IN THE

SUPREME COURT OF THE UNITED STATES

Case No._____

TRAVIS J. GUTTU,

Petitioner,

APPENDIX TO PETITION FOR WRIT OF HABEAS CORPUS

Appendix A - Decision of Seventh Circuit denying COA

Appendix B - Decision of U.S. District Court of Wisconsin

Appendix C - Decision of Wisconsin Court of Appeals

Appendix D - Warrant for threats to presiding judge

Appendix E – Relevant Transcripts

APPENDIX A

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted January 20, 2023
Decided January 24, 2023

Before

THOMAS L. KIRSCH II, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

No. 22-2506

TRAVIS J. GUTTU,
Petitioner-Appellant,

v.

CHRIS S. BUESGEN,
Respondent-Appellee.

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

No. 21-cv-600-wmc

William M. Conley,
Judge.

ORDER

Travis Guttu has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254 and an application for a certificate of appealability. This court has reviewed 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. Guttu's motion to proceed in forma pauperis is DENIED.

APPENDIX B

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

TRAVIS J. GUTTU,

Petitioner,

v.

CHRISTOPHER BUESGEN,

Respondent.

OPINION AND ORDER

21-cv-600-wmc

Travis J. Guttu, appearing *pro se*, has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 as well as a memorandum in support. (Dkt. ##1, 7.) He challenges a June 2010 judgment of conviction entered in Brown County Circuit Court Case No. 09CF394 for one count each of second-degree sexual assault and aggravated battery. Guttu contends that he should be allowed to withdraw his pleas and proceed to trial for three reasons: (1) his plea to aggravated battery was not knowingly entered because the trial court did not ensure that Guttu sufficiently understood the elements of that charge; (2) trial counsel Attorney Reetz was ineffective in declining to pursue a theory concerning Guttu's motive for committing battery that Guttu wanted to use to establish his innocence of sexual assault and in persuading Guttu to sign a "fraudulent" plea deal; and (3) trial counsel Attorney DeBord was ineffective in failing to raise errors in the plea documents and Guttu's lack of awareness of Wis. Stat. ch. 980 ("Chapter 980") at the time of his plea to second-degree sexual assault as grounds for pre-sentencing plea withdrawal. (Dkt. ##1 at 5, 7-8; 7 at 13-14.)

The petition is before the court for preliminary review under Rule 4 of the Rules Governing Section 2254 cases. However, the petition is untimely, and Guttu fails to make

a persuasive argument in his memorandum that he qualifies for equitable tolling or that he is actually innocent. Accordingly, the court must dismiss the petition.

OPINION

A state prisoner must file a federal habeas petition within one year of when the state court judgment became final. 28 U.S.C. § 2244(d)(1)(A). Generally, a state court judgment becomes final on the date that direct review has concluded, or on the date that the deadline for seeking direct review has expired. *Id.*

Based on the petition, memorandum, and Wisconsin state court records available online, petitioner pleaded no contest to one count of second-degree sexual assault and one count of aggravated battery on June 30, 2010. Petitioner then pursued postconviction relief, which the trial court denied on December 28, 2011. The Wisconsin Court of Appeals affirmed that decision, rejecting petitioner's arguments that he should be allowed to withdraw his plea: (1) to the sexual assault charge because Attorney DeBord was ineffective in failing to raise petitioner's alleged lack of knowledge about Chapter 980 at the time of the plea as a ground for pre-sentencing plea withdrawal; and (2) to the aggravated battery charge because the trial court allegedly failed to ensure that petitioner sufficiently understood the elements of that charge. *State v. Guttu*, 2013 WI App 1, ¶ 1, 345 Wis. 2d 398, 824 N.W.2d 928 (unpublished decision). The Wisconsin Supreme Court denied petitioner's petition for review on September 17, 2013, and he did not file a petition for certiorari in the United States Supreme Court.

Petitioner's one-year limitations period began running on December 16, 2013, 90 days after the Wisconsin Supreme Court denied review of his direct appeal. *Anderson v.*

Litscher, 281 F.3d 672, 674-75 (7th Cir. 2002) (one-year statute of limitations does not begin to run under § 2244(d)(1)(A) until expiration of 90-day period in which prisoner could have filed petition for writ of certiorari with United State Supreme Court). Because petitioner has not filed any motions for postconviction or other collateral review since December 2013 that would have tolled his habeas clock, his limitations period expired on or about December 16, 2014, and his petition was thus over six years late when he submitted it for mailing on or about September 16, 2021.

The petition is plainly untimely, and petitioner does not argue otherwise. Although an untimely petition may be salvaged if grounds exist to equitably toll, or pause, the running of the limitations period, equitable tolling is an extraordinary remedy that is rarely granted. *Tucker v. Kingston*, 538 F.3d 732, 734 (7th Cir. 2008). The Supreme Court has explained that a petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing. *Holland v. Florida*, 560 U.S. 631, 649 (2010).

In his memorandum, petitioner unpersuasively asserts that he was prevented from diligently pursuing his rights by "[e]xtraordinary circumstances." (Dkt. #7 at 4-5.) In support, he notes that he reached out to the Wisconsin Innocence Project after his direct appeal, which declined to take his case approximately a year later, but he did not pursue other postconviction relief in court until filing the petition in 2021. He argues that he could not be expected to know that he still had ways of challenging his convictions when neither his postconviction counsel nor the Wisconsin Innocence Project informed him of any additional, available steps to properly attack his convictions, and told him nothing

could be done. (*Id.* at 4.) However, "[l]ack of familiarity with the law . . . is not a circumstance that justifies equitable tolling." *Taylor v. Michael*, 724 F.3d 806, 811 (7th Cir. 2013); *see also Arrieta v. Battaglia*, 461 F.3d 861, 867 (7th Cir. 2006) ("Mistakes of law or ignorance of proper legal procedures are not extraordinary circumstances warranting invocation of the doctrine of equitable tolling"). And as for the failure of any lawyer to inform petitioner, "[a] lawyer's ineptitude does not support equitable tolling" either. *Lee v. Cook Cnty.*, 635 F.3d 969, 973 (7th Cir. 2011); *see Cosmano v. Varga*, No. 16-cv-8704, 2017 WL 11318203, at *2 (N.D. Ill, Aug. 18, 2017) (rejecting as a ground for equitable tolling the argument that petitioner's attorneys did not inform him that he could file a habeas petition or that there was a one-year deadline).

Petitioner further notes that he can only use the law library for 45 minutes 3 times a week, or 117 hours per year, and conclusorily states that this is insufficient time to research exceptions to filing and procedural bars and prepare and file a petition within the one-year deadline. (Dkt. #7 at 4-5.) But petitioner does not also assert that law library time is the only time he could work on his petition, or that he otherwise did not have access to his legal materials. Nor does petitioner assert that he ever *tried* to use the library within the limitations period to investigate or pursue postconviction remedies or before meeting the inmate who allegedly helped him prepare his "late petition." (*Id.* at 5.)

More to the point, limited law library access is a circumstance most *pro se* petitioners face, and one the Seventh Circuit has held does not per se justify equitable tolling. *See Tucker*, 538 F.3d at 734-35 (lack of legal expertise and limited access to a law library, standing alone, are not grounds for equitable tolling); *see also Ademiju v. United States*, 999

F.3d 474, 478 (7th Cir. 2021) (subpar law library did not support equitable tolling of § 2255 petition); *cf. Socha v. Boughton*, 763 F.3d 674, 684-87 (7th Cir. 2014) (limited access to the law library *along with* administrative confinement, and the failure of former counsel to hand over the case file, was an extraordinary circumstance warranting equitable tolling). Here, petitioner adds that Covid-19 protocols "prevented virtually all access" to the law library "for over a year and half" (dkt. #7 at 5), which is more concerning, but the pandemic did not begin until well after petitioner's limitations period expired in 2014. In sum, petitioner has explained why he did not file a petition before September 2021, but he has not shown that "despite exercising reasonable diligence, [he] could not have learned the information he needed in order to file [a federal petition] on time." *Jones v. Hulik*, 449 F.3d 784, 789 (7th Cir. 2006).

