IN THE SUPREME COURT OF THE UNITED STATES
CASE NO.

WILLIAM BRANSFORD
Petitioner,

V.

DANIEL WINKLESKI,
Respondent

APPENDIX
On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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Appendix (A-D)

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted January 26, 2021
Decided February 3, 2021

Before

DAVID F. HAMILTON, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 20-3307

WILLIAM H. BRANSFORD,
Petitioner-Appellant,

v.

DAN WINKLESKI,
Respondent-Appellee.

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

No. 20-CV-462-JPS

J. P. Stadtmueller,
Judge.

ORDER

William Bransford seeks a certificate of appealability regarding the denial of his petition under 28 U.S.C. § 2254. After reviewing the final order of the district court and the record on appeal, we find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is **DENIED**. All pending motions are also **DENIED**.

Appendix A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM H. BRANSFORD,

Petitioner,

v.

WARDEN DAN WINKELSKI,

Respondent.

Case No. 20-CV-462-JPS

ORDER

On March 23, 2020, Petitioner William H. Bransford ("Bransford") filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, alleging that his continued incarceration in the custody of the State of Wisconsin is a violation of his constitutional rights. (Docket #1). The Court will now turn to screening the petition under Rule 4 of the Rules Governing Section 2254 Proceedings. Rule 4 authorizes a district court to conduct an initial screening of habeas corpus petitions and to dismiss a petition summarily where "it plainly appears from the face of the petition . . . that the petitioner is not entitled to relief." The Rule provides the district court the power to dismiss both those petitions that do not state a claim upon which relief may be granted and those petitions that are factually frivolous. *See Small v. Endicott*, 998 F.2d 411, 414 (7th Cir. 1993). Under Rule 4, the Court analyzes preliminary obstacles to review, such as whether the petitioner has complied with the statute of limitations, exhausted available state remedies, avoided procedural default, and set forth cognizable claims.

According to his petition and the state court docket, on April 23, 2002, Bransford was adjudged guilty by a jury of his peers of one count of robbery, one count of kidnapping, and six counts of second-degree sexual

Appendix B

assault/use of force in Milwaukee County Circuit Court Case No. 2001CF6890. He received a bifurcated sentence of 168 years with 112 years to be served in the Wisconsin State Prison System and 56 years of extended supervision, with all counts running consecutively. Shortly thereafter, Bransford filed a motion for resentencing which was denied by the Milwaukee County Circuit Court on October 20, 2003. The Wisconsin Court of Appeals affirmed this decision on December 17, 2004, and the Supreme Court of Wisconsin denied Bransford's petition for review on April 6, 2005. Starting in June 2014, Bransford initiated a series of collateral attacks on his conviction and sentence on grounds including ineffective assistance of counsel and improper denial of his post-conviction motion to review his presentence investigation report. The Milwaukee County Circuit Court denied all three of his challenges; the Wisconsin Court of Appeals affirmed these denials; and the Supreme Court of Wisconsin declined review of these decisions. *See State v. Bransford ("Bransford II")*, No. 2014AP1607-CR; *State v. Bransford ("Bransford III")*, No. 2016AP553-W; *State v. Bransford ("Bransford IIII")*, No. 2018AP266.

The court begins its Rule 4 review by examining the timeliness of the habeas petition. A state prisoner in custody pursuant to a state court judgment has one year from the date "the judgment became final" to seek federal habeas relief. 28 U.S.C. § 2244(d)(1)(A). A judgment becomes final within the meaning of § 2244(d)(1)(A) when all direct appeals in the state courts are concluded followed by either the completion or denial of certiorari proceedings in the U.S. Supreme Court, or, if certiorari is not sought, at the expiration of the ninety days allowed for filing for certiorari. *See Ray v. Clements*, 700 F.3d 993, 1003 (7th Cir. 2012) (citing *Anderson v. Litscher*, 281 F.3d 672, 675 (7th Cir. 2002)).

Here, Bransford's petition is untimely. Bransford's direct appeal ended on April 6, 2005, the day that the Wisconsin Supreme Court denied his request for discretionary review. His ninety-day period for petitioning the U.S. Supreme Court for certiorari began on April 6, 2005 and expired on July 5, 2005. Bransford did not seek a writ of certiorari, so the one-year habeas clock started to run on July 5, 2005. It was not until June 25, 2014, nearly ten years after the statute of limitations began to run, that Bransford filed his first collateral attack of his conviction and sentence. Thus, despite any of the tolling that may have been afforded under 28 U.S.C. § 2244(d)(2) during the pendency of his interim state challenges, the statute of limitations had already run. *See* 28 U.S.C. § 2244(d)(1)(A). Thus, Bransford's present petition is untimely.

Bransford argues that he should not be procedurally barred from pursuing his habeas petition because he has been "diligently pursuing relief as a *pro se* litigant in the state court since [2014]." (Docket #2 at 7). A late petition can only be considered under two circumstances. The first is commonly known as the "actual innocence" exception, i.e., if the petitioner "'presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of non-harmless error.'" *Gladney v. Pollard*, 799 F.3d 889, 896 (7th Cir. 2015) (quoting *Schlup v. Delo*, 513 U.S. 298, 316 (1995)). Bransford does not present evidence of actual innocence, so the first exception is not at play.

The second exception is "equitable tolling," which is "reserved for extraordinary circumstances far beyond the litigant's control that prevented timely filing." *Socha v. Boughton*, 763 F.3d 674, 684 (7th Cir. 2014) (quotation omitted). To be entitled to equitable tolling, a petitioner bears

the burden of establishing: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Id.* at 683–84; *Holland v. Florida*, 560 U.S. 631, 649 (2010). Bransford did not initiate his pursuit of relief until nearly ten years after his direct appeal was made final. This cannot be characterized as "diligent." Further, Bransford has failed to allege any "extraordinary circumstances" that prevented him from timely filing this petition. Accordingly, the Court will not equitably toll the statute of limitations in this case.

Because Bransford's petition is untimely, his petition must be dismissed under Rule 4. 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), Bransford 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). In this case, no reasonable jurists could debate whether Bransford's petition was timely. 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**;

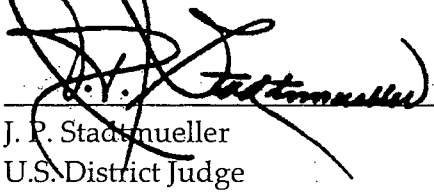
IT IS FURTHER ORDERED that this action be and the same is hereby **DISMISSED with prejudice**; and

IT IS FURTHER ORDERED that a certificate of appealability be and the same is hereby **DENIED**.

The Clerk of Court is directed to enter judgment accordingly.

Dated at Milwaukee, Wisconsin, this 27th day of October, 2020.

BY THE COURT:



J. P. Stadtmueller
U.S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM H. BRANSFORD,

Petitioner,

v.

WARDEN DAN WINKELSKI,

Respondent.

Case No. 20-CV-462-JPS

JUDGMENT

Decision by Court. This action came on for consideration before the Court and a decision has been rendered.

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

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

IT IS FURTHER ORDERED AND ADJUDGED that a certificate of appealability be and the same is hereby **DENIED**.

APPROVED:

J.P. Stadtmueller
U.S. District Judge

October 27, 2020
Date

GINA M. COLLETTI
Clerk of Court
s/ Jodi L. Malek
By: Deputy Clerk

COURT OF APPEALS
DECISION
DATED AND FILED

April 23, 2019

Sheila T. Reiff
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. 2018AP266 Cir. Ct. No. 2001CF6890

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM BRANSFORD,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: CAROLINA STARK, Judge. *Affirmed.*

Before Kessler, P.J., Brennan and Kloppenburg, JJ.

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. RULE 809.23(3).

Appendix C

¶1 PER CURIAM. William Bransford, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2017-18) postconviction motion without a hearing.[1] Because Bransford has not set forth a sufficient reason for failing to raise his claims earlier, we affirm.

I. BACKGROUND

¶2 This appeal constitutes Bransford's third attempt to challenge his 2002 convictions for eight felonies, which included six counts of second-degree sexual assault, one count of robbery with use of force, and one count of kidnapping.

¶3 In his direct appeal, Bransford challenged his convictions and the order denying his WIS. STAT. § 974.02 (2003-04) motion for resentencing. He argued that the sentencing court erred when it failed to consider whether he might benefit from WIS. STAT. ch. 980, which provides for commitment of sexually violent offenders after release from imprisonment for sexually violent crimes. ***State v. Bransford*** (***Bransford I***), No. 2003AP3068-CR, unpublished op. and order at 1 (WI App Dec. 17, 2004). We summarily affirmed. *See* ***id.***

¶4 Bransford, *pro se*, subsequently appealed an order denying his postconviction motion for permission to review his presentence investigation

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[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

The Honorable Jacqueline D. Schellinger presided over Bransford's jury trial and imposed the sentences in this matter. The Honorable Carolina Stark denied the postconviction motion that underlies this appeal.

report (PSI). ***State v. Bransford*** **(*Bransford II*)**, No. 2014AP1607-CR, unpublished op. and order at 1 (WI App Apr. 29, 2015). We affirmed. *See* ***id.***

¶5 Next, Bransford, *pro se*, petitioned for a writ of habeas corpus alleging ineffective assistance of appellate counsel. ***State v. Bransford*** **(*Bransford III*)**, No. 2016AP553-W, unpublished op. and order (WI App Aug. 9, 2016). In our opinion, we denied some of Bransford's claims because he raised them in the wrong court given that they alleged claims of ineffectiveness against postconviction counsel. *See* ***id.*** at 5-6. In doing so, we noted that Bransford may face barriers to his pursuit of relief in the circuit court. *See* ***id.*** at 7 n.1.

¶6 This brings us to the postconviction motion at issue in this appeal. In his motion, Bransford argued that postconviction counsel was ineffective for not pursuing claims based on trial counsel's ineffectiveness. Specifically, Bransford claimed his trial counsel was ineffective for failing to do the following: (1) retain a DNA expert to assist him during the process of deciding whether to accept the State's plea offer; (2) present various defenses at trial; and (3) request a new PSI for sentencing. He continues to pursue these claims on appeal.

¶7 Additional background information is set forth below as necessary.

II. DISCUSSION

¶8 At issue is whether the circuit court erroneously exercised its discretion when it denied Bransford's postconviction motion without a hearing. Our supreme court has summarized the applicable legal standards:

> Whether a motion alleges sufficient facts that, if true, would entitle a defendant to relief is a question of law that this court reviews *de novo*. The circuit court must hold an evidentiary hearing if the defendant's motion raises such facts. However, if the motion does not raise facts sufficient

> to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing.

State v. Burton, 2013 WI 61, ¶38, 349 Wis. 2d 1, 832 N.W.2d 611 (italics added; citations and internal quotation marks omitted).

¶9 WISCONSIN STAT. § 974.06 permits collateral review of the imposition of a sentence based on errors of jurisdictional or constitutional dimension. ***State v. Johnson***, 101 Wis. 2d 698, 702, 305 N.W.2d 188 (Ct. App. 1981). However, it "was not designed so that a defendant, upon conviction, could raise some constitutional issues on appeal and strategically wait to raise other constitutional issues a few years later." ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Thus, a defendant who has had a direct appeal or another postconviction motion may not seek collateral review of an issue that was or could have been raised in the earlier proceeding, unless there is a "sufficient reason" for failing to raise it earlier. *See* ***id.*** (italics omitted).

¶10 A claim of ineffective assistance from postconviction counsel may present a "sufficient reason" to overcome the ***Escalona*** procedural bar. *See, e.g.*, ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). A defendant can overcome the presumption of effective assistance only if he can "show that 'a particular nonfrivolous issue was clearly stronger than issues that counsel did present.'" ***State v. Romero-Georgana***, 2014 WI 83, ¶¶45-46, 360 Wis. 2d 522, 849 N.W.2d 668 (applying "'clearly stronger'" standard to evaluation of WIS. STAT. § 974.06 motions "when postconviction counsel is accused of ineffective assistance on account of his failure to raise certain material issues before the circuit court") (citations, italics, and one set of quotation marks omitted). Whether a procedural bar applies is a question of law

we review *de novo*. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

¶11 To be entitled to an evidentiary hearing, Bransford "was required to do more than assert that his postconviction counsel was ineffective for failing to challenge on direct appeal several acts and omissions of trial counsel that he alleges constituted ineffective assistance." *See* ***State v. Balliette***, 2011 WI 79, ¶63, 336 Wis. 2d 358, 805 N.W.2d 334. He was required to allege that postconviction counsel's "'performance was deficient' and 'that the deficient performance prejudiced the defense.'" *See* ***id.*** (citation omitted). If his allegations fail as to one of these prongs, we need not address the other prong. *See* ***Strickland v. Washington***, 466 U.S. 668, 697 (1984) (holding that a defendant must show deficient performance *and* prejudice to prevail on ineffective assistance claims). We conclude that Bransford has failed to show that he is entitled to an evidentiary hearing or relief on his claims that postconviction counsel was ineffective. We will address each claim in turn and explain why it fails.

