the nature of the charges, specifically the essential elements of the offense of **attempted** as defined in Wis. Stats. 939.32 and **intent** defined in Wis. Stats. 939.23 and 940.01.

Pursuant to Caplenas, the trial court had an obligation not only to inform Deichsel of the nature of the charges, including an awareness of the essential elements, but also ascertain Deichsel's understanding. The court did not do this, therefore as in Caplenas, Deichsel has shown a prima facie violation of 971.08 Stats. and the mandatory duties established in **Bangert**.

To establish that applellate counsel's performance was deficient in the context of an appeal the defendant must show that his attorney was objectively unreasonable in failing to find arguable issue to appeal... If the defendant

succeeds in such a showing, then he must establish actual prejudice by demonstrating a reasonable probability that, but for counsel's deficiency he would have prevailed on appeal. See **Brandt v. United States**, 2014 U.S. Dist. Lexis 163610.

The lower courts should have granted Deichsel a COA to allow review of the District Court's conclusion that no prejudice occured in appellate counsel's failure to brief merits surrounding defective plea colloquy as it relates to elemments of the crime. Accordingly, Deichsel has at least made a "substantial showing of the denial of a constitutional right." § 2253 (c)(2). "At the COA stage, the only question is whether the applicant has shown that 'jurist of reason' could disagree with the District Court's resolution of Deichsel's constitutional claims of that jurist could conclude the issues presented are adequate to deserve encouragement to proceed further." **Buck v. Davis**, 137 S.Ct. 759, 773 (2017) (quoting **Mille-El v. Cockrell**, 537 U.S. 322, 325 (2003)). This "threshold" inquiry is more limited and forgiving than "adjudication of the actual merits." **Buck**, 137 S.Ct. at 773; See also **Miller-El**, 537 U.S. at 336 (noting that "full consideration of the federal or legal bases adducced in support of the claims" is not appropriate in evaluating a request for a COA).

All indications here demonstrate that Deichsel's ineffective assistance of counsel claim "deserve[d] encoouragement to proceed further." **Miller-El**, U.S. at 327.

First, the trial court failed to inform Deichsel on the nature of the charges,, specifically the essential elements of the offense. Second, as a matter of fundamental due process a pleading defendant must possess an adequate understanding of the nature of the offense including the essential elements composition of the crime. Finally, a plea cannot be truly voluntary

unless the defendant possess an understanding of the elements of the crime.

For all the reasons, the District Court's decision was certainly "debatable". The Seventh Circuit Court of Appeals' resolution of the case in an unreasoned order denying a COA after initially granting a COA compounded the error. This case instead should have gone to a merits panel of the 7th Circuit for closer review.

DEICHSEL WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL

A. TRIAL COUNSEL

To the extent Deichsel is deemed to have waived the aforementioned claims with his no contest plea, Deichsel was denied the effective assistance of counsel during the plea hearing guaranteed by the Sixth Amendment to the United States constitution and Article I, Section 7 of the Wisconsin constitution. Deichsel submits that there was no legitimate tactical basis for counsel not to make sure Deichsel understood all essential elements of the charges to which he plead, and such conduct or failure was unreasonable under prevailing professional norms, and that Deichsel was prejudiced by it.

B. APPELLATE COUNSEL

Attorney Kachinsky filed a no merit report. The no merit report does not adequately discuss trial court's failure to advise Deichsel on the elements of the crime. In other words, he simply missed the error, and for the reasons stated herein, the error likewise prejudiced Deichsel's direct appeal. Proper appellate litigation by attorney Kachinsky would have resulted in an appeal

based on arguable merit (rather than no-merit appeal) or a reversal on direct appeal.

CONCLUSION

This Court should grant the petition for Writ of Certiorari and, upon review, reverse the judgement of the Seventh Circuit Court of Appeals regarding Deichsel's request for COA. Only by finding the decision denying a COA erroneous in the case at bar, can this Court affrim a standard set by **Slack**, which is "A certificate of appealability may issue 'only if the appellate has made a substantial showing of the denial of a constitutional right.' 28 U.S.C. § 2253 (c)(2). To make a substantial showing of the denial of a constitutional right, the petitioner must demonstrate that 'reasonable jurist' could debate whether (as, for that matter, agree that) the petition should have been resolved in a different manner or that the issue presented were adequate to deserve encouragement to proceed further." **Slack v. McDanials** 529 U.S. 473, 484 (2000) (quoting **Barefoot v. Estelle**, 463 U.S. 880, 893 n.4 (1983).

Dated this 15th day of June 2021.

Respectfully Submitted,

Scott R. Deichsel

Scott R. Deichsel, Pro Se