That said, petitioner may also be able to overcome the one-year time limit by arguing for an equitable exception based on a claim of actual innocence. *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). "Actual innocence" means "factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). To succeed, a petitioner must persuade the court "that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 329 (1995); *see also Perkins*, 569 U.S. at 327 (a petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence). This is so even in a case such as petitioner's, where he was convicted pursuant to a plea. *See, e.g., Bousley*, 523 U.S. at 623 (applying "actual innocence" test to case involving guilty plea); *Hanson v. Haines*, No. 13-cv-01145, 2014

WL 4825171, at *1-2 (E.D. Wis. Sept. 26, 2014) (discussing application of *Bousley* to § 2254 petitioner who pled no contest and dismissing petition as untimely); *cf. Taylor v. Powell*, 7 4th 920, 933 (10th Cir. 2021) (a petitioner invoking actual innocence as to a guilty plea "still has to prove his innocence of the charge to which he pleaded guilty"). This is a demanding standard, which permits review only in extraordinary cases. *Coleman v. Lemke*, 739 F.3d 342, 349 (7th Cir. 2014).

Even construing petitioner's filings liberally, he does not meet this narrow, demanding exception. Indeed, petitioner does not present any new evidence, nor argue in any detail the factual record in support of his actual innocence of the crimes of conviction, beyond pointing to his conclusory assertion to the trial court that he has always maintained his innocence, and that no DNA was found on his sweatpants, and explaining a theory he wanted to present at trial to establish his innocence of sexual assault by admitting to battery, or at least by presenting evidence that could provide motive for battery. (Dkt. #7 at 2, 12-14.) Petitioner contends that he does not need to show it was more likely than not that no reasonable juror would have convicted him, because he never went to trial and is bringing a "procedural innocence" claim that his counsel was ineffective and his plea defective. (*Id.* at 1-3.) That is not correct. As noted, courts have applied the *Schlup* standard in cases involving pleas. And while the Court in *Schlup* distinguished a substantive claim of actual innocence from a procedural one, a petitioner asserting innocence as a gateway still must support that claim with exculpatory evidence. *See Schlup*, 513 U.S. at 314-16, 329 ("Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of

justice that would allow a habeas court to reach the merits of a barred claim"); *see also Perkins*, 569 U.S. at 386-87; *Arnold v. Dittmann*, 901 F.3d 830, 836-37 (7th Cir. 2018) ("A claim of actual innocence must be both credible and founded on new evidence;" and once a petitioner satisfies the actual innocence exception, he "must show that his conviction violates the Constitution, laws, or treaties of the United States" to obtain any habeas relief). Absent a showing of actual innocence, the court must dismiss the petition.[1]

The only remaining question is whether to grant petitioner a certificate of appealability. Under Rule 11 of the Rules Governing Section 2254 Cases, the court must issue or deny a certificate of appealability when entering a final order adverse to a petitioner. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Tennard v. Dretke*, 542 U.S. 274, 282 (2004). This means 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 quotations and citations omitted). For all the reasons just discussed, petitioner has not made such a showing. Therefore, a certificate of appealability will not issue.

[1] As for petitioner's related contention that his claims are not procedurally defaulted, the court does not reach that question.

ORDER

IT IS ORDERED that:

1) Petitioner Travis J. Guttu's petition for a writ of habeas corpus brought under 28 U.S.C. § 2254 is DISMISSED as untimely.

2) No certificate of appealability shall issue. Petitioner may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22.

Entered this 27th day of July, 2022.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge

APPENDIX C

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

TRAVIS J. GUTTU,

Petitioner,

v.

CHRISTOPHER BUESGEN,

Respondent.

ORDER

21-cv-600-wmc

On July 27, 2022, the court denied petitioner Travis J. Guttu's petition for a writ of habeas corpus under 28 U.S.C. § 2254 and denied him a certificate of appealability. (Dkt. #9.) Now, Guttu has filed a notice of appeal and a motion for leave to proceed *in forma pauperis* on appeal. (Dkt. ##14, 16.) Under Fed. R. App. P. 24(a)(3), a district court may allow an appellant to proceed without prepaying the appellate filing fee if it finds that the appellant is indigent and that the appellant filed the appeal in good faith. Although it appears from the materials that Guttu submitted that he is unable to pay the full filing fee, the motion will be denied because Guttu's appeal is not taken in good faith.

The court declined to issue a certificate of appealability in this case, but the Seventh Circuit has warned district courts against conflating the good faith and certificate of appealability standards "because the standard governing the issuance of a certificate of appealability is not the same as the standard for determining whether an appeal is in good faith. It is more demanding." *Walker v. O'Brien*, 216 F.3d 626, 634 (7th Cir. 2000). "To determine that an appeal is in good faith, a court need only find that a reasonable person could suppose that the appeal has some merit." *Id.*

The court dismissed the petition because Guttu failed to show good cause for his six-year delay in filing a habeas petition. He also failed to substantiate that he is actually innocent. Having reviewed Guttu's motion and the order of dismissal, the court concludes that no reasonable person could suppose that his appeal has some merit. Although the court does not conclude that Guttu is motivated by any ill will, the court certifies that Guttu's appeal is not taken in good faith for purposes of Fed. R. App. P. 24(a)(3). Accordingly, Guttu cannot proceed with his appeal without prepaying the $505 filing fee unless the court of appeals gives him permission to do so.

ORDER

IT IS ORDERED that:

1) Petitioner Travis J. Guttu's request for leave to proceed *in forma pauperis* on appeal (dkt. #16) is DENIED because the court certifies that his appeal is not taken in good faith.

2) Guttu may appeal this decision under Fed. R. App. P. 24(a)(5) by filing a separate motion to proceed *in forma pauperis* on appeal with the Clerk of Court, United States Court of Appeals for the Seventh Circuit, within 30 days of the date of this order. With that motion, he must include an affidavit as described in the first paragraph of Fed. R. App. P. 24(a), along with a statement of issues he intends to argue on appeal. Also, he must send along a copy of this order. Guttu should be aware that he must file these documents in addition to the notice of appeal he has filed previously.

Entered this 12th day of September, 2022.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge

345 Wis.2d 398
Unpublished Disposition
See Rules of Appellate Procedure, Rule 809.23(3), regarding citation of unpublished opinions. Unpublished opinions issued before July 1, 2009, are of no precedential value and may not be cited except in limited instances. Unpublished opinions issued on or after July 1, 2009 may be cited for persuasive value.
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.
Court of Appeals of Wisconsin.

STATE of Wisconsin, Plaintiff-Respondent,
v.
Travis J. GUTTU, Defendant-Appellant.

Nos. 2012AP128-CR, 2012AP129-CR.
|
Nov. 29, 2012.

Appeals from an order of the circuit court for Brown County: William M. Atkinson, Judge. *Affirmed.*

Before LUNDSTEN, P.J., SHERMAN and BLANCHARD, JJ.

Opinion

¶ 1 BLANCHARD, J.

*1 Travis J. Guttu appeals a circuit court order denying his consolidated motions for postconviction relief from judgments convicting him of second-degree sexual assault, aggravated battery, and other offenses. Guttu argues that he should be allowed to withdraw his plea to the sexual assault charge because one of his attorneys was ineffective in failing to raise Guttu's alleged lack of knowledge of WIS. STAT. ch. 980 (2009-10)[1] ("Chapter 980") at the time of the plea as a ground for pre-sentencing plea withdrawal. Guttu separately argues that he should be allowed to withdraw his plea to the aggravated battery charge because his plea was not knowing, intelligent, and voluntary, based on the circuit court's alleged failure to ensure that Guttu sufficiently understood the elements of the charge. We reject these arguments and affirm the order.

BACKGROUND

¶ 2 Guttu entered no contest pleas to several charges, including the second-degree sexual assault and aggravated battery charges. At the time of his pleas, Guttu was represented by Attorney Brett Raetz.