(1) *A DNA expert for the defense.*

¶12 The complaint in this matter was filed seventeen months after the crimes occurred. The charges were filed after investigators discovered that DNA in semen collected from the victim matched a DNA profile collected from Bransford. According to the report of a forensic scientist with the Wisconsin State Crime Laboratory (the crime lab), which was referenced in the complaint:

> [T]he probability of randomly selecting an unrelated individual whose DNA profile would match the DNA profile from the semen found on the anal swab and underpants of [the victim] is approximately 1 in 14 quintillion in the Caucasian population, 1 in 93 quadrillion in the African-American population and 1 in 2.1 quintillion in the Hispanic population.

The victim did not identify Bransford in a lineup.

¶13 Bransford was offered a plea agreement: in exchange for a guilty plea to one count of second-degree sexual assault and to the kidnapping charge, the State would recommend twenty years of initial confinement and ten years of extended supervision. Bransford instead proceeded to a jury trial on all eight charges. A forensic scientist who worked for the crime lab testified to the DNA results implicating Bransford. The jury convicted Bransford on all of the charges, and the circuit court sentenced him to 168 years, bifurcated as 112 years of initial confinement and 56 years of extended supervision.

¶14 In his WIS. STAT. § 974.06 motion, Bransford argued that he "was not provided with any means of making an intelligent decision concerning the weight of the evidence against him except being told that the [S]tate had DNA evidence." Bransford contends that his postconviction counsel was ineffective for not arguing that trial counsel was ineffective for failing to retain a DNA expert for the defense. Bransford asserts that there is a reasonable probability that he would have accepted the plea agreement offered by the State had he been provided with the report from Alan Friedman (a DNA expert who was retained by postconviction counsel) before trial. Bransford further asserts that this issue was clearly stronger than the issue pursued in postconviction counsel's WIS. STAT. § 974.02 (2003-04) motion and on direct appeal.

¶15 In his report, Friedman concluded that crime lab protocol was followed, and he did not find any issues with the quality of the crime lab's work. Without this information, which essentially affirmed the correctness of the original findings by the crime lab, Bransford claims he was precluded from making an informed, knowing, and intelligent decision during plea negotiations.

¶16 Bransford was required to demonstrate within the four corners of his motion that his postconviction counsel was ineffective for not challenging trial counsel's failure to secure a DNA expert for the defense in advance of the plea negotiations. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶64 ("We will not read into the [WIS. STAT.] § 974.06 motion allegations that are not within the four corners of the motion."). As to the second prong of the ineffective-assistance-of-counsel test, Bransford simply asserts that postconviction counsel's failure to pursue an ineffective assistance claim against trial counsel on this basis resulted in prejudice. However, he does not state that he would have told his postconviction counsel to pursue this claim, had she advised him that it was an option, because he needed to be able to weigh the State's evidence before deciding whether to proceed to trial. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶68 ("A proper allegation of prejudice would state that Romero-Georgana would have told Attorney Hagopian to pursue the plea withdrawal claim if she had advised him that it was an option because he wanted to avoid deportation."). The mere fact that postconviction counsel did not pursue this claim, without more information, does not demonstrate ineffectiveness, and "[w]e will not assume ineffective assistance from a conclusory assertion[.]" *See* ***id.***, ¶62 (stating that the mere fact that postconviction counsel did not pursue certain claims does not demonstrate ineffectiveness).

¶17 Because we have determined that the WIS. STAT. § 974.06 motion does not allege sufficient facts to demonstrate prejudice as to Bransford's DNA expert claim, he fails to show that this claim is clearly stronger than the claim that postconviction counsel actually brought. *See* ***Romero-Georgana***, 360 Wis. 2d

522, ¶43-46. Accordingly, Bransford fails to show that his postconviction counsel was ineffective.[2]

(2) *Bransford's theories of defense.*

¶18 In his postconviction motion Bransford claimed that his trial counsel was ineffective for failing to investigate and to perform legal research to support defenses to the State's DNA evidence. He specifically faults trial counsel for not pursuing theories "that the source of the DNA had come from [Bransford's] shirt that he had discarded after exchanging it with a shirt from the yard of [another man]" or "that the source of the DNA came from consensual sex between the victim and Bransford and neither of them could recall because it was the result of a spontaneous one time sexual experience while both were intoxicated."

¶19 We conclude that Bransford's claim that trial counsel was ineffective for not pursuing any alternative defense theories is, as the postconviction court stated, "wholly conclusory in nature and completely without factual support to establish a viable claim for relief." *See* ***Burton***, 349 Wis. 2d 1, ¶38 (holding that a circuit court has discretion to deny a hearing where a motion presents only conclusory allegations). Accordingly, Bransford fails to show that this claim is clearly stronger than the claim that postconviction counsel actually brought, such that postconviction counsel was ineffective.

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[2] Bransford also alleged that postconviction counsel was ineffective for failing to argue that trial counsel was ineffective for improperly advising Bransford that the State's DNA evidence would not be admissible. However, Bransford does not explain why, in light of that alleged advice, he still needed a DNA expert to examine the State's DNA evidence. Moreover, Bransford's allegation is refuted by the record, in which trial counsel states that he saw no basis for challenging the admissibility of the State's DNA evidence. Because Bransford's reference to this allegation is undeveloped, inconsistent with his argument as to his need for a DNA expert, and refuted by the record, we do not address it further.

(3) *A new PSI.*

¶20 Some of the background information relating to this claim was set forth in our decision in ***Bransford II***:

> The [circuit] court ordered preparation of a PSI in advance of sentencing. When the matter reconvened for the sentencing hearing, however, Bransford objected to the PSI because its author, without consulting or advising trial counsel, had required Bransford to take a psychological examination. Bransford sought to strike the PSI and to require a new PSI prepared by an author who was uninfluenced by the results of the psychological examination.
>
> The [circuit] court proposed going forward with the sentencing, explaining that the court had not read the PSI and would not do so. To further ensure that the psychological examination would not affect Bransford's sentencing, the [circuit] court ordered the State to limit any discussion of the contents of the PSI to objective information and biographical data. The [circuit] court additionally assured Bransford that it would seal all of the copies of the PSI so that its contents could not be obtained from the court file.
>
> Bransford, through trial counsel, said he was "completely prepared to proceed" as the [circuit] court proposed. The State also agreed with the [circuit] court's solution. The State further advised that it had already identified for defense counsel the portions of the PSI the State would discuss, and defense counsel had no objection.
>
> The [circuit] court then conducted the sentencing hearing without reviewing the PSI. At the conclusion of the proceeding, the [circuit] court imposed eight consecutive sentences. The aggregate term of imprisonment was 168 years, bifurcated as 112 years of initial confinement and 56 years of extended supervision.

Id., No. 2014AP1607-CR, at 1.

¶21 According to Bransford, comments throughout the sentencing hearing concerning a prior sexual assault charge in Tennessee and a promiscuous lifestyle were gleaned from the psychological report by the PSI writer, the

prosecutor, and the judge. In his postconviction motion, Bransford alleged that trial counsel was ineffective for failing to request a new PSI. Bransford argues that simply sealing the PSI was not a proper remedy.

¶22 According to Bransford, "[r]equesting a new PSI would have protected Bransford from any contaminating factors while preserving mitigating circumstances." For instance, Bransford suggests that the fact that he "sired a child at the age of fourteen years old" with a then-twenty-year-old woman would have been considered as a mitigating circumstance if a psychological examination was presented by the defense. Bransford writes: "The record clearly shows that [trial counsel] made a motion to strike the PSI before being strong-armed by [the circuit court] to disregard the constitutional error." By his own admission, Bransford acknowledges that trial counsel did object to the PSI. Accordingly, he fails to show that trial counsel was deficient. Moreover, he fails to explain how a new PSI containing this information would have made a difference at sentencing. He also fails to explain why he himself could not have brought this information to the circuit court's attention at sentencing.

¶23 For all of these reasons, Bransford fails to show that his PSI claim is clearly stronger than the claim that postconviction counsel actually brought, such that postconviction counsel was ineffective.

¶24 In sum, Bransford did not demonstrate in his motion any sufficient reason for failing to raise his claims earlier. Consequently, the procedural bar of ***Escalona*** and WIS. STAT. § 974.06(4) applies. The postconviction motion was properly denied without a hearing.

By the Court.—Order affirmed.

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
Branch 17

STATE OF WISCONSIN,

Plaintiff,

vs.

Case No. 01CF006890

WILLIAM BRANSFORD,

Defendant.

DECISION AND ORDER DENYING MOTION TO VACATE JUDGMENT OF CONVICTION AND ORDER A NEW TRIAL

On October 6, 2017, the defendant filed a *pro se* motion to vacate the judgment of conviction and order a new trial pursuant to section 974.06, Wis. Stats., and ***State ex rel. Rothering v. McCaughtry***, 205 Wis.2d 675 (Ct. App. 1996). Under ***Rothering***, a defendant may bring a claim under section 974.06, Stats., before the trial court alleging that postconviction counsel was ineffective. The ***Rothering*** court indicates that the ineffective assistance of postconviction counsel may be sufficient cause under ***State v. Escalona-Naranjo***, 185 Wis.2d 169 (1994), for failing to raise an issue previously. Both sec. 974.06(4), Wis. Stats., and ***Escalona*** require a defendant to raise all issues in his or her original postconviction motion or appeal. In addition, when arguing that postconviction counsel was ineffective for failing to raise the ineffectiveness of trial counsel, a defendant must demonstrate that the claims he wishes to bring are clearly stronger than the claims postconviction counsel actually brought. ***State v. Starks***, 349 Wis. 2d 274 (2013); *reconsideration denied* 357 Wis. 2d 142 (2013).

In his motion, the defendant argues that postconviction counsel should have argued that trial counsel was ineffective for failing to request funding for a DNA expert to use at trial; that the

Appendix D

absence of a DNA expert prejudiced him in making a decision as to whether to accept the State's plea offer; that trial counsel's erroneous advice with regard to the state crime lab analyst, Laura Kwart, was a major factor in his decision not to accept a plea offer that he claims would have limited his prison exposure to 30 years; and that had DNA expert Alan Friedman been hired, a lesser sentence would have been imposed because he would have taken the plea offer. In essence, he argues that he was not presented with sufficient information to make an intelligent and informed decision about the weight of the State's evidence against him. (*Motion, p. 3*).

Strickland v. Washington, 466 U.S. 668, 694 (1984), sets forth a two-part test for determining whether an attorney's actions constitute ineffective assistance: deficient performance and prejudice to the defendant. Under the second prong, the defendant is required to show "'that there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Id. at 694; also ***State v. Johnson***, 153 Wis.2d 121, 128 (1990). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. A court need not consider whether counsel's performance was deficient if the matter can be resolved on the ground of lack of prejudice. ***State v. Moats***, 156 Wis.2d 74, 101 (1990). "Prejudice occurs where the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, 'the result of the proceeding would have been different.' ***Strickland***, 466 U.S. at 694 . . . . " ***State v. Erickson***, 227 Wis.2d 758, 769 (1999).

The defendant was charged with one count of robbery – use of force, kidnapping (carries forcibly), and six counts of second degree sexual assault (use or threat of force or violence). The complaint alleged that he had approached a woman walking on Humboldt Avenue in the city of Milwaukee around 12:30 p.m. on July 25, 2000 and began talking to her. He then pushed her down a hill and went through her purse. She only had a dollar in her wallet, which he took, and he told

her, "I'm gonna have your pussy, I'm gonna fuck you." He then began a series of attempts to enter different orifices of her body with a non-erect penis, and after going through her purse again to look for more money, ultimately gave up and ran into the woods. The victim was unable to identify her attacker, but the State Crime Laboratory got a direct hit identifying the defendant as the source of the sperm fraction DNA recovered from the victim's panties and anal swab as well as a swab from the right side of her neck.