¶ 3 Before Guttu was sentenced, he moved for plea withdrawal. The circuit court denied Guttu's motion after a hearing. During this phase of proceedings, Guttu was represented by Attorney Brett DeBord.

¶ 4 After sentencing, Guttu filed a postconviction motion, again seeking plea withdrawal. In this motion, Guttu argued for the first time that he should be allowed to withdraw his plea to the sexual assault charge because he had no knowledge, at the time he entered the plea to that charge, that he might potentially be committed under Chapter 980 ("Sexually Violent Person Commitment"), based in part on the sexual assault conviction. He claimed that, in moving for pre-sentencing plea withdrawal, Attorney DeBord was ineffective in failing to raise Guttu's alleged lack of awareness of Chapter 980 as a basis.[2] In addition, Guttu argued that his plea was not knowing, intelligent, and voluntary because the circuit court failed to ensure that Guttu understood the elements of the sexual assault charge and the aggravated battery charge.[3]

*2 ¶ 5 The circuit court held an evidentiary hearing on Guttu's motion. Attorney Raetz, Attorney DeBord, and Guttu each testified. At the close of the hearing, the court concluded that Attorney DeBord was not ineffective because DeBord was not required to "locate all issues available" and because Guttu failed to show prejudice. The court further concluded that Guttu understood the elements of the charges at the time of the plea and that Guttu's plea was therefore knowing, intelligent, and voluntary. Accordingly, the court denied Guttu's postconviction motion for plea withdrawal.

¶ 6 As indicated above, Guttu now appeals the order denying his postconviction motion. We reference additional facts as needed in our discussion below.

DISCUSSION

¶ 7 In the plea withdrawal context, courts distinguish between *Bangert*-type[4] and *Straszy*-type[5] motions. We need not explain all of the differences between the two types. It is sufficient for our purposes here to note that *Bangert*-type challenges generally involve an allegation that there was some defect in the plea colloquy, while *Straszy*-type challenges generally involve an allegation that the plea was defective on some other basis, such as ineffective assistance of counsel. *See State v. Howell*, 2007 WI 75, ¶ 74, 301 Wis.2d 350, 734 N.W.2d 48.

¶ 8 In this appeal, Guttu makes one of each type of challenge. First, Guttu argues that he should be allowed to withdraw his plea to the sexual assault charge because Attorney DeBord was ineffective

in failing to raise Gutts's alleged lack of awareness of Chapter 980 as a ground for pre-sentencing plea withdrawal on that charge. This is a *Bentley*-type challenge. Second, Gutts argues that he should be allowed to withdraw his plea to the aggravated battery charge because his plea to that charge was not knowing, intelligent, and voluntary, based on the circuit court's alleged failure to ensure that Gutts sufficiently understood the elements of that charge. This is a *Bangert*-type challenge. We address each in turn.

A. Second Assault Charge

¶ 9 In order to put Gutts's first argument in context, we review the differing standards for plea withdrawal motions made before and after sentencing:

> "[3] Withdrawal of a plea may occur either before sentencing, or after sentencing. When a defendant moves to withdraw a plea before sentencing, 'a circuit court should "freely allow a defendant to withdraw his plea prior to sentencing for any fair and just reason, unless the prosecution [would] be substantially prejudiced." ' However, this rule should not be confused ' "with the rule for post-sentence withdrawal where the defendant must show the withdrawal is necessary to correct a manifest injustice." '
>
> When a defendant moves to withdraw a plea after sentencing, the defendant 'carries the heavy burden of establishing, by clear and convincing evidence, that the trial court should permit the defendant to withdraw the plea to correct a "manifest injustice." ' Here, the burden is on [the defendant] to prove that plea withdrawal is warranted because "the state's interest in finality of convictions requires a high standard of proof to disturb that plea." Therefore, in order to disturb the finality of an accepted plea, the defendant must show " 'a serious flaw in the fundamental integrity of the plea.' "

State v. Cain, 2012 WI 68, ¶¶ 24-25, 342 Wis.2d 1, 816 N.W.2d 177 (citations omitted).

¶ 10 Thus, the "fair and just reason" standard that applies to a motion made before sentencing is considerably less stringent than the "manifest injustice" standard that applies when the motion is made after sentencing. Among the circumstances that may constitute a manifest injustice is the circumstance in which the defendant received ineffective assistance of counsel. *Id.*, ¶ 26, 816 N.W.2d 177.

¶ 11 Gutts argues that it would be a manifest injustice to allow his plea to the second assault charge to stand because he received ineffective assistance of counsel in connection with that plea. More specifically, as already stated, Gutts argues that he received ineffective assistance of counsel because, in moving for plea withdrawal before sentencing, Attorney DeBest failed to raise Gutts's alleged lack of awareness of Chapter 980 as a basis.

¶ 12 In order to address Gutts's argument, and the State's response, we first summarize two opinions of this court: *State v. Ajuwa*, 199 Wis.2d 391, 544 N.W.2d 609 (Ct.App.1996), and *State v. Nelson*, 2005 WI App 113, 282 Wis.2d 502, 701 N.W.2d 32.

¶ 13 In *Ajuwa*, the defendant sought to withdraw his plea after sentencing on the ground that the circuit court had not informed him at the time of his plea that his sexual assault conviction could lead to a Chapter 980 commitment. *Ajuwa*, 199 Wis.2d at 393-94, 544 N.W.2d 609. We concluded that the potential for a future Chapter 980 commitment is a collateral consequence of a plea and that the defendant did not need to have "knowledge of the potential for a future chapter 980 commitment in order to make his plea knowing and voluntary." *Id.* at 394-95, 544 N.W.2d 609. The basis for this decision was that any potential commitment was contingent on a future commitment hearing. *See id.* While the underlying conviction could serve as a predicate offense for, and therefore an essential element of, a potential commitment, the conviction itself would not trigger commitment. *See id.*

[4] ¶ 14 In *Nelson*, the defendant entered guilty pleas to charges that included sexual assault. *See Nelson*, 282 Wis.2d 502, ¶ 5, 701 N.W.2d 32. The defendant subsequently changed attorneys and, prior to sentencing, the new attorney filed a motion seeking plea withdrawal, asserting that the defendant's previous attorney neglected to advise the defendant that the conviction resulting from the defendant's plea could provide the predicate offense for a Chapter 980 commitment. *Id.*, ¶¶ 5-6. The circuit court concluded that the defendant established a fair and just reason for pre-sentencing plea withdrawal, but denied plea withdrawal on the ground that withdrawal would be prejudicial to the State. *Id.*, ¶ 6. On appeal, we agreed with the circuit court that the defendant had shown a fair and just reason:

> Just like the lack of knowledge as to the sex offender registration requirement is a fair and just reason to withdraw one's plea, so too is the lack of knowledge that one is now eligible for a Chapter 980 commitment a fair and just reason. In fact, eligibility for a Chapter 980 commitment has the potential for far greater consequences than registering as a sex offender. Sex offender registration merely centralizes information already in the public domain. A Chapter 980 commitment, however, could be lifelong.

Id., ¶ 15. However, we disagreed with the circuit court as to prejudice, concluding that the State failed to show that plea withdrawal would result in substantial prejudice to the State. *Id.*, ¶ 22. We therefore reversed and remanded so that the defendant could withdraw his pleas to the sexual assault counts. *Id.*, ¶¶ 3, 22, 25.

¶ 15 In *Nelson*, we distinguished *Ajuyo* as a case in which plea withdrawal was sought "after sentencing in a postconviction motion and, thus, was subject to a different and more stringent test." *Id.*, ¶ 16 n. 3, 504 N.W.2d 609. We did not elucidate further.

¶ 16 Gutts contends that *Ajuyo* is distinguishable from his case because, among other reasons, *Ajuyo* involved the *court's* failure to provide information and did not involve the question of ineffective assistance of counsel. In contrast, Gutts argues here that Attorney DuBord was ineffective in failing to raise Gutts's alleged lack of Chapter 980 knowledge as a ground under *Nelson* for pre-sentencing plea withdrawal.

*5 ¶ 17 The State argues, in part, that Gutts's case is not materially different from *Ajuyo*. The State does not, however, develop this part of its argument in significant detail. The State concedes that, "under *Nelson*, a defendant's lack of knowledge about Chapter 980 provides a fair and just reason for allowing the defendant to withdraw his plea prior to sentencing."

¶ 18 We will assume, without deciding, that *Ajuyo* does not preclude Gutts's ineffective assistance of counsel claim. Nonetheless, the question remains whether Gutts is correct that, given *Nelson*, Attorney DuBord was ineffective. We conclude for the reasons that follow that the circuit court correctly determined that Gutts fails to show prejudice, and therefore Gutts fails to show ineffective assistance of counsel.

1. Ineffective Assistance of Counsel Standards

¶ 19 To prevail on an ineffective assistance of counsel claim, "a defendant must demonstrate that (1) counsel's performance was deficient, and (2) the deficiency was prejudicial." *State v. Harbor*, 2011 WI 28, ¶ 67, 333 Wis.2d 53, 797 N.W.2d 828. "We need not address both components of the inquiry if the defendant fails to make an adequate showing on one." *Id.*

¶ 20 To show that the performance was deficient, a defendant must show that counsel made errors so serious that counsel was not functioning as the effective "counsel" guaranteed by the Sixth Amendment. *State v. Balliette*, 2011 WI 79, ¶ 64, 336 Wis.2d 358, 805 N.W.2d 334. One example is when a defendant shows that counsel was "objectively unreasonable" in "failing to find arguable issues." *See id.*

¶ 21 To prove prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Harbor*, 333 Wis.2d 53, ¶ 72, 797 N.W.2d 828 (citation omitted).

¶ 22 " '[B]oth the performance and prejudice components ... are mixed questions of law and fact.' " *State v. Pitsch*, 124 Wis.2d 628, 633–34, 369 N.W.2d 711 (1985) (citation omitted). The circuit

court's findings of fact will not be overturned unless clearly erroneous. *State v. Johnson*, 153 Wis.2d 121, 127, 449 N.W.2d 845 (1990). However, whether the attorney's performance was deficient and whether the deficiency prejudiced the defense are questions of law that we review de novo. *Id.* at 128, 449 N.W.2d 845.

2. Application of Standards

*6 ¶ 23 As indicated above, the circuit court concluded that Attorney DuBord's performance in moving for pre-sentence plea withdrawal was not deficient because, in the circuit court's words, DuBord was not required to "locate all issues available." The court also concluded, without further explanation, that Gutts failed to show prejudice.

¶ 24 We will assume, without deciding, that Attorney DuBord's performance was deficient. We nonetheless conclude for the following reasons that Gutts fails to show prejudice.

¶ 25 Gutts's prejudice argument is a nuanced one that is based on *Nelson* and on the differing standards for pre- and post-sentencing plea withdrawal. Gutts summarizes his argument this way:

> [H]ad Attorney DuBord argued Chapter 980 and *Nelson* during the presentencing hearing, Gutts would not now be left with arguing manifest injustice. Rather, had Attorney DuBord argued Chapter 980 and *Nelson*, and had the trial court still denied the presentence motion, this appellate court's standard of review of the trial court would be as it was in *Nelson*. It would have been an easier standard of review than the present manifest injustice standard.

Similarly, Gutts summarizes his argument in another portion of his briefing as follows:

> [H]ad Attorney DuBord raised the Chapter 980 issue, even if the trial court had still denied the [pre-sentencing] plea withdrawal motion, at least Gutts could have positioned himself as the defendant in *Nelson* did. By Attorney DuBord not making the argument, Gutts now must allege[] ineffective assistance of counsel. Therefore, Gutts was prejudiced by Attorney DuBord.

In short, Gutts's argument is that Attorney DuBord's failure to raise the Chapter 980 issue under *Nelson* before sentencing put Gutts in a much weaker position to seek plea withdrawal after sentencing.

¶ 26 While Gutts's argument has some superficial attraction, it is defective when viewed under the correct test for prejudice.

¶ 27 Gutts's argument frames the test incorrectly. The test is not, as Gutts's argument suggests, whether the defendant is in a comparatively worse position because of his counsel's errors. Undoubtedly, that is often the case, including when, as here, counsel's performance results in the forfeiture of direct review of an issue. However, we do not assume prejudice in such circumstances. The test is as stated above: whether "there is a reasonable probability that, but for counsel's unprofessional errors, *the result of the proceeding would have been different*." *Harlan*, 333 Wis.2d 53, ¶ 72, 797 N.W.2d 828 (emphasis added). Thus, what Gutts needed to show is that there is a reasonable probability that, but for Attorney DeBord's failure to raise the Chapter 980 issue before sentencing, Gutts would have been permitted to withdraw his plea to the sexual assault charge. We conclude that Gutts failed to carry his burden of proving a reasonable probability that, had Attorney DeBord raised Gutts's alleged lack of awareness of Chapter 980 before sentencing, Gutts would have been allowed to withdraw his plea to the sexual assault charge.

*7 ¶ 28 Applying the correct test, Gutts's argument is defective because it is based on a factual premise that we reject based on our reading of the record, namely the premise that the record shows that Gutts lacked knowledge of Chapter 980 when he entered his plea.[6]

¶ 29 It is true that Gutts averred and testified as part of his postconviction motion that he was not aware of Chapter 980 when he entered his plea. It is also true that the circuit court made no express finding as to whether it believed these assertions. However, Gutts fails to provide any reasonable interpretation of the court's prejudice determination. We conclude that the most likely interpretation, as we explain below, is that the court made a credibility determination that Gutts did not aver or testify truthfully in claiming that he was ignorant on this topic at the time of the plea. *See State v. Lentowiggar*, 2004 WI App 127, ¶ 30 n. 7, 275 Wis.2d 512, 685 N.W.2d 536 (We "assume facts, reasonably inferable from the record, in a manner that supports the trial judge's decision.").

¶ 30 And, as to that determination, as discussed further below, it is evident to us that the circuit court had a sound basis to discredit Gutts's assertions of ignorance regarding the potential for Chapter 980 commitment. We therefore agree with the circuit court that Gutts failed to show prejudice.

¶ 31 In reaching this conclusion, we rely in particular on the record of what occurred during Gutts's pre-sentencing plea withdrawal hearing addressing other, related issues. There, the circuit court found that Gutts lacked credibility on a closely related point, namely Gutts's claim that he did not know about the sex offender registry, or at least had not discussed the registry with his attorney before entering his plea.[7] The court made this finding based, in part, on a further finding that Gutts's case had been pending for a long time and that Gutts had shown a high level of involvement in his case, "discussing and ... digesting every bit of law and fact" relating to it.

*8 ¶ 32 The record of postconviction proceedings further supports our conclusion that the circuit court discredited Gutts's claim that he lacked knowledge of the potential for Chapter 980 commitment. Attorney Rentz's postconviction affidavit and testimony showed that, although Rentz had no specific recollection of or record of discussing Chapter 980 with Gutts, it was Rentz's customary practice to advise clients of potential Chapter 980 consequences when they pled to offenses that could constitute predicate offenses for a Chapter 980 commitment.

¶ 33 Further, Gutts's affidavit on the topic suggests a credibility problem on its face. Specifically, Gutts averred that, at the prison meeting where he first learned of Chapter 980, *not one* of the fourteen to seventeen inmates that were present had ever heard of civil commitment under Chapter 980, and that the inmates all "gasped" when informed of it. Considered alone, Gutts's highly unlikely account might not undermine his ability to demonstrate prejudice. However, considered in combination with the other factors we list, it supports the circuit court's conclusion that Gutts failed to show prejudice and our conclusion that the court discredited Gutts's claim that he was unaware of the potential for Chapter 980 commitment.