A jury trial was held before the Hon. Jacqueline D. Schellinger on April 15 – 19, 2002 and April 22-23, 2002.[1] On June 24, 2002, she sentenced the defendant to 12 years in prison on counts one and two (consecutive to any other sentence), bifurcated into 8 years of initial confinement and 4 years of extended supervision; and to 24 years in prison on each of the sexual assault counts, bifurcated into 16 years of initial confinement and 8 years of extended supervision, and all imposed consecutive to any other sentence. Postconviction counsel was appointed, and a motion for resentencing was filed and denied by the Hon. Mary Kuhnmuench as successor to Judge Schellinger's sexual assault calendar. A notice of appeal followed, and the Court of Appeals affirmed the judgment of conviction and postconviction order on December 17, 2004. The main issue for appellate review was whether Judge Schellinger should have considered the treatment available under Chapter 980 to determine the minimum amount of time necessary for confinement at sentencing to rehabilitate him and protect the community. The appellate court upheld the postconviction order, finding that there was no statute or case law which required a sentencing court to consider the provisions of Chapter 980 when sentencing a sex offender and that it was "entirely

[1] Exhibit G of the defendant's motion is a letter addressed to trial counsel regarding a plea offer from the State. In exchange to guilty pleas to kidnapping (carries forcibly) and one count of second degree sexual assault (use of threat of force or violence), the State indicated it would move to dismiss counts 1, 4, 5, 6, 7 and 8 and recommend 30 years in prison – 20 years of initial confinement followed by 10 years of extended supervision.

speculative whether the defendant will meet the statutory definition of a sexually violent person at some future date." (*Court of Appeals Decision, p. 3 dated December 17, 2004*).

The defendant now contends that trial counsel should have hired a DNA expert. Postconviction counsel hired Dr. Alan Friedman, who submitted a report in 2003 concerning the evidence presented in this case. The defendant essentially claims that if trial counsel had Dr. Friedman's report prior to trial, he would have approached his case in a different manner. In his report, Dr. Friedman states that he found no issues with the quality of the crime lab's work and that the sperm fraction DNA profiles were very clear and unanimous that the defendant could not be excluded as the source. Although the defendant conclusorily states in his affidavit that he would have accepted the State's plea offer had he seen the report of an expert prior to trial, these same circumstances were not unknown to anyone at the commencement of the case. The complaint itself stated that the defendant's DNA profile which was found on the victim's anal swab and panties was "approximately 1 in 14 quintillion in the Caucasian population, 1 in 93 quadrillion in the African-American population and 1 in 2.1 quintillion in the Hispanic population." This particular information as set forth in the complaint was provided by Daniel Haase from the State Crime Lab,[2] and Daniel Haase was listed as a witness for purposes of trial, so the defendant had notice that this information was certain to be conveyed by the State to the jury. Had Judge Schellinger not allowed Ms. Kwart to provide the statistical information, Daniel Haase was available for further testimony in this regard.[3] In short, both the definitive findings of the State Crime Lab, including its statistical evidence, was known from the very beginning. The defendant nevertheless opted to go to trial rather than take advantage of the State's plea offer. The defendant does not explain how or why Dr. Friedman's report affirming the correctness of these findings

[2] The court record shows that the defendant was provided with a copy of the complaint at his initial appearance on December 31, 2001 as is required.

[3] Trial counsel specifically reserved his right to further question him. (Tr. 4/18/02, p. 188).

would have made a difference when those findings were undisputable. These issues are not any stronger than the one raised by postconviction counsel after sentencing. *See* ***Starks***, *supra,* and ***State v. Romero-Georgana***, 347 Wis. 2d 549 (2014).

Therefore, the court cannot find that any failure on the part of counsel to hire an expert, specifically Dr. Friedman, prejudiced the defendant's case. In addition, counsel may have provided his opinion to the defendant that Ms. Kwart's statistical conclusions would not be permitted by the court, but Daniel Haase from the State Crime Lab, as referenced in the complaint, could easily have testified to the same statistical results of the DNA analysis performed by Ms. Kwart in his office, and the same evidence would have been presented to the jury. Further, defendant's claim that trial counsel did not pursue any alternative theories of defense is wholly conclusory in nature and completely without factual support to establish a viable claim for relief. His claim with regard to the stolen shirt is entirely speculative, and there is no evidence demonstrating that anyone other than the defendant robbed, kidnapped, and sexually assaulted the victim in this case.

Because the court cannot find trial counsel ineffective with regard to the above issues, postconviction counsel cannot be deemed ineffective. The defendant has not set forth a valid claim for relief.

THEREFORE, IT IS HEREBY ORDERED that the defendant's motion to vacate the conviction and order a new trial is **DENIED.**

Electronically signed by Carolina Maria Stark

Circuit Court Judge/Circuit Court Commissioner/Register in Probate

Circuit Court Judge

Title (Print or Type Name if not eSigned)

01/10/2018

Date

IN THE SUPREME COURT OF THE UNITED STATES
CASE NO.

WILLIAM BRANSFORD
Petitioner,

V.

DANIEL WINKLESKI,
Respondent

APPENDIX
On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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Appendix (E-L)

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DISTRICT I

October 3, 2016

To:

Hon. David L. Borowski
Circuit Court Judge
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William Bransford 294774
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You are hereby notified that the Court has entered the following order:

2016AP553-W State of Wisconsin ex rel. William Bransford v. Timothy Douma (L.C. # 2001CF6890)

Before Curley, P.J., Kessler and Brennan, JJ.

On August 9, 2016, this court released an opinion and order denying a petition for a writ of *habeas corpus* pursuant to ***State v. Knight***, 168 Wis. 2d 509, 522, 484 N.W.2d 540 (1992) (to bring a claim of ineffective assistance of appellate counsel, a defendant must seek a writ of *habeas corpus* from the appellate court that heard the appeal). The *pro se* petitioner, William Bransford, moves to reconsider that opinion. The bulk of Bransford's motion reiterates arguments that we rejected or presses claims that we concluded must be raised in another forum. Nothing in the motion to reconsider persuades us that we erred in reaching those conclusions.

Appendix E

Bransford's motion also suggests that the ***Knight*** petition raised a claim that we did not address in our opinion, specifically, that appellate counsel failed to pursue challenges to the State's DNA expert that trial counsel preserved by objection during the trial. We have reviewed Bransford's ***Knight*** petition in light of the motion. We note that, midway through an argument that trial counsel was ineffective, Bransford asserted that trial counsel "made a challenge to the testimony of [the State's expert] concerning the statistical DNA data. This issue in and of itself was stronger than the issue presented by [appellate counsel] on appeal." We now conclude that, although Bransford's presentation of this issue was oblique at best, we should construe his *pro se* petition as including a claim that appellate counsel was ineffective for failing to pursue challenges to the statistical testimony offered by the State's expert. *See* ***Lewis v. Sullivan***, 188 Wis. 2d 157, 164-65, 524 N.W.2d 630 (1994) (we liberally construe *pro se* pleadings). Accordingly, we have considered the merits of such a claim. We reject the claim *ex parte* and deny the motion for reconsideration.

The transcript excerpts that Bransford supplied with his petition show that his trial counsel urged the circuit court to reject the proffered expert testimony of the State's DNA analyst on the ground that the analyst was not a statistician and her testimony therefore improperly addressed statistical probabilities of DNA matches she derived from an FBI computer program. Relatedly, trial counsel complained that the analyst's testimony lacked a scientific basis because, according to counsel, the testimony did not describe the analyst's own work but instead related "what [the] computer tells [her]." Bransford evidently believes that an appellate argument challenging the expertise of the State's witness and the scientific foundation for her testimony would have been clearly stronger than the sentencing challenge appellate counsel pursued on appeal. *See* ***State v. Starks***, 2013 WI 69, ¶6, 349 Wis. 2d 274, 833 N.W.2d

146 (to prevail in a claim that appellate counsel was ineffective, convicted person must show that the issue counsel did not pursue was clearly stronger than the issue counsel raised). He is wrong.

At the time of Bransford's trial, expert testimony was governed by WIS. STAT. § 907.03 (2001-02), which "implicitly recognize[d] that an expert's opinion may be based in part on the results of scientific tests or studies that are not her own.... [The expert] need not have performed the tests herself to form an admissible expert opinion based upon them, and [the appellant's] characterization of [the expert's] testimony as something other than an expert opinion lacks merit." *See* ***State v. Williams***, 2002 WI 58, ¶29, 253 Wis. 2d 99, 644 N.W.2d 919. Therefore, if Bransford's appellate counsel had pursued such an argument, it too would have been rejected as meritless.

Moreover, the State's expert was interpreting her results against given standards and, as the circuit court explained in response to Bransford's objections, that is a routine aspect of expert opinion testimony. In a case involving the question of paternity, we explicitly held that medical experts could testify about computer-aided test results. ***State ex rel. v. T.R.S.***, 125 Wis. 2d 399, 400, 373 N.W.2d 55 (Ct. App. 1985). In ***T.R.S.***, the appellant, like Bransford's trial counsel here, objected that "there was inadequate foundation for admission of [the experts'] testimony concerning the computer calculations." *See* ***id.*** at 401. We rejected that contention, explaining:

> personnel in [the expert's] laboratory fed test results from conceded experts ... into a computer, and the computer calculated a statistical paternity index. The computer report was merely a net result of composite information fed into the machine. The medical experts interpreted this report and relied on it, as they routinely do, as a partial basis for their opinions. The trial court did not abuse its discretion in admitting the evidence.

Id. at 404.

Bransford directs our attention to the federal rules of evidence, and he reminds us that in 2011 the Wisconsin legislature adopted the standard that governs admission of expert testimony in federal court, namely, the reliability standard set forth in ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579 (1993). He suggests that the testimony of the State's DNA expert failed to satisfy this standard. Bransford, however, filed his appeal in 2003, and Wisconsin did not use the ***Daubert*** standard to determine the admissibility of expert testimony prior to 2011. *See* ***State v. Giese***, 2014 WI App 92, ¶17, 356 Wis. 2d 796, 854 N.W.2d 687. Any argument challenging testimony in this case because it failed to comply with ***Daubert*** would have been frivolous.

In light of the foregoing, an appellate argument that the circuit court erroneously overruled objections to expert testimony in this case would have lacked merit. Meritless claims do not provide a basis for *habeas* relief. *See* ***Starks***, 349 Wis. 2d 274, ¶6.

Therefore,

IT IS ORDERED that the motion to reconsider is denied.

Diane M. Fremgen
Clerk of Court of Appeals

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DISTRICT I

August 9, 2016

To:

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William Bransford 294774
New Lisbon Corr. Inst.
P.O. Box 4000
New Lisbon, WI 53950-4000

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

2016AP553-W William Bransford v. Timothy Douma (L.C. # 2001CF6890)

Before Curley, P.J., Kessler and Brennan, JJ.

William Bransford petitions *pro se* for a writ of *habeas corpus*, alleging ineffective assistance of appellate counsel. *See* ***State v. Knight***, 168 Wis. 2d 509, 522, 484 N.W.2d 540 (1992) (to bring a claim of ineffective assistance of appellate counsel, a defendant must seek a writ of *habeas corpus* from the appellate court that heard the appeal). When a petitioner seeks *habeas corpus* in this court, we follow the procedure for supervisory writs, and consequently, we may deny the petition *ex parte*. *See* ***State ex rel. LeFebre v. Abrahamson***, 103 Wis. 2d 197, 202, 307 N.W.2d 186 (1981). We deny Bransford's petition *ex parte*.

A jury convicted Bransford of eight felonies, including six counts of second-degree sexual assault, one count of robbery with use of force, and one count of kidnapping. The circuit court ordered a presentence investigation report but, with the consent of the parties, ordered the report sealed without reviewing it. The circuit court went on to impose an aggregate 168-year term of imprisonment.

With the assistance of new counsel, Attorney Dianne M. Erickson, Bransford filed a postconviction motion for resentencing. The circuit court denied relief and he appealed, pursuing only the sentencing issue. We affirmed. *See* ***State v. Bransford***, No. 2003AP3068-CR, unpublished op. and order (WI App Dec. 17, 2004) (***Bransford I***). Subsequently, he pursued a *pro se* postconviction motion to review his presentence investigation report, and we affirmed the order denying the requested relief. *See* ***State v. Bransford***, No. 2014AP1607-CR, unpublished op. and order (WI App Apr. 29, 2015) (***Bransford II***).

Bransford next filed the petition for a writ of *habeas corpus* presently before this court, asserting that Attorney Erickson was ineffective on appeal. We assess claims of ineffective assistance of appellate counsel by applying the familiar two-prong test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). *See* ***State v. Balliette***, 2011 WI 79, ¶28, 336 Wis. 2d 358, 805 N.W.2d 334. Under ***Strickland***, a criminal defendant must show both a deficiency in counsel's performance and prejudice as a result. ***Id.*** at 687. To demonstrate deficient performance, the defendant must show that counsel's actions or omissions "fell below an objective standard of reasonableness." *See* ***id.*** at 688. To demonstrate prejudice, "[t]he 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." ***Id.*** at 694. If a defendant fails to make an adequate showing as to one element, the court need not address the other. ***Id.*** at 697.

Additionally, to prevail on postconviction claims, a defendant must present more than conclusory allegations. *See* ***State v. Allen***, 2004 WI 106, ¶15, 274 Wis. 2d 568, 682 N.W.2d 433. Our supreme court has offered a "specific blueprint" for making sufficient postconviction claims: "the five 'w's' and one 'h' test, that is who, what, where, when, why and how." ***Balliette***, 336 Wis. 2d 358, ¶59.