¶ 34 Even Gutts's postconviction counsel recognized Gutts's credibility problem on the Chapter 980 issue, and could do little to rehabilitate him. Specifically, during the postconviction hearing, counsel addressed the topic during examination of Gutts as follows:

> Q—Well, the Court found at the [pre-sentencing plea] withdrawal hearing that [the court] basically didn't believe you. [The court] said that [it] thought you did know what the sex registry program was, correct?
>
> A Correct.
>
> Q So, how—what's the best way for us to believe you today that you didn't know about 980? You know about the registry, but you didn't know about Chapter 980. Why is that?
>
> A I've never heard that in the news or anywhere else.

Gutts's response, if viewed in isolation, may have provided a plausible explanation for Gutts's claim that he lacked awareness of Chapter 980, but it was an unlikely one, given all the other information in the record.

¶ 35 During closing argument to the postconviction court, defense counsel acknowledged, "Now, the Court did find ... in the plea withdrawal hearing that the Court did not believe Mr. Gutts as to his representation that he did not know of the sex registration law. I would ask the Court to not automatically find that he would have known of 980 also." Thus, counsel's argument all but conceded that there was an ample basis for the circuit court to reject Gutts's claim of ignorance, and simply urged the court not to do so "automatically."

*9 ¶ 36 In sum, the record supports the circuit court's implicit finding that Gutta was not credible in asserting that he did not know about Chapter 980 when he entered his plea. Therefore, we agree with the circuit court that Gutta fails to carry his burden of showing prejudice based on Attorney DeBord's failure to raise Gutta's alleged lack of knowledge as a ground for pre-sentencing plea withdrawal under *Nelson*. Gutta thus has not shown that he should be allowed to withdraw his plea to the second assault charge based on ineffective assistance of counsel in connection with that charge.[8]

B. Aggravated Battery Charge

*10 ¶ 37 We turn to Gutta's argument that his plea to the aggravated battery charge was not knowing, intelligent, and voluntary. Gutta makes this argument under *Bangert*, meaning that Gutta alleges that his plea was not knowing, intelligent, and voluntary because of a defect in the plea colloquy. *See Howell*, 301 Wis.2d 350, ¶ 74, 734 N.W.2d 48.

¶ 38 In a *Bangert* motion, the procedure is as follows:

> If the motion establishes a prima facie violation of WIS. STAT. § 971.08 or other court-mandated duties and makes the requisite allegations [that the defendant did not know or understand information that should have been provided at the plea hearing], the court must hold a postconviction evidentiary hearing at which the state is given an opportunity to show by clear and convincing evidence that the defendant's plea was knowing, intelligent, and voluntary despite the identified inadequacy of the plea colloquy.... In meeting its burden, the state may rely "on the totality of the evidence, much of which will be found outside the plea hearing record." For example, the state may present the testimony of the defendant and defense counsel to establish the defendant's understanding. The state may also utilize the plea questionnaire and waiver of rights form, documentary evidence, recorded statements, and transcripts of prior hearings to satisfy its burden.

State v. Brown, 2006 WI 100, ¶ 40, 293 Wis.2d 594, 716 N.W.2d 906 (citations and footnotes omitted).

¶ 39 Gutta argues that his plea to the aggravated battery charge was not knowing, intelligent, and voluntary because the circuit court failed to determine that Gutta entered the plea with a sufficient understanding of the elements of that charge. He cites WIS. STAT. § 971.08(1)(a), which provides, in part, that the court must determine that a plea is made "with understanding of the nature of the charge and the potential punishment if convicted."[9]

*11 ¶ 40 As indicated above, the circuit court held an evidentiary hearing and concluded that Gutta's plea to the aggravated battery charge was knowing, intelligent, and voluntary. We agree and we conclude that, whether or not Gutta met his initial burden entitling him to that hearing, the State in any case proved by clear and convincing evidence based on the entire record that Gutta's plea was knowing, intelligent, and voluntary.

¶ 41 In deciding whether a defendant's plea is knowing, intelligent, and voluntary, we accept the circuit court's findings of historical fact unless they are clearly erroneous. *State v. Hoppe*, 2009 WI 41, ¶ 45, 317 Wis.2d 161, 765 N.W.2d 794. However, we review de novo the question of whether those facts show that the plea was knowing, intelligent, and voluntary. *Id.*

¶ 42 Gutta's argument is based on errors in the plea questionnaire and waiver form. He points to three: (1) although the top portion of page one of the form correctly states "Aggravated Battery w/ Intent," the bottom portion of that page shows the lesser crime of "Substantial Battery;" (2) the form references on "attached sheet," and the attached sheet is for a misdemeanor battery offense; and (3) page one of the form shows the maximum penalty for a substantial battery conviction.

¶ 43 The State concedes that the form contains errors. The State argues, however, that other portions of the record establish that Gutta understood that he was pleading to aggravated battery, understood the elements of aggravated battery, and understood the maximum penalty for aggravated battery.

¶ 44 The errors in the form are unfortunate and, especially in combination, surprising. Nonetheless, we agree with the State for four reasons.

¶ 45 First, as the State points out, the circuit court received the form at the beginning of the plea hearing, and the ensuing colloquy supports a conclusion that, despite the form's errors, Gutta understood that he was pleading to aggravated battery, understood the elements, and understood the maximum penalty. During the pertinent portion of the colloquy, a question arose as to whether Gutta had an opportunity to read the final amended complaint. Gutta stated, "But the one that was amended to-increasing the charge and adding the charge, *increased it from substantial to aggravated* ... I have not read that Criminal Complaint, the Amended Criminal Complaint." (Emphasis added.) In response, the court read to Gutta from the amended information, which indicated to Gutta the elements of aggravated battery and the maximum penalty:

> [T]he above-named defendant, on or about Monday, March 23, 2009 ... did cause great bodily harm to [the alleged victim] by an act done with intent to cause great bodily harm to that person, contrary to Section 940.19(2) of the Wisconsin Statutes, a Class E felony, and upon conviction, may be fined not more than $50,000 or imprisoned not more than 15 years or both.

*12 At this point in the colloquy, neither Gutta nor his counsel indicated any confusion or objection regarding the aggravated battery charge.

¶ 46 At another point in the colloquy, the court and Gutte had a second exchange regarding the aggravated battery charge and the maximum penalty:

> THE COURT: ... I may have to apologize if I am being redundant, Mr. Gutte. You understand the maximum penalty *for the Aggravated Battery* is $50,000 or 15 years or both?
>
> TRAVIS GUTTU: Yes.

(Emphasis added.) Again, neither Gutte nor his counsel indicated any confusion or objection regarding the aggravated battery charge.

¶ 47 Second, the circuit court made a finding of fact at the postconviction hearing that Attorney Reetz reviewed the pattern jury instructions for aggravated battery with Gutte before Gutte entered his plea. This finding is supported by evidence in the record, including the following: Attorney Reetz's testimony; a copy of the pattern jury instructions in the record, located near the plea questionnaire and waiver form; the court's recollection that it had directed court staff to provide the jury instructions to Attorney Reetz at the time of Gutte's plea; and the court's belief based on its prior experience that the proximity of the pattern jury instructions and plea form in the record showed that Attorney Reetz had reviewed the instructions with Gutte before submitting them as a packet to the court.[10]

¶ 48 Gutte asserts that "it is not plausible" that Attorney Reetz could have gone over the correct elements using the correct jury instructions while at the same time providing the circuit court with the court-filed form. We disagree. The circuit court could reasonably find that Attorney Reetz reviewed the correct jury instructions with Gutte even if Attorney Reetz made errors on the form.

¶ 49 Third, to the extent Gutte avowed or testified that he did not understand that he was pleading to aggravated battery, did not understand the elements of aggravated battery, or did not understand the maximum penalty, it is apparent that the circuit court discredited Gutte's averments and testimony, at least implicitly.[11] This court may not second-guess the court's credibility determinations. *See Cogswell v. Rubenstein Counsels Co.*, 87 Wis.2d 243, 250, 274 N.W.2d 647 (1979).

*13 ¶ 50 Fourth, Gutte points to nothing in the record suggesting that he had a reduced capacity for understanding, as did the defendant in *Brown*, the primary case on which Gutte relies. *See Brown*, 293 Wis.2d 594, ¶ 9, 716 N.W.2d 906 (defendant was "illiterate and had been diagnosed with reading and mathematics disorders," and attorney representing defendant stated that defendant was "no deficient [in reading] as anybody I've ever represented in 20-some years"). Nor is *Brown* otherwise analogous. *See id.*, ¶¶ 11–12, 53, 58, 79 (concluding that circuit court must hold hearing on plea withdrawal when there was no plea questionnaire and waiver form, the court never addressed any elements of the crimes to which the defendant pled, and the defendant adequately alleged that he did not understand the nature of the charges).

¶ 51 Taking all of these considerations together, we are satisfied that the State showed by clear and convincing evidence that Gutte's plea to the aggravated battery charge was knowing, intelligent, and voluntary.

CONCLUSION

¶ 52 In sum, we affirm the circuit court order denying Gutte's consolidated motions for postconviction relief.

Order affirmed.

Not recommended for publication in the official reports.

All Citations

345 Wis.2d 398, 824 N.W.2d 928 (Table), 2012 WL 5949512, 2013 WI App 1

Footnotes

1 All references to the Wisconsin Statutes are to the 2009–10 version unless otherwise noted.

2 It is undisputed that Gutte's conviction on the second-degree sexual assault charge would serve as a predicate offense for a Chapter 980 commitment.

3 In this appeal, Gutte has abandoned his argument that the circuit court failed to ensure that he understood the elements of the second-degree sexual assault charge, but, as discussed in the text below, he renews his argument that the court failed to ensure that he understood the elements of the aggravated battery charge.

4 *State v. Bangert*, 131 Wis.2d 246, 389 N.W.2d 12 (1986).

5 *State v. Brown*, 293 Wis.2d 594, 716 N.W.2d 906 (2006).

6 Gutte argues that, under *Brown*, we should remand the case for a hearing because the circuit court failed to make any express finding as to whether Gutte knew about Chapter 980 when he entered his plea. The State relies on the position that, if we determine, as Gutte's appointed lawyer in *State v. Nelson*, 2005 WI App 113, 282 Wis.2d 500, 701 N.W.2d 52, such a remand would be inappropriate. However, we conclude for the reasons given in the text that a remand would not be appropriate because Gutte's plea was knowing, intelligent, and voluntary.

7 Under WIS. STAT. §§301.45, Wisconsin's sex offender registration statute, a defendant may be required to register with the Department of Corrections as a sex offender, based on conviction for a listed offense, and may be prosecuted for failure to register.

8 We need not and do not rely on the State's argument that Gutte's ineffective assistance of counsel claim fails because Gutte did not sufficiently allege or prove that he would not have entered his plea to the second-assault charge if he had known about Chapter 980 at the time. The State based this argument on a statement in *Bentley*. In *Bentley*, the court stated that, "[i]n order to satisfy the prejudice prong of the [ineffective assistance of counsel] test, the defendant seeking to withdraw his earlier plea must allege that he can show by more than a mere possibility that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 311, 548 N.W.2d 50 (emphasis added) (citation omitted).

We do not understand the State's reliance on this statement in *Bentley*. In *Bentley*, the ineffective assistance of counsel claim pertained to counsel's failure to provide accurate information regarding the defendant's parole eligibility date before the defendant entered his plea. *See id.* at 307, 308, 548 N.W.2d 50. Here, in contrast, Gutte has never asserted that his trial counsel failed to provide accurate information about Chapter 980. Gutte's ineffective assistance of counsel claim is that his trial counsel (Attorney Reetz) failed to provide information about Chapter 980, Gutte's ineffective assistance of counsel claim (Attorney Bathke) failed to raise Gutte's alleged lack of Chapter 980 knowledge as a ground for postconviction plea withdrawal under *Nelson*. Thus, as far as we can tell, Gutte has not asserted, in the words of *Bentley*, whether there is a reasonable probability that, but for [Attorney Bathke's] errors, [Gutte] would not have pleaded guilty," because by the time Attorney Bathke was acting as Gutte's attorney, Gutte had already entered his plea.

9 Gutts also cites WIS. STAT. § 971.08(1)(b), which provides that the circuit court must "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." However, Gutts does not develop any separate argument invoking § 971.08(1)(b) and we therefore consider § 971.08(1)(b) no further. *See State v. Pettit*, 171 Wis.2d 627, 646–47, 492 N.W.2d 633 (Ct.App.1992) (court of appeals need not address insufficiently developed arguments).

10 Gutts does not argue that the circuit court could not rely, at least in part, on its conversation and plea experience. We take this as a concession by Gutts that the court could consider its conversation and plea experience.

11 The relevant portion of Gutts's affidavit and testimony are not clear in these respects. What is clear, however, is that the court did not credit Gutts on the most pertinent points. For example, Gutts asserted that Attorney Rosin failed to review the jury instructions for approximately twenty-minutes, but the court clearly rejected that assessment when it made a finding of fact to the contrary based on other evidence. *See* ¶ 42, *supra*. Gutts also claimed in both his affidavit and in testimony that he was unable to pay attention to what the circuit court was saying during the plea colloquy because he was upset and confused by various aspects of his plea and plea hearing, but it is apparent that the circuit court must have implicitly rejected that claim in concluding that Gutts's plea was knowing, intelligent, and voluntary.

APPENDIX D

- Original -

State of Wisconsin | Circuit Court 2 | Brown County

STATE OF WISCONSIN

-vs- Plaintiff,

DA Case No.: 2010BR002289
Assigned DA/ADA: David L. Lasee
Agency Case No.: BCSD1011462
Court Case No.: 2010CF 351

Travis J Guttu
2955 Brookview Drive
Green Bay, WI 54313
DOB: 08/19/1982
Sex/Race: MW
Eye Color: Gray
Hair Color: Brown
Height: 6 ft 1 in
Weight: 150 lbs
Alias:

FILED
MAR 26 2010
CLERK OF COURTS
BROWN COUNTY, WI

WARRANT

Defendant,

THE STATE OF WISCONSIN TO ANY LAW ENFORCEMENT OFFICER:

A complaint, a copy of which is attached, having been made before me accusing the defendant of committing the crime(s) of:

THE CRIME(S) OF:	DATE OF VIOLATION:	CONTRARY TO WIS. STATUTE(S).:
Stalking	September 2009	940.32(2)
Battery or Threat to Judge	through March 2010	940.203(2)
Bailjumping-Felony	03/17/2010	946.49(1)(b)
Bailjumping-Felony	03/25/2010	946.49(1)(b)
	03/26/2010	

And having found that probable cause exists that such violation was committed by the defendant, you are, therefore, commanded to arrest the defendant and bring him before me, or if I am not available, before some other judge of this county.

Date: March 26, 2010

Lawrence Lyday
Circuit Court Judge/Court Commissioner

EXTRADITION: YES: XX NO:
ENTER: Wisconsin Only: Nationwide: XX Adjoining Counties/States:

(1) 3/26/2010

APPENDIX E

POST CONVICTION HEARING

DEC 2, 2011

A Since 1992.
Q And licensed from the State of Wisconsin?
A Yes.
Q And do you recall being appointed by the public defender's office to represent Travis Guttu; is that correct?
A Yes.
Q At what point were you appointed? Do you know the date?
A No.
Q You were appointed on a number of cases; is that correct?
A Yes.
Q And do you know how many?
A Three.
Q Now, at some point this matter was going to trial; is that correct?
A Yes.
Q In fact, all three of these matters were scheduled on the same day?
A That's my recollection, yes.
Q But they were scheduled as separate trials, though?
A Yes.
Q Do you remember what the day was that the trial was supposed to happen?
A June 30th, 2010.
Q Okay. At some point during the course of trial

narrative that you've given there, you can't recall if you approached the State or if the State approached the defense?