Finally, in the context of a ***Knight*** petition, the claimant must demonstrate that the arguments appellate counsel failed to make are "'clearly stronger' than the claims appellate counsel raised on appeal." *See* ***State v. Starks***, 2013 WI 69, ¶56, 349 Wis. 2d 274, 833 N.W.2d 146. We respect counsel's professional judgment "in separating the wheat from the chaff." *See* ***id.***, ¶60. With these standards in mind, we turn to Bransford's petition.

We first consider the contention that Attorney Erickson was ineffective for not pursuing an allegedly meritorious claim that, during closing argument, the prosecutor improperly commented on Bransford's failure to testify. To demonstrate the merits of claiming improper prosecutorial argument, Bransford provides three pages of transcript that he tells us reflect the "court record of closing arguments and defense motion for mistrial." Our review reveals that the excerpt includes the State's purportedly objectionable remark, followed by defense counsel's objection, the court's ruling, and a later discussion explaining the circuit court's decision to deny a mistrial. Based on these supporting documents, Bransford contends appellate counsel overlooked an argument clearly stronger than the sentencing argument raised in ***Bransford I***. We reject the contention, for multiple reasons.

> [F]or a prosecutor's comment to constitute an improper reference to a defendant's failure to testify, three factors must be present: (1) the comment must constitute a reference to the defendant's failure to testify;

> (2) the comment must propose that the failure to testify demonstrates guilt; and (3) the comment must not be a fair response to a defense argument."

State v. Jaimes, 2006 WI App 93, ¶21, 292 Wis. 2d 656, 715 N.W.2d 669 (citing ***United States v. Robinson***, 485 U.S. 25, 34 (1988)). Here, Bransford's petition is insufficient to permit an independent assessment of the third ***Jaimes*** factor. Because Bransford does not include the transcript of the defense argument, we cannot determine whether the prosecutor fairly responded to that argument. It is Bransford's burden to support his petition. *See* ***Balliette***, 336 Wis. 2d 358, ¶59.

Moreover, the portion of the transcript Bransford includes with his petition conclusively shows he does not satisfy the first prong of the ***Jaimes*** analysis because the prosecutor's comment was not a reference to his failure to testify. "Whether a prosecutor's remarks reference a defendant's failure to testify is based on 'whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.'" ***Jaimes***, 292 Wis. 2d 656, ¶22 (citations omitted). In this case, Bransford's trial counsel objected and sought a mistrial when the prosecutor argued: "[a]nd we have evidence that Mr. Bransford's DNA matches the semen found on [A.R.D.]. And what we don't have is any explanation coming from the defense *during his closing*." (Emphasis supplied.)

As the plain text of the transcript excerpt shows, the State did not comment on Bransford's choice not to testify but on the substance of defense counsel's closing argument. No jury would think that the prosecutor's observation about the content of the closing argument referenced the defendant's decision not to testify. Indeed, a prosecutor's argument about gaps in a defense attorney's summation is a common form of attack and entirely appropriate. *See* ***State***

v. Johnson, 121 Wis. 2d 237, 246, 358 N.W.2d 824 (Ct. App. 1984). As the circuit court explained when responding to trial counsel's motion for a mistrial: "you didn't have to give a closing argument, but you did, and as a result, [the State] can say that, you know, you've explained this is the way DNA works, but you kind of failed to explain something else."

Accordingly, Bransford's claim for a mistrial lacked merit. Because the claim was meritless, appellate counsel was not required to pursue it further. No attorney is ineffective for failing to pursue meritless matters. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

We turn to the remainder of the claims Bransford raises in his petition. He asserts Attorney Erickson failed to file a postconviction motion to preserve his claims that trial counsel was ineffective for: (1) not retaining a DNA expert; and (2) not insisting on a new presentence investigation report before proceeding to sentencing. Bransford also asserts that Attorney Erickson should have sought review of the sealed presentence investigation report to search for issues it might have revealed. We will not address the substance of these issues because Bransford raises them in the wrong court.

The rule is long-settled that a defendant who alleges ineffective assistance of trial counsel must first raise the claim by postconviction motion in the circuit court to preserve the claim for review in a direct appeal from a judgment of conviction. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 677-78, 556 N.W.2d 136 (Ct. App. 1996). Similarly a motion for postconviction discovery must first be presented to the circuit court, not the court of appeals. *See* ***State v. Ziebart***, 2003 WI App 258, ¶¶30-33, 268 Wis. 2d 468, 673 N.W.2d 369. Here, Bransford claims Attorney Erickson should have filed a postconviction motion that alleged trial

counsel was ineffective and that sought postconviction discovery of a sealed document. In respect to these claims, his petition for a writ of *habeas corpus* therefore presses a claim that postconviction counsel was ineffective for failing to bring certain motions in the circuit court. *See* ***Rothering***, 205 Wis. 2d at 679.

As the supreme court recently confirmed, "claims of ineffective assistance of counsel should generally be brought in the forum where the alleged error occurred." ***State ex rel. Kyles v. Pollard***, 2014 WI 38, ¶38, 354 Wis. 2d 626, 847 N.W.2d 805. The rule controls unless the forum in which the error occurred is unable to provide a remedy. ***Id.*** Here, Bransford identifies errors that allegedly occurred in the circuit court when Attorney Erickson did not take the actions Bransford believes were required. *See* ***Rothering***, 205 Wis. 2d at 679 ("The allegedly deficient conduct is not what occurred before [the court of appeals] but rather what should have occurred before the trial court by a motion filed by postconviction counsel."). He can pursue a remedy in the circuit court by filing a postconviction motion in that forum pursuant to WIS. STAT. § 974.06. *See* ***id.***; *see also* ***Balliette***, 336 Wis. 2d 358, ¶32 ("When ... conduct alleged to be ineffective is postconviction counsel's failure to highlight some deficiency of trial counsel in a [WIS. STAT. §] 974.02 motion before the [circuit] court, the defendant's remedy lies with the circuit court under either Wis. Stat. § 974.06 or a petition for *habeas corpus*."). Accordingly, the circuit court, not the court of appeals, is the proper forum for Bransford's claims that postconviction counsel was

ineffective for failing to challenge trial counsel's effectiveness and for failing to seek discovery of the sealed presentence investigation report.[1]

Upon the foregoing reasons,

IT IS ORDERED that the petition for a writ of *habeas corpus* is denied *ex parte*, with no costs to any party.

Diane M. Fremgen
Clerk of Court of Appeals

1 Bransford may face barriers to his pursuit of relief in the circuit court. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994) (postconviction claims that could have been raised in prior postconviction or appellate proceedings are barred absent a sufficient reason for failing to raise the claims in the earlier proceedings). Nonetheless, the court of appeals is not the proper forum for Bransford to launch his claims that postconviction counsel performed ineffectively.

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STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

BRANCH 34

STATE OF WISCONSIN,

Plaintiff,

v. CASE NO. 01-CF-6890

WILLIAM BRANSFORD

Defendant.

JURY TRIAL - CLOSING ARGUMENTS

CORRECTED PAGE 41 FROM TRANSCRIPT

Honorable JACQUELINE D. SCHELLINGER, presiding.

DATE: APRIL 22, 2002

APPEARANCES

PATTI WABITSCH, ATTORNEY AT LAW, APPEARED ON BEHALF OF THE STATE.

LEW WASSERMAN, ATTORNEY AT LAW, APPEARED ON BEHALF OF THE DEFENDANT.

GLORIA J. WEBER - COURT REPORTER

Appendix F

has stood the test of time. And certainly one where other emerging nations who choose to be free decide that this is the kind of way that they want their justice system to work. So you're an important part of our history.

We are so grateful to you for everything you've sacrificed and for the tremendous hard work you put in this trial. I'll be in the jury room shortly to give you your final instructions. Please rise for the jury.

(Jury exits.)

THE COURT: Does the state have a motion at this time?

MS. WABITSCH: Yes, Your Honor. I move for judgment on all eight verdicts. And I also ask for a remand of the defendant.

THE COURT: All right. Thank you. And for the defense?

MR. WASSERMAN: Your Honor, I move for judgment not withstanding the verdicts. And I'd like to explain why just briefly.

THE COURT: Please proceed.

MR. WASSERMAN: In my view, this case stands for the proposition that the state can offer conclusions concerning the identity of the

defendant based upon DNA without offering in any way, shape or form the basis for those conclusions, except in the most cursory and conclusory fashion.

There's a complete and utter lack, in my view, on the part of the state's case in presenting to the jury the actual scientific basis that if any existed for the expert's conclusion that the DNA profile obtained from Mr. Bransford matched the DNA profile obtained on July 25th, 2000. And ultimately apparently put into the data bank that led to the preliminary match. So what this amounts to, in my view, is insufficient evidence.

Now, I'd like to explain something just very briefly because I think it's important for those that are obviously now going to have to read this record. That is my question why this wasn't challenged pre-trial.

Well, you may have noted during the course of the trial I come in here with three fairly thick folders. Two of those folders contained not only the protocol that the state provided to me but all of the work, if you will, that was put down on paper done by the expert Laura Kwart. And by expert I mean generically the kind

of work that she does. And by Daniel Huss and everybody else connected with this case.

So I anticipated and I thought that the record explained this. But just to be certain so the nature of the subsequent challenge is clear, I did not challenge you on pre-trial because I had no discovery issue. I had what I needed in terms of my analysis of what the state crime laboratory did or didn't do. What was so vexing for me at trial was that none of it ever got presented. None of it.

The other thing that made it so vexing in trial is Laura Kwart was virtually unable, in my view, to discuss the basis for her conclusions other than to say that she fed numbers into a computer and got numbers out of the computer.

So I didn't challenge you pre-trial, because again, I had no discovery issue. So that wasn't it.

And normally the basis for presenting DNA evidence you think might be challenged pre-trial. But again, based upon what I had been handed in discovery, I didn't see any basis for challenging the admissibility.

By challenge during the course of the

trial and made it the close of the trial, both at the close of the state's case and the close of the defense case which is virtually simultaneous. And I'm making it here again today. Is that in my view the state is required under fundamental due process and the defendant's Sixth Amendment right to see the evidence that is going to be used to try to convict him.

But all he saw here were conclusions. And that might be okay in an ordinary identification case. But in this case it seems to me that there's no credible evidence other potentially than that of the DNA.

If the DNA had not been a match, there would have been no case. There was no credible -- There was no identification. We all know that.

Despite the state's urging to the jury to compare a composite or the booking photo, that would not have been sufficient. So this is clearly a DNA case.

So my challenge during the course of the trial was to the fact that the state failed to present any of the bases for its expert's conclusion. And that will be the subsequent challenge.

I think this case ultimately will stand for the proposition that yes, they don't need to or they did sufficiently in this case or they do need to. But my challenge to this verdict is based on -- I think categorically I have to call it insufficiency of the evidence.

But so it's clear, obviously in my view the testimony -- the conclusion offered by Miss Kwart I'm not saying and I don't think I could make the claim that her conclusion by itself is insufficient evidence.

But the point is, is that I -- I think it's clear, and it's clear from other jurisdictions -- I'll let the next counsel do that formal briefing. But before that conclusion can be presented, that there must be a sound, reliable, scientific basis for it.

So this is not another Daubert challenge, but the science must be reliable. And in my view, you had nothing before you but naked conclusions. And one cannot assert or ascertain from naked conclusions the reliability of the work underlying that scientific, again, categorically scientific conclusion.

And so for that reason, I make the

motion for judgment not withstanding the verdict based on sufficiency of the evidence, for all those reasons that I've stated.

THE COURT: Do you wish to be heard?

MS. WABITSCH: No.

THE COURT: Until just recently, DNA evidence if there had been compliance with notice requirements pursuant to statute, really needed virtually no sponsoring witness. And it's a glitch in the law that somehow that statute has been affected.

But it really doesn't have any application to this case except to make it very clear that the State of Wisconsin has such faith in the reliability of DNA evidence that there was a statute that did allow its admission into the record really without regard to any testimony regarding its scientific underpinnings.

This is a case that presents itself in the State of Wisconsin which is not adhered to the Daubert standards. Therefore, reliability does not need to be shown in terms of the underlying premise for which DNA evidence is admissible into the record.

The state did prove the three things

that needed to be proved in order for an expert to testify regarding DNA. And for that reason, I accepted the testimony into the record of Miss Kwart who testified by -- from the state crime laboratory that after testing samples of what appeared to be semen from the crime scene, she made an analysis using generally accepted practices and came up with a DNA profile.

She then said that she took the known tissue sample from Mr. Bransford and she, using the very same protocol and practices, came to a conclusion regarding the DNA profile of Mr. Bransford. They matched perfectly.

And I know it is the defense position that because of her extrapolation of conclusions based on a computer-generated report to her that another person, having the very same DNA in the Caucasian population, would require the assembly of more than a klintilion of people. And that that extrapolation came from an analysis of 200 people. That somehow that must be flawed.

That would have -- That would cause the court, I suppose, to have to conclude that there's something so inherently flawed with using 200 people, for example, and just that one segment

of the statistical probability conclusion to say that that evidence is incompetent.

The defense has no duty to call any witnesses in this case, but nobody prevents that from occurring. If you thought that this was something that required competing experts and there was somebody else that you wanted to call, that's certainly something you could have done to impeach Miss Kwart. And that is exactly what the case law in the State of Wisconsin guarantees. That our system of responding to reliability challenges like the ones you are currently making exist.

In addition to that, you have the right to impeach the witness just the way you did. You asked her several questions that she wasn't able to answer. But that doesn't mean that there was anything wrong with the evidence. It means that she wasn't able to explain the underpinnings of why 200 people, for example, make an appropriate statistical sampling. And that she realizes on the fact that those people are not related, even though she doesn't know to what degree they have gone back into the histories of those persons to determine if they weren't in fact related.

It is true that this verdict is based

on the scientific evidence which does not have in this record an explanation for how the kit that she used, for example, to test the DNA of the defendant and of the unknown person who left semen at the scenes, it doesn't -- we did not get evidence that explained why DNA evidence is tested the way that it is, not the exquisite extent that we could have.

But I also think that expert testimony is intended to aid a trier of fact if it does. And there's a point in time where getting into the kind of biogenetic detail that would provide the underpinnings for such testing to be occurred -- to occur and then to receive into evidence eventually loses us all because it is so esoteric. And then it no longer aides the trier of fact.

I think that a good point was made by the prosecution during closing argument, and that is that even though in your closing argument you said that just because a person might have a bachelor's degree and would go to several seminars that would be offered by medical schools for several years doesn't make that person a physician.

And in response to that, the prosecution said that these physicians who take on sort of an exalted position as a result of their

being used analogously in their argument to the lack of science, which in spite of training which was ascribed to Miss Kwart, the state asked this jury to understand as a matter of their common knowledge that just because a physician may rely on a MRI scan in coming to a determination doesn't mean that a jury who listens to that physician's conclusion has to have the physician explain precisely how the MRI scanner is constructed, how it works and why it's reliable. And she's absolutely right.

The other thing that makes this evidence something extraordinarily reliable in this case is that even though in your cross-examination of Miss Kwart and your argument to the jury you attacked the reliability of her findings, because failure to understand exactly how DNA is assessed in terms of taking those 13 genetic markers as opposed to any number of others, and why the certain numerals were assigned to describe that difference between one person and another, including within their own DNA makeup, the difference between their -- the contribution from their mother and from their father. And she clearly wasn't able to explain all of that.

But what is really hard to explain then is how if she is so impeachable, why was Mr. Bransford in a databank where she wasn't the person who did the DNA analysis but some other person did do DNA analysis when Mr. Bransford became a felon. And he had to give a sample as a result of his legal obligation to do so. And that DNA analysis resulted in precisely the same conclusion.

And it almost seems like it's expedientially impossible for Miss Kwart to come up with a conclusion she came up with twice and have them match something that some other entity, by some other whether it's a technician or a scientist also did.

This verdict in all respects appears to have been based on the rational examination of all the evidence in this case. I do find that the evidence that was presented at this trial was competent and a jury came to a conclusion beyond a reasonable doubt that as to all 12 -- all eight charges that the defendant is guilty.

At this time the court enters a judgment of conviction with regard to count one, robbery, use of force; a judgment of conviction

with regard to count two, kidnapping; a judgment of conviction with regard to count three, sexual assault in the second degree; judgment of conviction with regard to count four, sexual assault in the second degree; judgment of conviction with regard to count five, sexual assault in the second degree; a judgment of conviction with regard to count six, sexual assault in the second degree; a judgment of conviction with regard to count seven, sexual assault in the second degree; and a judgment of conviction with regard to sexual assault in the second degree, count eight.

MR. WASSERMAN: May I state just one thing for the record?

THE COURT: Yes.

MR. WASSERMAN: I just want to make it clear we are not abandoning the challenge to this court as an expert in the field that she claimed her expertise. I thought that was -- It seemed to be understood by the court --

THE COURT: I do.

MR. WASSERMAN: -- that that was part of our challenge.

THE COURT: Absolutely. I do understand that.

MR. WASSERMAN: And the other thing is just because I never -- now something was said twice that I haven't had a chance to respond to.

THE COURT: The thing is we're not here to debate this. You've made your record. You've made it three times now. And I assure you that this issue is preserved for appeal.

At this time the defendant is remanded into the custody of the sheriff. There will be a presentence investigation that will be conducted, including an analysis as to what the department of corrections would consider the appropriate sentence to be under the circumstances. We'll give you a date for return. And that will be in approximately five weeks, unless the defense intends to also do a private presentence.

MR. WASSERMAN: Well, I'll discuss the relative advantages and disadvantages of that with my client. If we're going to do that, we'll make sure that it's available to all the parties and the court at an appropriate time. I don't need more time.

THE COURT: I just want to make sure that the time we set is appropriate, because I don't want it delayed again. Six weeks enough?

MR. WASSERMAN: That's fine. That will be plenty of time.

THE COURT: Thank you very much. You both did quite an excellent job in this case. Both of your closing arguments were really very compelling.

MR. WASSERMAN: Judge, thank you. But every physician I've ever known can tell you how an MRI works. Everyone.

THE COURT: All right.

MR. WASSERMAN: Everyone. I've never met one that did not.

THE COURT: All right. Thank you.

(Off the record for date.)

THE CLERK: June 24th at 8:30 for sentencing.

<:><:><:><:>

(Proceedings concluded.)

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Paternity &
Forensic Testing
Consulting

October 24, 2003

Dianne Erickson
Wasielewski & Erickson
1442 N. Farwell, #606
Milwaukee, WI 53202-2924

Re: WI v. William Bransford

Dear Ms. Erickson,

Enclosed, please find my final report, time sheet and invoice in the Bransford case. I apologize for not finalizing this report sooner. I have included an SPD voucher for experts and I would appreciate your submitting it as soon as possible.

As I told you on the in our phone conversation, I did not find any issues with the quality of the crime laboratory's work. Of the evidence tested, the sperm fraction DNA profiles from anal swab and the panties seemed to be very clear and unanimous. Mr. Bradford could not be excluded as the source of these DNA profiles. The swab on the right side of the neck and right hand nail scrapings were mixtures of at least two individuals. Mr. Bradford could not be excluded as being the major contributor to the neck swab. The DNA profile of the minor contributor to nail scraping was incomplete, with Ms. Drost being the major contributor. The DNA profiles from the other evidence (sperm fraction of vaginal swab, blood stains on two $1 bills, upper arm swab, left hand nail scraping) were all consistent with having come from Ms. Drost.

As for the trial transcript, as a DNA expert, I didn't find any problems that would indicate ineffective counsel. Mr. Wasserman raised a range of issues having to do with Ms. Kwart's qualifications to offer statistical evidence, validity of the statistical methods, adherence to laboratory protocol, and admissibility of the evidence. I don't think Ms. Kwart came off looking very knowledgeable. She sounded more like a technician following recipes rather than a professional forensic expert. Nevertheless, I think her testimony was correct (save for a few trivial errors). I thought the judge showed a very good understanding of the science and case history and made a very strong record.

If you have additional questions or wish to discuss this case further, I can be reached at 414-263-2074.

Sincerely,

Alan Friedman

Alan Friedman, PhD

Appendix G

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Forensic Testing
Consulting

DNA Case Review

State of Wisconsin v. William Bransford

Wisconsin State Crime Lab No. R00-2592

Suspect: William Bransford

Alleged Victim: Abby-Rene Drost

Materials Reviewed:

1. Laboratory Findings (DNA) Report, October 3, 2000
2. DNA Databank Report, December 14 2001
3. Supplemental Report, January 17, 2002
4. Case notes and supporting documents from Laura J.M. Kwart, Serology/DNA analyst with the Wisconsin State Crime Laboratory, Milwaukee, pages 3-152
5. Transcript from WI v. William Bransford, Case No. 01-CF-6890, April 19, 2002, 216 pages

Case Review Findings

Review of Laboratory Findings

The first two pages of Ms. Kwart's notes were missing. It appears that these would have covered her examination of a pink bra (item A; according to the transcript it, the bra was not examined); a shirt (item B) and the reference blood from Abby-Rene Drost.

The cervical and oral swabs (items F and G), fluid matter found in the lower vestibule (item I); right knee swab (items M); a swab of the left inner thigh (items N); a white gauze (item T) were all negative for acid phosphatase (AP) and spermatozoa.

Blood was identified on a swab on the upper arm (item O); two $1 bills (item AA and AB). No blood was found on a rock (item AD).

The following items were preserved for DNA analysis without the identification of biological fluid: left hand nail scrapes (item U); right hand nail scrapes (item V); swabs from the right side of neck (item J); swabs from right nipple and areola (item K); swabs from left nipple and areola (item L).

The vaginal swabs (item E) tested negative for acid phosphatase (AP) an enzyme marker for semen. However, two sperm heads were observed. Since the presence of sperm is a confirmatory test and AP is a presumptive test for semen, I would conclude that small quantities of semen were present on the vaginal swab.

Stains found in the crotch of a pair of red thong panties (item Y) contained spermatozoa and tested positive for AP.

Stains containing semen were subjected to differential DNA extraction resulting in a non-sperm (f1) and sperm fraction (f2). Differential DNA extraction is an enrichment procedure and it is not uncommon to find non-sperm DNA in the sperm fraction, especially when large amounts of the victims DNA is present in the sample. Blood stains, swabs from the neck, fingernails, and arm were subjected to a single DNA extraction.

The sperm fraction DNA from the panties (item Y-f2) and anal swab (item H-f2) was from a single source and was foreign to Abbey-Rene Drost and Aaron J. Branski.

This DNA profile was compared to the Convicted Offender Index (database). On December 10, 2001, William H. Bransford was identified as a match. This is considered an investigative lead. A buccal swab was obtained from Mr. Bransford and profiled by Ms. Kwart. Mr. Bransford could not be excluded as the source of the sperm fraction DNA recovered from the panties and anal swab (items Y-f2 and H-f2).

The swab from the right side of the neck yielded a mixed DNA profile. Mr. Bransford could not be excluded as the major contributor to this mixture.

The right hand nail scrapings yielded a mixed DNA profile. Ms. Drost could not be excluded as a minor contributor. The minor contributor's DNA profile was incomplete but consistent with William Bransford.

The DNA profiles from the vaginal swab sperm fraction (item E-f2), dollar bills (items AA and AB), upper arm swab (item O) and left and nail scraping (item U) were all consistent with having come from Abbey-Rene Drost.

Transcript Review

The direct examination of the states DNA expert, Laura Kwart seems fairly routine up though page 36. Qualifications, evidence examined, procedures followed and conclusions reached. On page 36, Ms. Wabitch asked: *Statistically speaking, what is the possibility that there would be another person who's DNA profile would match the profile that you have....* Mr. Wasserman objects to the form of the question stating that the question is not the same as according to accepted physical analysis methods. Although the objection was sustained, I think the question was close to correct. I would have asked about the probability rather than the possibility. There are two parts to any DNA analysis: 1. does the evidence match a known reference sample? (from the defendant, victim or some known third party) and if so, 2. what is the likelihood that a random and unrelated individual might have this DNA profile by chance alone?

Upon rephrasing the questions, Ms. Kwart stated that she used a computer program to evaluate the statistics. I thought this was a weak answer. She is an expert who uses the computer program as a tool but should understand the statistical procedures that underlie the

program. The program relies on fundamental concepts in population genetics and statistics to calculate the random match probability and the reciprocal, the likelihood ratio.

On page 42-43 the judge used the word contamination to describe more than one contributor to a mixture (away from the jury). Ms. Kwart should have corrected him; it's not contamination, it is a mixture of unknown individuals that have contributed to the evidence. Contamination, if it exists, occurs during sample collection, transportation, storage or laboratory handling and represents DNA that was not present at the crime scene prior to sample collection.

Mr. Wasserman objects on page 60 to the scientific foundation to the results of POPSTATS, the FBI program for calculating DNA statistics. In chambers, he argues that the statistics program is like Norton Anti-virus that needs to be updated. This is wrong. The population frequency database is a sample of the population. We do not know the true population gene frequencies, so we take a random sample. The sample will have a mean and a standard deviation. The standard deviation is a measure of the uncertainty between the sample mean and the population mean. This is a fundamental concept in statistics.