A Right. I mean -- I don't know to use the word "approach" if you mean physically approach?

Q Made the initial contact about discussing --

A I don't recall who made the initial comment. It could have very well been me.

Q Okay. Approximately what time was it the idea of plea -- of a possible plea bargain began?

A I don't know other than it was between 9:00 o'clock and 10:00 o'clock.

Q Okay.

A Somewhere in that range.

Q You said it was after voir dire?

A After voir dire.

Q Do you have any recollection of how long the voir dire process lasted?

A An hour. Normally about an hour, hour and a half. I'm not certain.

Q Okay. So, the idea of the possible settlement is broached in some way. Where did the negotiations take place?

A In the courtroom -- in the courtroom and in the glass conference room.

persuasion -- I do recall this specifically -- there was persuasion going on on both parties.

Q Okay. What do you mean by that?

A There was my representation to Travis that this was a -- given the risk and possible outcomes, this was an entirely acceptable proposal. And my understanding was that the State was making a similar argument to the alleged victim.

Q So, there was really only one offer made in the discussions that were between the attorneys persuading the various clientele; is that what you are telling us?

A Yeah. If you call it an offer. It wasn't as if someone said, "we'll do this." There was an agreement between the State -- my recollection is there was an agreement between the State and the defense of eight years IC, meaning initial period of incarceration, and that agreement was contingent upon the defendant and in part the victim accepting such a consequence for all the cases. So, I think there is -- there was not -- if there was very limited negotiation between myself and the State as to where we -- where this thing would resolve if it did resolve.

Q All right. You are talking about sentencing recommendation; is that correct?

A Yes.

attorneys involved in this case about the basic framework of the negotiated settlement?

A I don't know. I can give a time frame. I can't give a specific number if it's -- it was between, I'd say, ten minutes the low side to half an hour at the high side if you added up all the time we spoke during this time period.

Q All right. So, you've spoken with the DA, and now by this point you've got the basic framework of an offer, and now you approach Mr. Guttu; is that correct?

A Yeah. But I had discussed a framework with Travis before I had conversations with the State.

Q Okay. What do you mean by that?

A The initial discussion occurred between Travis and I where there was either a comment where I said it or, here we go to trial, dah, kind of a "dah" comment.

Q Here -- I don't follow you what you are telling us there.

A Well, I wasn't finished.

Q Oh, okay.

A Of course we're going to trial when I say "dah" comment. Of course we're going to trial. Travis maintains his innocence, the State hasn't made any offers. That does not allow or provide any middle ground to resolve the case. And I may have made a comment that this is a case, given the consequences of losing and it being three

issues which is sort of the inverse of this decision. If you want the deal, here's the deal.

Those issues, evidentiary issues -- I'm not talking about motions to suppress -- questions about what about this or she did this or she did that or he said -- those types of things. Those were somewhat not dismissed but put in context that those are trial issues.

So, we spoke about eight years -- I think I recall I usually tell clients I'm not that concerned about extended supervision. If they are well behaved on extended supervision, it's not that problematic, it's not that large of a burden, it shouldn't be.

Q So --

A Ult --

Q I'm sorry?

A Ultimately Travis did not make a decision. Some family members were brought in, discussed -- I discussed some things with them, and then collectively he agreed to plea.

Q Okay. Now, you state that you don't as a habit discuss extended supervision with your clients?

A It's -- yeah -- I don't -- I don't argue -- when I say I don't discuss, I say extended supervision is like probation. It's akin -- it's basically the new word for parole other than the fact that you are not released

A I don't know if I glossed over it at the time. It's glossed over in my head now.

Q All right. Now, as to initial confinement time, is there any discussion about not being eligible for programming such as Earned Release, Challenge Incarceration, Risk Reduction?

A The only discussion would be to this advice that, to the extent he's eligible, I don't believe anyone will have an objection to it. There is no specific -- there is no specific objection to any of those programs. My experience of late is that it is what it is. If you are eligible, the DOC is great at making that determination.

District attorneys rarely -- I can't remember the last time has said we'll not agree to that when, in fact, someone is technically eligible for those programs. So, there -- I don't have any specific recollection of a discussion regarding those programs other than, if you are eligible, you are eligible.

Q All right. But you are aware that certain Chapter 948 charges, such as second-degree sexual assault, make a person uneligible for such programming?

A I am, yeah.

Q But you didn't discuss that with Mr. Guttu?

A Did not, no. Not that specifically.

Q Now, one of the charges he was to plead to was sexual

see, I think, the tail end of her high school career. So, his daughter was brought up. It wasn't brought up in the context of the sex offender registry.

Q Okay. Now, you previously testified that there had been no offers made by the State before this date, this June 30th date.

A That's my recollection, yeah. I -- I think I was the fifth attorney.

Q Okay.

A So, I'm saying there is no offers I was aware of. There may have been one that said plead and argue. I don't know.

Q How long were you the attorney on this case?

A I don't recall. Eight months, nine months, six months.

Q But this was the first time you and Mr. Guttu had ever discussed any type of resolution of this matter short of trial?

A Yeah. This comprehensively, absolutely. There was some discussions about getting it dismissed and a lot of irritation that there was even a case, but there was an adamant -- there -- innocence was maintained in this case, so it wasn't a situation where compromise was at all -- this wasn't -- it wasn't susceptible to compromise.

Q Until it was; that's correct?

used.

Q Trial issues?

A Evidentiary issues. I call that trial issues.

Q Did you and Mr. Guttu have disagreements about those issues?

A Yeah. We disagreed a lot throughout the case.

Q And so some of that discussion in that one hour time period was about things that you disagreed on?

A There were subjects brought up, had to be, given the comprehensive nature of our disagreement in terms of trial strategy and things like that. I'm certain that some of the things that were brought up in terms of what I call the collateral trial issues were things that Travis and I disagreed on to the extent of the import of those facts or lack of facts, the use of them, the benefit of them, the detriment of them.

Q Right. Because when I look at the affidavit that was supplied to the Court before I came on this case, it indicates that there was disagreement about evidence that was supplied by the State. Do you recall that?

A I can. Sure. There was a -- it's a disagreement about evidence.

Q And Mr. Guttu felt that not every bit of discovery had been supplied to him?

A That was a complaint of his.

-- at some point we are putting ourselves in the Judge's shoes or jurors' shoes or bailiff's shoes, that we should probably wrap this up. We should probably come to a yes -- thumbs up or thumbs down answer, and I think we were all somewhat conscientious people and we were aware of the time going.

And then I think the two -- two messages from the Judge that I think the first one may have been, "Where are you at?" And I think we sent a few back that we are working on it. I think -- I try a lot of cases. Dana and I might have even gone back and spoken with the Judge to give him a status. That's possible.

But ultimately it was a combination of those things. It wrapped up. And I think terms and merits of the agreement, I think those questions had been answered. To reanswer them and go over them indefinitely, I was becoming redundant.

Q Would it have been better to have more time to discuss this decision?

A Well, yes.

Brett came back and told me the Judge would agree to the 8 in 1 if victim & DD.

Q I mean in an ideal situation how long would you like to have to discuss this type of agreement with your client?

A It depends on the client. Some clients it --

Q A client such as Mr. Guttu?

A This is where a waiver comes in. I don't think time

MOTION HEARING

SEPT 10, 2010

he had already formulated a decision that he wanted to withdraw his plea, correct?

A As I recall, yes.

Q And he was the one who came to you with the reasoning as to why he wanted to withdraw his plea, correct?

A I don't recall that.

Q You recall who came up with the idea of arguing sex offender registration and lack of notification regarding that?

A I had conversations with Mr. Reetz and Mr. Guttu. I had two telephone conversations with Mr. Reetz about possible strategies. I can't recall if it was either he or I that initially suggested that. And, again, as far as my conversations with Mr. Guttu, I don't recall if I introduced the idea or if he did.

Q You did indicate that Mr. Guttu often in his conversations with you would reference what you deemed to be trial issues as opposed to plea withdrawal issues.