Mr. Wasserman is wrong when he argues on page 62 that the older paternity methods did not exclude people. The judge was correct here. The question that was debated in chambers is whether a profile can be unique. In paternity, we simply state that the tested man can not be excluded as the father and calculate (using the same databases) the likelihood that he is the father as compared to a random man of the same race (this is the paternity index). In criminal forensics, we calculate the likelihood that the evidence came from some known individual as compared to a random and unrelated individual. When does the likelihood ratio become so small (1 in a very large number) that the source of the DNA is unique? This was addressed in the 1996 NRC[1] study on DNA evidence (usually called NRC II). Although no recommendation was made, the panel concluded that it was a question of defining a threshold for uniqueness. The WSCL defines a profile as unique, *to a reasonable scientific certainty,* if it exceeds 1,000 times the population of the earth or 1 in 6 trillion. The procedure was upheld by the WI Supreme Court in *2002 WI 3. Supreme Court of Wisconsin. Case No. 99-2980-CR, State of Wisconsin v. Iran Shuttlesworth.* However, it should be noted that the likelihood that a primary relative will have the same profile is considerably more likely. For instance, the likelihood that two brothers would share an identical profile at 13 loci is 1 in 67 million; improbable but not unique according to the WSCL threshold.

On page 69-71 Mr. Wasserman invokes WI v. Hartman that deals with paternity index versus probability of paternity. Probability of paternity is bases on a prior probability (Bayesian Statistics) which as no relevance to the type of statistics used in this case. Furthermore, there is a much higher degree of uncertainty in paternity testing since we are only concerned with a single allele at each locus, the obligate paternal allele. When dealing with transfer evidence (most criminal cases) both alleles must be present in the evidence as well as the suspect for a match to be declared.

---

[1] National Research Council (1996) The evaluation of forensic DNA evidence. Committee on DNA Forensic Science; James Crow, *Chair*. National Academy Press, Washington, DC.

[redacted]

In his cross-examination, Mr. Wasserman hammered Ms. Kwart on her knowledge of population genetics and statistics. Ms. Kwart would not be pinned down on the definition of the term *related*. She was very evasive and did not want to be drawn into testimony on the population genetics of the FBI sampling method.

Ms. Kwart's testimony that *I quintillion* has 17 zeros is incorrect; it has 18. She got it right on *quadrillion*.

Ms. Kwart seems to have the locus designations wrong on page 114; in 1987 a system of nomenclature was established.[2] In the example used, D3S1358, *D* stands for DNA; the *3* indicates that the locus is found on chromosome 3; *S* indicates that this is a single copy locus and *1358* designates this locus as the 1,358th named on chromosome 3.

Conclusions

From my independent review of the DNA data, I found that the WSCL analyst followed their protocol. I furthermore found that the sperm fraction DNA from the anal swab and the semen stain on the panties was clear and unambiguous. The evidence DNA profiles matched the DNA profile of William Bransford at all 13 STR loci. Since the anal swab was an intimate sample, one could not argue that it was unrelated to sexual contact with the victim.

I don't like the use of source attribution (unique profile) because it does not take into account the chance that the true source was a primary relative. However, this issue was resolved in *WI v. Shuttlesworth.*

From a DNA expert's point of view, I thought Mr. Wasserman did a good job in his cross-examination of the states DNA expert. However, I think the judge did a very good job in managing the objections and made a strong record. At the time, the controlling statues, 907.02, simply placed a discovery burden on the state if they intended to introduce DNA evidence. In my opinion, this evidence was of sufficient quality that it would have gotten in irregardless of whether the standard was general relevance, reliability (Daubert) or general acceptance by the scientific community (Frye).

As for the statistical methods used. The WSCL uses POPSTATS, a computer program that was written by the FBI. The program is bases on fundamental principles of population genetics and statistics that were reviewed and endorsed by NRC II. It is true that none of the DNA allele frequency databases are very large, however they are large enough to be reasonable approximations of the populations. How can one arrive at a likelihood that is 1 in 10^{18} from a database that only contains 200 members? It has nothing to do with the size of the sample or, for that matter with the size of the population. Although a flip of a coin has only two possible outcomes, heads or tails, the odd that 10 flips will come out heads is 1 in 1,024. Although there are only 52 cards in a deck, the odds of drawing a royal flush are only 1 in 649,740. The power of DNA analysis depend on how rare the alleles are in the population (some alleles are close to heads on a coin, 0.5 and others are less common, as

[2] Human Gene Mapping 9: Proceedings of the Ninth International Workshop on Human Gene Mapping. 1987 Cytogenetics and Cell Genetics 47-762

[redacted]

in1/52 for a card) and the number of loci examined (this is analogous to the number of flips of the coin or the number of cards drawn).

Reviewed by:

Alan Friedman

Alan L. Friedman, Ph.D., President
HELIX BIOTECH, INC.
2821 N. Fourth St., Suite 226
Milwaukee, WI 53212

Date: October 22, 2003

[redacted]

DNA Profile Assignment from ABI 310 Data in Bransford Case

Profiler

	D3S1358	vWA	FGA	Amel.	D8S1179	D21S11	D18S51	[redacted]		
Abbey-Rene Drost										
Aaron J. Branski										
William Bransford										
D	17,18	18	25,26	x	9,13	30,31.2	16,17	12,13	10,13	10,12
AF	16,18	18,19	21,24	x,y	12,13	30,31	16,20	11,12	9,11	9,10
AG	15,17	16	23,25	x,y	14	30,31	11,13.2	12	12,13	10,11
J	15,17(18)	16(18)	23,25(26)	x(y)	14(9,13)	30,31(31.2)	11,13.2(16,17)			
Y-f2	15,17	16	23,25	x,y	14	30,31	11,13.2			
H-f2	15,17	16	23,25	x,y	14	30,31	11,13.2	12	12,13	10,11
V	17,18(15)	16,18	25,26	x(y)	9,13,14	30,31.2(31)	16,17(11)	12(13)	10,13	10,12
E-f2	17,18	18	25,26	x	9,13	30,31.2	16,17	12,13	10,13	10,12
AA	17,18	18	25,26	x	9,13	30,31.2	16,17			
AB	17,18	18	25,26	x	9,13	30,31.2	16,17			
O	17,18	18	25,26	x	9,13	30,31.2	16,17			
U	17,18	18	25,26	x	9,13	30,31.2	16,17	12,13	10,13	10,12
							16,17	12,13	10,13	10,12

right side of neck swab
underpants-sperm fraction
anal swab-sperm fraction
right hand nail scrapings
vaginal swab-sperm fraction
dollar bill
dollar bill
upper arm swab
left hand nail scraping

Cofiler

	D3S1358	D16S539	Amel.	THO1	TPOX	CSF1PO	[redacted]
Abbey-Rene Drost							
Aaron J. Branski							
William Bransford							
D	17,18	8,13	x	8	8,11	11	10,12
AF	16,18	12,13	x,y	6,9	8	10,12	9,10
AG	15,17	11,13	x,y	7,9	8,10	7,11	10,11
J	15,17(18)	11,13(8)	x(y)	7,8,9	8,10(11)	7,11	10,11(12)
Y-f2	15,17	11,13	x,y	7,9	8,10	7,11	10,11
H-f2	15,17	11,13	x,y	7,9	8,10	7,11	10,11
V	17,18(15)	8,13(11)	x(y)	8(7,9)	8,11	11	10,12
E-f2	17,18	8,13	x	8(7)	8,11	11(7)	10,12(11)
AA	17,18	8,13	x	8	8,11	11	10,12
AB	17,18	8,13	x	8	8,11	11	10,12
O	17,18	8,13	x	8	8,11	11	10,12
U	17,18	8,13	x	8	8,11	11	10,12

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JOHN T. WASIELEWSKI
DIANNE M. ERICKSON

October 22, 2002

Mr. William Bransford
Columbia Correctional Institute
P.O. Box 900
Portage, Wisconsin 53901-0900

Re: State v. Bransford, 01 CF 6890

Dear Mr. Bransford:

Mike Marshall telephoned to ask for permission for you to call me. He is sending me a form. While, you certainly may telephone, I want you to know that at this point, I have no transcripts. The court reporters will have until about December 8 or 9, 2002 to prepare the transcripts. Then they will send them to me. After that, I have sixty days to examine them.

Just keep that in mind as you are trying to communicate about your appeal. You may also write to me, and you should do so immediately if there are any witnesses that my investigator could interview. Such persons would include those who were not called at trial and who you have reason to believe are making different statements.

Sincerely,

Dianne M. Erickson

Appendix H

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JOHN T. WASIELEWSKI
DIANNE M. ERICKSON

October 29, 2002

Mr. William Bransford
294774
Columbia Correctional Institute
P.O. Box 950
Portage, Wisconsin 53901-0950

Re: State v. Bransford, 01-CF-6890

Dear Mr. Bransford:

I think perhaps our letters crossed in the mail. At this time, I cannot comment on the merits of the appeal nor on any issues until I have reviewed the transcripts. Since the court reporters do get sixty days to prepare the transcripts, and then I get sixty days to review them, I am likely to have nothing coherent nor intelligent to say about the case for four months. At present, I know nothing about it.

Why do you feel that Laura Kwart should not have been allowed to testify? When you answer, please do not present a lot of statute numbers. These are meaningless. Just tell me what it was about her testimony that you felt was unfair. Please start by letting me know what she said.

Sincerely,

Dianne M. Erickson

[redacted]

November 5, 2002

Re: State V. BRANSFORD, 01 CF 6890

Dear Mr Erickson

I received both of your letters. There are witnesses who I believe should be interviewed. A report was submitted by Detective Michael Braunreiter on July 28, 2000. The report was an interview with a Mr. Tom C. Hackney of 1133A E. Clarke St. #374-5256. Mr. Hackney reported having a shirt stolen from his backyard. Although I don't recall a specific date I am sure that I took that shirt and left my own shirt. I also believe that the shirt which I left was the possible source of DNA which the state used in this case. Detective John Reesman should also be interviewed. He was involved with the investigation of this case but [redacted] did not testify at my trial. Police Officer Joyce Johnson testified concerning transporting lab samples from Sinai Samaritan Hospital to the Wisconsin Crime Lab. But also submitted a report of an interview with the victim that was never mentioned in court. I believe that the report was revelant because it placed the victim at a bar which I also frequently visited. Mr. Lew A. Wasserman, my trial attorney, could probably [redacted] explain the problems with the testimoney of Laura Kwart in a more intelligent manner than myself. His office is located at 735 North Water Street,

Suite 720, phone number is (414) 272-7622 or Fax (414) 272-4744.

I understand that you do not have the court transcripts. Perhaps some of these people will be of some help. I do have most of the discovery in my possession. If any of it would be of some help to you at this time please let me know.

Sincerely,

William Bransford

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JOHN T. WASIELEWSKI
DIANNE M. ERICKSON

March 25, 2003

Mr. William Bransford
294774
Columbia Correctional Institute
P.O. Box 900
2925 Columbia Drive
Portage, Wisconsin 53901-0900

Re: State v. Bransford, 01 CF6890

Dear Mr. Bransford:

The court reporter who has many of your transcripts is on a medical leave. She appears to have worked in Judge Schellinger's court. There is some courthouse information that indicates that following a traumatic shooting in the courtroom, those who worked there have suffered from the stress of the incident. I am not sure whether that applies to the court reporter.

I will attempt to find out about her status. After that, I will review the record to determine whether legal errors exist. Without being able to review the record, this is hard. Just now, I was not been able to get anyone at the court to answer the telephone; reserve judges have been in that courtroom now for several months.

Should the court reporter's incapacity be permanent, someone will need to type from her notes, if possible.

Sincerely,

Dianne M. Erickson

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JOHN T. WASIELEWSKI
DIANNE M. ERICKSON

June 5, 2003

Mr. William Bransford
Columbia Correctional Institute
P.O. Box 900
2925 Columbia Drive
Portage, Wisconsin 53901-0900

Re: State v. Bransford, 01CF006890

Dear Mr. Bransford:

I am reading the trial transcripts and have no doubt that I will finish within a few days. I will be seeking an extension because the Columbia Correctional Institute refuses to allow attorneys to telephone their clients. My experience is that the collect call system does not work for non-Ameritech customers. I would need to find time in my schedule to make a visit.

In addition, your trial counsel has not yet provided discovery. I will need to remind him.

Finally, I am wondering why you did not use the services of a DNA expert. If you feel you can discuss that issue in a letter, it would help me. Your trial counsel told me that the expert would have been no help. This was determined without even asking any expert. Please tell me if you disagree with counsel's decision.

Sincerely,

Dianne M. Erickson

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John T. Wasielewski
Dianne M. Erickson

April 19, 2005

Mr. William Bransford
Columbia Correctional Institute
P.O. Box 900
Portage, Wisconsin 53902-0950

Re: State v. Bransford, 03AP3068-CR

Dear Mr. Bransford:

Enclosed please find your copy of the Supreme Court's denial of our petition for review. This is very frustrating; I simply do not believe you should have to do all that time, and no one is listening.

I feel very badly for you. I do not know whether if our DNA expert, Alan Friedman, had been involved earlier in the case, you might have settled with the state and cut some losses?

I wish I could have helped more.

Sincerely,

Dianne Erickson

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JOHN T. WASIELEWSKI
DIANNE M. ERICKSON

July 25, 2005

Mr. William Bransford
Columbia Correctional Institute
2925 Columbia Drive
P.O. Box 900
Portage, Wisconsin 53901-0900

Re: State v. Bransford

Dear Mr. Bransford:

I can probably get the transcripts to you this week or next week. Please remember that these copies are the only copies. I keep no back-up copies, and once they are gone from my office, I have no more. You should make sure that you do not put them in jeopardy, such as allowing the prison to destroy them if you move or giving them to a relative who loses them. Believe it or not, I know of all these situations occurring!

I know of nothing else you can file, or I would have filed it.

I think Mr. Wasserman has the discovery, but I will double-check.

Sincerely,

Dianne Erickson

Even if a court were to find that the inability to adequately investigate and challenge government expert testimony amounted to an incompetent effort, it is virtually certain that the defendant would be unable to prove prejudice. To prove prejudice, the defendant would need to have the benefit of expert testimony. Otherwise, there would be no way to show that had there been a court-appointed defense expert at trial, the trial would have unfolded differently. Since the defendant is not even entitled to appointed counsel in a postconviction attack on a conviction, [85] there is little chance that the indigent defendant will have the assistance of an expert.

V. THE OVERARCHING QUESTION

The overarching question for defense counsel and judges is this: Can defense counsel have a fair opportunity to investigate, appropriately assess, and challenge forensic testimony without the assistance of expert testimony? Justice Breyer hit the nail on the head in *McWilliams* when he described the contribution a defense expert in psychiatry might make: the expert "will conduct an appropriate [1] *examination* and assist in [2] *evaluation*, [3] *preparation*, and [4] *presentation* of the defense." [86] There is no a priori reason to believe that this is less the case when non-mental-health forensic evidence is presented.

It seems logical, then, that competent defense lawyers would always consult their own experts in preparing to confront government experts. Wealthy defendants can retain their own experts. Federal defenders have resources that enable them to retain experts. But counsel appointed under the Criminal Justice Act [87] and by many state courts generally need judicial approval to obtain funds for expert testimony. There is yet no standard that requires appointment of experts simply because defense counsel claims a lack of expertise in the subject matter of forensic testimony.

Proposed Rule 707 is useful in stating the factors that prosecutors, defense counsel, and all trial judges should focus on when forensic testimony is going to be presented by the government in a criminal case. [88] If the prosecutor is the proponent of expert testimony, the prosecutor can focus the expert on ***1725** these factors and make the case that they are satisfied. Unless the court appoints an expert for the defense, defense counsel will have no basis to assess the testimony provided by the prosecution's expert, and the court itself generally is in no position to identify sua sponte any defects in the forensic testimony. The court could appoint an expert pursuant to Federal Rule of Evidence 706. [89] If the court were inclined to use public funds for this purpose, however, there is good reason to believe that those funds would be better spent by providing the defense with the expert so that the factors under proposed Rule 707 could be assessed in an adversarial setting.

The vast majority of federal and state criminal cases are disposed of by plea, [90] which might suggest that because only the infrequent case goes to trial, motions to appoint expert witnesses for indigent defendants could be limited to those cases. But, there are cases in which prosecutors rely upon forensic evidence while plea bargaining. If a defendant's decision whether to take a plea or risk a trial depends to any significant extent on the importance of the forensic evidence, is a defense counsel in any better position than at a trial to evaluate that evidence without the help of an expert? The law is clear that defense counsel must provide competent advice at the plea stage as well as provide competent representation at trial. [91] It would be wrong, then, to conclude that counsel for indigent defendants will not seek appointment of defense experts prior to trial while plea bargaining is underway, and equally wrong to conclude that they have a lesser need for expert assistance than lawyers who go to trial.

Proposed Rule 707 would, if enacted, apply only in federal courts. But the issues that it identifies surrounding forensic testimony should be equally applicable in state courts, whether or not states have a similar or identical rule. Each of the concerns raised in this Article about the competency of defense counsel applies in every trial court and for all plea bargains, whether a case proceeds in state or federal court. Thus, every factor set forth in the proposed rule is something that any court with a rule akin to Federal Rule of Evidence 702 should already consider in determining whether an expert is qualified, has testimony that would assist the trier of fact in understanding a ***1726** fact in dispute, [92] testifies based on reliable methodology, [93] has sufficient facts or data, and applies the reliable methodology in a reliable way to those facts and data. [94]

Appendix J

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DISTRICT I/IV

December 17, 2004

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Robert D. Donohoo
Deputy District Attorney
821 West State Street, Rm. 412
Milwaukee, WI 53233

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

03-3068-CR State of Wisconsin v. William Bransford (L.C.# 01CF006890

Before Dykman, Vergeront and Lundsten, JJ.

William Bransford appeals the judgment of convictions and sentences on eight felonies, including six counts of second-degree sexual assault in violation of WIS. STAT. § 940.25(2)(a),[1] and the order denying his motion for resentencing. The issue is whether the sentencing court erred in failing to consider whether Bransford might benefit from WIS. STAT. ch. 980, which provides for commitment of sexually violent persons after release from imprisonment for sexually violent offenses. Upon review of the briefs and record at conference, we summarily affirm.

Appendix K

Bransford was found guilty after a jury trial of the six counts of second-degree sexual assault, one count of robbery with use of force in violation of WIS. STAT. § 943.32(1)(a), and kidnapping in violation of WIS. STAT. § 940.31(1)(a). The circuit court sentenced him to twelve years each on the robbery and kidnapping charges, eight years confinement on each, consecutive to each other, and twenty-four years on the second-degree sexual assault charges, sixteen years confinement on each, consecutive to each other and to any other sentence. In imposing these sentences, the court did not mention WIS. STAT. ch. 980. Bransford filed a motion seeking resentencing on the ground that the court should have considered ch. 980 in rendering its sentence because that chapter provides for commitment at the end of the prison sentence if the person at the time of release is a sexually violent person as defined in WIS. STAT. § 980.01(7). Bransford argued in his motion, as he does on appeal, that consideration of the treatment available under ch. 980 is essential to imposing the minimum term of imprisonment necessary to rehabilitate Bransford and protect the public, as required by *McCleary v. State*, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971). The circuit court denied the motion on the ground that the court was not required to consider ch. 980 in determining an appropriate sentence for Bransford's crimes.

We conclude the circuit court correctly denied the motion for resentencing. There is no requirement in WIS. STAT. ch. 980, any other statute, or the case law that a court sentencing a person convicted of a sexually violent crime consider the availability of ch. 980 in imposing the sentence. More specifically, there is no indication in ch. 980 that the legislature intended that the enactment of the chapter would reduce, or have an impact on, the sentences for sexually violent

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

crimes. In addition, there is no meaningful way a court could consider at the time of sentence the impact that the potential availability of a ch. 980 commitment at the end of a sentence should have on the length of the sentence. At the time of sentencing, it is entirely speculative whether the defendant will meet the statutory definition of a sexually violent person at some future date, and the sentencing court has no control over whether the State decides to file a ch. 980 petition for any particular individual in the future. The sentencing court must structure a sentence based on the appropriate sentencing factors of rehabilitation, protection of the public, and gravity of the offense, *McCleary*, 49 Wis. 2d at 276, applied to the facts that exist at the time of sentencing. It has no duty, and no practical way to consider events that may or may not occur after the completion of the sentence.

IT IS ORDERED that the judgment of convictions and sentences and the postconviction order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

Cornelia G. Clark
Clerk of Court of Appeals

STATE OF WISCONSIN :: COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Plaintiff

-vs-

Case number:
01-CF-6890

WILLIAM BRANSFORD,

Defendant

MOTION TO EXTEND TIME BY NINETY DAYS TO FILE POSTCONVICTION MOTIONS OR A NOTICE OF APPEAL

Current deadline: June 9, 2003
Judge: Honorable Jacqueline D. Schellinger

Dianne M. Erickson, attorney for William Bransford, requests an additional ninety days to file a postconviction motion or notice of appeal.

AS GROUNDS, the following are offered:

1. Court reporter, Gloria J. Weber, had asked for a medical leave, which then unfortunately left her with many

transcripts to do; she continued having trouble getting out the transcripts; these transcripts came in April 9, 2003. She had a large portion of the trial transcripts. Attorney Erickson in no way faults her.

2. Defense Counsel Lew Wasserman has not yet turned over the file; Attorney Erickson had asked him for it months ago, and called again during the first week of June 2003 for the file.

3. Attorney Erickson's understanding is that no DNA expert was hired for this case, and she would like to hire someone to look at the case; as she is reading the trial, she feels the need to consult an expert.

4. Attorney Erickson's schedule in April and in May was intense, as far as appellate cases were concerned; she wrote two no-merit reports, two TPR briefs/no merit reports, one petition for review, one brief-in-chief, one trial court sentence modification motion (after reading a huge record), and read one large record on another case. For trial cases, she has a difficult two-count armed robbery case, among other matters.

5. After an intense appellate schedule that appeared to

begin around December, possibly November 2002, Mr. Bransford's case is about the only case left where she still needs to finish reading the record and make a decision on how to proceed. She stopped taking cases from the appellate division, other than one she accepted last week, where she knew nothing would come due for months.

6. On another case, the Columbia Correctional Institute, where another client is housed, only reluctantly allowed Attorney Erickson to call the client on the telephone; at nearly every other prison, the attorney calls the prison, and the social worker puts the client on the telephone. On state public defender cases, the State saves a tremendous amount of money. The alternative is to accept collect calls, which are extremely expensive; Attorney Erickson estimates that those calls might be three to ten times the cost of a normal call, and such calls only work if the attorney contracts with certain local telephone carriers. Ms. Erickson's carrier, AT&T, usually is blocked. Mr. Bransford is at the Columbia Correctional Institute.

7. To communicate with Mr. Bransford, Attorney Erickson would need to drive to Columbia. This is a four

hour round trip from Milwaukee. In addition, since the state public defender has not paid any of the money owed her partner and herself for bills submitted after March 3, 2003 and has instead announced its intent not to pay until July, her accounts are being steadily drained, mostly by expenses involved in state public defender cases. If road mishaps should occur, the accounts would be likely drained. Attorney Erickson has informed the state public defender for years that prompt payment is necessary to effectively represent clients, but nothing has changed. The public defender's office pays no expense money up front nor for any work until the case is closed. Attorney Erickson does not believe road travel to a prison would be fiscally sound until mid-July, when the state public defender pays more of its debt, and the accounts are healthy. This is completely unfair to clients, but the state public defender is obliged to provide adequate financing. It is not the private bar's job to balance state budgets. In all the time Attorney Erickson has traveled to the prisons, she has had car trouble three times. Both Attorney Erickson and her partner, to whom she is married, have spent most of their time in late 2002 and 2003 on state public defender appellate cases.

The ninety day extension is necessary primarily to hire an expert to review the discovery and the transcripts. Attorney Erickson has already seen some issues she desires to have an expert examine.

STATE OF WISCONSIN
MILWAUKEE COUNTY

Dianne M. Erickson, being first duly sworn and on oath, states that all the facts placed in this motion, are correct, to the best of her recollection.

Dianne M. Erickson

Subscribed to and sworn to before me this 8th day of June, 2003.

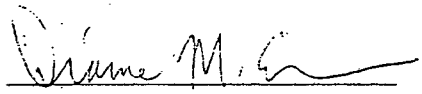
John T. Wasielewski,
Notary public

My commission is permanent.

cc Attorney General
William Bransford

Clerk of Court–Criminal Appeals

Submitted by:



Dianne M. Erickson,
Attorney for William Bransford
Date: May 8, 2003

SBN: 1009156

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STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
Branch 12

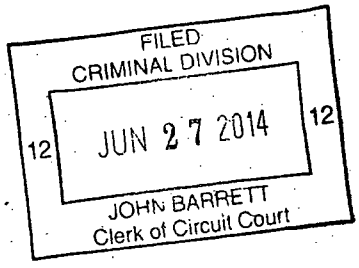
STATE OF WISCONSIN,

Plaintiff,

vs.

WILLIAM BRANSFORD,

Defendant.