A That was the majority of the conversation, yes.

MR. LASEE: No further questions.

MR. MORGAN: I have some redirect.

R E D I R E C T E X A M I N A T I O N

BY MR. MORGAN:

Q I'm going to show you what's been -- well, it's Exhibit 8 as part of this motion packet. It's a plea questionnaire

true?

A That, as I recall -- well, it depends. Is it the substantial battery or the aggravated battery?

Q Okay. But why would there be substantial battery on the form if that wasn't the plea?

A Because I missed it.

Q And it also indicates that the elements -- there is a check marked "see attached." If you look at the attachment, that's a misdemeanor battery form, correct?

A It is.

Q And Mr. Guttu signed that. That's completely incorrect. That's not even a felony checklist, correct?

A That's correct. I've seen these misdemeanor offense elements sheets many times. As I recall, though, that was corrected on the record at the plea sentencing, although my memory may be incorrect on that -- or the plea hearing, rather.

Q Yeah. I'd ask you to support that. I don't agree with that. If you have any detail on that, I'd like to know.

A Again, it's just from my memory.

Q And it's true that Mr. Guttu received a ten-year incarceration sentence on the battery charge in this case, correct?

A As I recall.

Q And that was not concurrent, that was consecutive.

MR. MORGAN: I don't think I have any more questions.

THE COURT: Thank you. You are excused.

(Witness excused.)

MR. MORGAN: I call Attorney Brett Reetz.

Judge, I do not need Mr. DeBord. He's under subpoena. I'm not sure if the State wants him to stick around after Mr. Reetz testifies.

MR. DEBORD: I've been requested to stay.

BRETT REETZ, was duly sworn and testified as follows:

THE COURT: State and spell your name.

THE WITNESS: Brett Reetz, B-R-E-T-T R-E-E-T-Z.

D I R E C T E X A M I N A T I O N

BY MR. MORGAN:

Q Mr. Reetz, did you receive a copy of the motion packet?

A Yes.

Q Okay. And you prepared an affidavit which is Exhibit 6, and you signed that August -- it looks like August 3rd; is that correct?

A If that's what it is, yes.

Q Okay. I'll just let you refer to this. Now, in your affidavit, you indicated that in 2010, which was the plea hearing here, that it was your customary practice to advise defendants of both the sex registry law and the Chapter

Q You were here when I asked Mr. DeBord about the plea form?

A Yes.

Q I'll show you Exhibit 8 also. Now, is it true that you are the one that actually wrote the form?

A Yes.

Q Okay. And do you have an explanation as to why you wrote "substantial battery" in the middle part of the form with three and a half years as the maximum term?

A Other than a mistake, no.

Q And the attachment to the plea form has the misdemeanor battery checklist. Is that a mistake also?

A Yes.

Q And you did submit the form to the Court as part of the plea hearing, correct?

A Yes.

Q And you -- the transcript shows no discussion whatsoever after the initial acknowledgment of the Court that he received the form. Do you recall any discussion about the form during the hearing?

A Sure. I mean there was --

Q Pardon me?

A Sure. There was discussion regarding the plea questionnaire. Do I recall any specific discussion --

Q No. During the hearing with the Court, it had never come up as to what the form represented?

instructions. That's how we evaluate case strategies. It's certainly how you formulate defenses by attacking elements.

If you are inferring or implying that that was done here on the morning of the plea hearing, I'm not certain of that. But there would have been times in the jail when Travis and I discussed jury instructions and the elements therein.

Q The reason I ask is that with the attachment of the plea form having the wrong checklist, is it a fair statement that you likely did not review jury instructions on the date of the hearing, of the plea hearing?

A Yeah, that's a fair statement. I mean I don't know if it's correct or not. I can't tell you -- I can't testify that it's incorrect.

Q Mr. Guttu, in the affidavit that you had a chance to review as part of this motion, he indicated that you had represented to him that the Judge was, quote, "on board" with eight years. Is that something that you would have said?

A No. It's not a phrase I use.

Q Okay. Did you ever make a statement to him that he would be out as early as six and a half years?

A I don't recall making that. I don't know how I could have made that statement. There may have been some discussion

A Yes.
Q He did?
A Yeah. Yeah.
Q How did you resolve that?
A Discussion, argument. The theory of the case was that there was consensual sex. There was prescription medication taken with alcohol which could cause a seizure or a fall. And then there was a plastic, cosmetic surgeon who would testify that the injuries were consistent with a single fall to the face rather than a battery of sorts with fists. And based upon that, that was the theory we were proceeding on.
Q The white polo shirt also was a piece of evidence Mr. Guttu focussed on, correct?
A Yes.
Q He had asked you to request more testing of the shirt; is that accurate?
A Yes.
Q And you did finally request an adjournment of trial to do that, correct?
A I read your pleadings, and I don't have a specific recollection, but the record would speak for that. That sounds familiar, but I can't testify to that.
Q Is there any reason why there was no way to do it just two days before the trial to make the request?

Q I'm going to present to you -- I have the file here in front of me from 9 CF 394.

A Okay.

Q I'm also going to represent that the staff in the clerk's office files documents in a chronological order and a certain pattern in these files. I'm sure -- I wonder if this refreshes your recollection at all. In this file there are the sheets that concern jury selection and then the jurors that were stroke -- struck. Immediately after that comes the Plea Questionnaire and Waiver of Rights Form --

A Okay.

Q -- the document that the attorney is talking about. And immediately -- not -- immediately adjacent to that is the jury instructions for 1225 Aggravated Battery With Intent to Cause Great Bodily Harm, Second-Degree Sexual Assault, and then Second-Degree Reckless Endangering Safety. These are not what -- they are filed as if that they were presented to the Court with the Plea Questionnaire and Waiver of Rights Form. Do you have a recollection that you presented those to the Court with the Plea Questionnaire and Waiver of Rights Form?

A I don't have a recollection if that was done. It could have been done. My strategy in trials -- in trial preparation is to use plea -- I'm sorry -- jury

I think that's just disingenuous on his part at this point.

THE COURT: Do you have any rebuttal?

MR. MORGAN: Only in conjunction to the timing. I mean I wasn't there, but it's still problematic, I think, that his trial attorney would have written up a form by using substantial battery. And there may have been motivation to get this deal through. He may have really thought the eight years was going to work, a little bit careless with the language and the attachments.

But the fact that that was prepared probably within a half hour or so of the hearing started when all this was presented, I don't think you can automatically disregard the form and say that because he heard you that's sufficient. There was some genuine confusion between him and his trial attorney at the time the plea form was prepared. And, unfortunately, again, the plea form was not corrected or commented on at all during the plea hearing. So, we'd ask the Court to take that timing into consideration and not just automatically hold Mr. Guttu to being held to knowing what he was doing based upon hearing you.

THE COURT: All right. I'll deny your motion on these grounds: Clearly the defendant entered his plea knowingly, voluntarily, intelligently. Clearly page 56 shows he was given the elements of the offense, given the

history, and I was very suspicious about this defendant wanting to enter a plea for purposes of just getting an adjournment only to withdraw. And I could see the writing on the wall from this defendant. I knew it was coming.

This defendant was trying to stall further. He knew the victim was here that day. He knew that the case was going to happen. He knew the jurors were going to find him guilty, and he was using whatever effort he could to try to stall the case. That was my perception. Knowing that, I wanted to make sure this plea was an airtight plea, so I took out the SM-32, the standard -- the gold standard plea form.

I was also aware that Mr. Reetz didn't have the jury instructions, and my practice is that when I take a plea in a felony case, always in a serious felony case and always in any case like this, a sexual assault case, I want the jury instruction attached to the plea questionnaire form. So, if you notice, next to the plea questionnaire are, in fact, the jury instructions. And they are not the jury instructions that are provided by the defense counsel or by the State because those come in an eight-and-a-half-by-eleven-inch sheet with no perforation holes. My jury instructions have perforation holes on the side.

My recollection is I informed my staff