Case No. 01CF006890

DECISION AND ORDER
DENYING MOTION TO REVIEW PRESENTENCE REPORT

On June 25, 2014, the defendant filed a *pro se* motion to review the presentence report in the above case. He claims that appellate counsel should have requested the court to open the sealed presentence report because it was relevant to the resentencing motion she had filed and would have qualified as a new factor. He also claims that he is entitled to a meaningful review of the report under State v. Parent, 298 Wis. 2d 63 (2006). The request is denied.

First, appellate counsel did not file a no merit appeal. Only a defendant subject to the no merit procedure on appeal is entitled to a review of the PSI, but not under normal appellate circumstances. Parent's holding was limited to the no merit review process. Here, the issue that counsel raised on appeal was whether the sentencing court should have considered the availability of Chapter 980 in fashioning its sentence. The defendant would not have been entitled to review the report under Parent in these circumstances.

Second, the sentencing court never read or relied upon the presentence report, and therefore, it was not relevant to the sentencing proceeding. After the presentence report was completed, it was learned that the writer had ordered the defendant to be psychologically

Appendix L

examined. A doctor's report had been submitted which affected the writer's evaluation of the defendant. Because of this and based on the objection of trial counsel, Judge Schellinger indicated that she was not going to read the report and that all copies would be sealed. (Tr. 6/24/02, p. 8). Consequently, the presentence report was not a document she could have used as a basis for resentencing.

Nor was it unknowingly overlooked by the parties. Thus, it could not be utilized for new factor purposes. A new factor is a fact or set of facts highly relevant to the imposition of sentence but "not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." State v. Rosado, 70 Wis. 2d at 280, 288 (1975). The court agreed with the parties that the report should not be considered based on the circumstances set forth above.

Nor can the defendant seek review of the report on grounds that he never saw it. Trial counsel informed the court that the defendant had read the report in its entirety. (Tr. 6/24/02, p. 16).

In sum, a review of the defendant is not entitled to further review of the presentence report.

THEREFORE, IT IS HEREBY ORDERED that the defendant's motion to review the presentence report is **DENIED.**

Dated this 27 day of June, 2014, at Milwaukee, Wisconsin.

BY THE COURT:

David L. Borowski
Circuit Court Judge

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DISTRICT I

April 29, 2015

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

2014AP1607-CR State of Wisconsin v. William Bransford (L.C. #2001CF6890)

Before Kessler and Brennan, JJ., and Thomas Cane, Reserve Judge.

William Bransford, *pro se*, appeals an order denying his postconviction motion for permission to review his presentence investigation report (PSI). Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We affirm.

A jury convicted Bransford in 2002 of six counts of second-degree sexual assault with use of force, one count of robbery with use of force, and one count of kidnapping. The trial court

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

ordered preparation of a PSI in advance of sentencing.[2] When the matter reconvened for the sentencing hearing, however, Bransford objected to the PSI because its author, without consulting or advising trial counsel, had required Bransford to take a psychological examination. Bransford sought to strike the PSI and to require a new PSI prepared by an author who was uninfluenced by the results of the psychological examination.

The trial court proposed going forward with the sentencing, explaining that the court had not read the PSI and would not do so. To further ensure that the psychological examination would not affect Bransford's sentencing, the trial court ordered the State to limit any discussion of the contents of the PSI to objective information and biographical data. The trial court additionally assured Bransford that it would seal all of the copies of the PSI so that its contents could not be obtained from the court file.

Bransford, through trial counsel, said he was "completely prepared to proceed" as the trial court proposed. The State also agreed with the trial court's solution. The State further advised that it had already identified for defense counsel the portions of the PSI the State would discuss, and defense counsel had no objection.

The trial court then conducted the sentencing hearing without reviewing the PSI. At the conclusion of the proceeding, the trial court imposed eight consecutive sentences. The

[2] The Honorable Jacqueline D. Schellinger presided over the trial and imposed sentence in this matter. We refer to Judge Schellinger both as the trial court and as the sentencing court. The Honorable David L. Borowski presided over the postconviction motion that underlies this appeal. We refer to Judge Borowski as the circuit court.

aggregate term of imprisonment was 168 years, bifurcated as 112 years of initial confinement and 56 years of extended supervision.

Bransford sought resentencing with the assistance of appointed counsel, who argued the sentences were unduly harsh. Bransford did not prevail. His appellate counsel pursued a direct appeal on his behalf, and this court summarily affirmed. *See* ***State v. Bransford***, No. 2003AP3068-CR, unpublished op. and order (WI App. Dec. 17, 2004).

Bransford next filed the postconviction motion underlying this appeal, seeking an order permitting him to review the sealed PSI. He claimed his postconviction counsel "should have requested to open the sealed PSI report because information within the report was relevant to the resentencing motion and would qualify as a new factor." Bransford asserted that, because he is now a *pro se* litigant, he is entitled to review the PSI himself. As authority for his asserted entitlement, he cited WIS. STAT. § 972.15(4m) and ***State v. Parent***, 2006 WI 132, 298 Wis. 2d 63, 725 N.W.2d 915. The circuit court denied the motion in a written order, and he appeals.

The parties agree that the decision to grant or deny access to a PSI after sentencing rests in the circuit court's discretion. We agree as well. *See* ***State v. Zanelli***, 212 Wis. 2d 358, 378, 569 N.W.2d 301 (Ct. App. 1997). Accordingly, our standard of review is highly deferential. *See* ***Olivarez v. Unitrin Prop. & Cas. Ins. Co.***, 2006 WI App 189, ¶16, 296 Wis. 2d 337, 723 N.W.2d 131. We will sustain a discretionary decision if the circuit court undertook a reasonable examination of the facts and the law, and the record shows a reasonable basis for the circuit court's determination. ***Id.***, ¶¶16-17.

Bransford first claims the circuit court erred because WIS. STAT. § 972.15(4m) affords a defendant the opportunity to review a PSI upon a showing that the defendant is unrepresented.

The statute provides, in pertinent part: "[t]he district attorney [and] the defendant's attorney ... are entitled to have and keep a copy of the presentence investigation report. If the defendant is not represented by counsel, the defendant is entitled to view the presentence investigation report but may not keep a copy of the report." ***Id.*** Interpretation and application of statutory language presents a question of law for our *de novo* review. *See* ***State v. Soto***, 2012 WI 93, ¶14, 343 Wis. 2d 43, 817 N.W.2d 848.

In this case, Bransford has already viewed the PSI. At sentencing, trial counsel advised the court, while Bransford was in the courtroom: "Mr. Bransford read this report in its entirety." Bransford did not contradict his counsel's remark. The statutory provision in WIS. STAT. § 972.15(4m) barring the defendant from keeping a copy of the PSI demonstrates that an offender has only a limited opportunity to review the document. Bransford fails to show that § 972.15(4m) affords a prisoner who is unrepresented in collateral proceedings the right to examine a PSI that he or she has previously reviewed.[3] We do "not read into the statute language that the legislature did not put in." ***Brauneis v. LIRC***, 2000 WI 69, ¶27, 236 Wis. 2d 27, 612 N.W.2d 635.

Next, Bransford claims the circuit court erroneously relied on ***Parent*** to deny his motion. In fact, Bransford relied on ***Parent***. The circuit court referred to ***Parent*** only to help Bransford understand why he misplaced his reliance on that case. In ***Parent***, the supreme court held that a

[3] Bransford states in his appellate brief that "he only gleaned [sic] over the PSI during the sentencing proceeding." This ambiguous remark, apparently offered to suggest Bransford has not fully reviewed the PSI, does not undermine the clear record showing Bransford read the PSI "in its entirety." "Assertions of fact that are not part of the record will not be considered." ***Nelson v. Schreiner***, 161 Wis. 2d 798, 804, 469 N.W.2d 214 (Ct. App. 1991).

convicted person may view a copy of the PSI in aid of his or her direct appeal under the no-merit procedures described in WIS. STAT. RULE 809.32. *See* ***Parent***, 298 Wis. 2d 63, ¶43. The supreme court subsequently held that "the rule of ***Parent*** is confined to no-merit appeals." *See* ***State ex rel Office of the SPD v. Court of Appeals***, 2013 WI 31, ¶29, 346 Wis. 2d 735, 828 N.W.2d 847. Bransford's case does not involve a no-merit appeal. Therefore, ***Parent*** is inapplicable, as the circuit court correctly explained.

Bransford next assigns error to the circuit court's conclusion that the PSI "could not be utilized for new factor purposes." In his view, because the sentencing judge never read the PSI, "any information within the psychological examination would qualify as information that [the sentencing judge] was unaware of at the time of sentencing.... The mere fact that information was not considered by [the] judge ... should qualify it as a new factor upon future motions." Bransford misunderstands the legal concept of "new factor." In the context of sentencing proceedings, a new factor is "'a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties.'" ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). In this case, the psychological examination and the PSI were in existence at the time of sentencing, so they do not qualify as factors that were previously nonexistent. Further, neither the PSI nor the psychological examination was "unknowingly overlooked"; they were intentionally excluded from review in response to Bransford's objection.

Bransford next—and somewhat inconsistently—faults the circuit court for concluding that the PSI was irrelevant to the sentencing decision. He acknowledges that the sentencing judge sealed the PSI and never reviewed it. Nonetheless, he asserts the PSI is relevant to a

determination of whether his appellate counsel should have "raised the issue of the psychological exam being performed without the advice of defense counsel and the effect it had on the sentencing hearing." He suggests he might challenge the effectiveness of his appellate counsel for failing to contend that the events surrounding the preparation of the PSI deprived him of his Sixth Amendment right to counsel at sentencing. *See* U.S. CONST. amend. VI. Bransford fails to demonstrate, however, that information sealed by the sentencing judge without review affected the sentencing hearing.

Bransford responds that, unless he examines the PSI, he cannot tell whether the information discussed by the State at sentencing originated with the psychological examination. The contention is unpersuasive. Bransford plainly has access to the sentencing transcript, excerpts of which he included in the appendix to his appellate brief. Despite that access, his postconviction motion failed to identify any information in the State's sentencing remarks that, in his view, must have originated with the psychological examination because the information could have no other source.[4]

Bransford goes on to complain that the lack of a PSI leads to "a far less fair and just sentence." Bransford appears to argue here that the sentencing court erred by not considering the PSI. That claim, however, is unavailable to Bransford. At sentencing, his trial counsel told the court that Bransford was "completely prepared to proceed" as the court suggested, without

[4] In the reply brief, Bransford suggests that sentencing remarks by the State concerning his "promiscuous life style" could have been "gleaned" from the psychological report. "It is a well-established rule that we do not consider arguments raised for the first time in a reply brief." ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661. Nonetheless, we note Bransford's failure to say that the psychological report is the only possible source for the State's information.

judicial review of or access to the PSI. Accordingly, Bransford may not assert that the court should have reviewed and considered the PSI before imposing sentence. *See* ***Shawn B.N. v. State***, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992) (we will not review error invited by appellant); *see also* ***State v. McDonald***, 50 Wis. 2d 534, 538-39, 184 N.W.2d 886 (1971) (defendant who acquiesces to trial counsel's strategic choice is bound by that decision).

Next, and perhaps relatedly, Bransford complains that "it is not logical ... to impose an aggregate total sentence of 168 years without any assistance of a PSI," and he asserts a sentencing court needs a PSI to conduct "the 'beyond a reasonable doubt' analysis." He is wrong. First, "[i]nformation upon which a trial court bases a sentencing decision, as opposed to a finding of guilt, need not, of course, be established beyond a reasonable doubt." ***State v. Marhal***, 172 Wis. 2d 491, 502, 493 N.W.2d 758 (Ct. App. 1992). Second, "a PSI is not required prior to sentencing." ***State v. Greve***, 2004 WI 69, ¶10, 272 Wis. 2d 444, 681 N.W.2d 479.

Bransford next asserts the PSI is an important document that influences correctional decisions. Nothing in the postconviction motion, however, alleged that the sealed PSI is affecting his institutional placement, nor has he demonstrated that review of the document could facilitate any change in his institutional treatment. We do not address arguments that are inadequately briefed, *see* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992), or presented for the first time on appeal, *see* ***State v. Champlain***, 2008 WI App 5, ¶17, 307 Wis. 2d 232, 744 N.W.2d 889.

Bransford concludes his reply brief by complaining he is unfairly required to disclose the basis for a contemplated future postconviction motion in order to review the PSI. He faces no such requirement. To prevail, however, he must persuade the circuit court that it should, in the

exercise of its discretion, permit him to read a PSI he previously viewed. *See* ***Zanelli***, 212 Wis. 2d at 378. He attempted to carry his burden by asserting that the PSI is relevant to resentencing and would qualify as a new factor. The circuit court did not agree with him. We see no error. Therefore,

IT IS ORDERED that the circuit court's order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals