Motion to vacate sentence

Highlight pgs 13 - 17 (start at "(b)" on 13, end on 17 Just before "II"

S T A T E O F W I S C O N S I N

C I R C U I T C O U R T R A C I N E C O U N T Y

STATE OF WISCONSIN,

Plaintiff,

- vs - Criminal Case Number: 2008CF001519

MARTELL D. ROGERS,

Defendant.

M O T I O N T O V A C A T E S E N T E N C E

The defendant, (Martell) D. Rogers, **pro se** and with aid of paralegal assistance, hereby move: (1) to vacate the sentence; (2) for referral to the State Public Defender (SPD) for an indigency determination and appointment of counsel; and (3) for an evidentiary hearing, pursuant to Wisconsin Statutes and Annotations (WSA) Section (§) 974.06 (2011-12).[1] Martell claims the right to be released upon the grounds that:

(A) The sentence is imposed in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I §§ 7 and 8 of the Wisconsin Constitution where:

i. The right to the effective assistance of counsel was denied at trial.

ii. The trial court judge was not impartial.

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1 Reference to WSA are to the 2011-12 version unless otherwise indicated.

iii. The Due Process right to be informed of the nature and cause of the accusation was denied.

(B) The trial court was without personal jurisdiction to impose the sentence.

(C) The sentence is subject to collateral attack.

WSA § 974.06 (1).

The record will reveal that Martell is entitled to relief and, therefore, a copy of this Motion to Vacate Sentence, and Exhibits, have been forwarded to:

Michael E. Nieskes, Esquire
Racine County District Attorney
730 Wisconsin Avenue
Racine Wisconsin 53403

who shall file a written response within the time prescribed by the Court. WSA § 974.06 (3) (a).

Submitted with the instant Motion to Vacate Sentence is the Prisoner's Petition for Waiver of Fees/Costs-Affidavit of Indigency, in support of the request for referral to the SPD for an indigency determination and appointment of counsel under WSA Chapter 977. WSA § 974.06 (3) (b).

The record will show that three grounds independently compel the conclusion that the sentence must be vacated:

* The denial of effective assistance of counsel at trial deprived Martell the right to a fair trial: a trial in which the case was not effectively put to the adversarial testing process.

* A person can never be tried before a judge who is not impartial.

* A person cannot be deprived liberty without Due Process notice of the cause and nature of the accusations.

Martell believe that anything less than an Order to vacate the sentence will send a highly visible, detrimental signal that this Court has retreated from United States and Wisconsin State Constitutional guarantees: (a) to the effective assistance of counsel; (b) due process; and (c) to provide a remedy for wrongs. Not only may an order to the contrary be deemed unfair and unconstitutional, there can be no sound reasoning as to why a court of law would ignore its oath to "support the constitution of the United States and the constitution of the state of Wisconsin." SCR 40.15.

A. CASE BACKGROUND

(I) Facts of the Case

Just before Chirstmas, on December 15, 2008, Martell was accused of committing multiple counts of Armed Robbery, as a Party to a Crime, and other criminal offenses. The accusations involved several alleged victims at various locations in the County of Racine, beginning in the summer of June 27, 2006, and concluding on July 31, 2006. Details of the allegations are outlined in a Criminal Complaint attached hereto as Exhibit A.

(II) Procedural History

Because of the nature of some of the claims asserted herein, the specifics as to certain procedural facts are provided for context.

Three weeks after the criminal complaint was filed, a preliminary hearing was held where Martell was bound over for trial on Counts 1, 2 and 3; the remaining counts - 4 through 12 -

were, by request of the State, granted adjourned until January 15, 2009. Preliminary,[2] January 8, 2009. However, on the adjourned date a plea agreement was reached with respect to counts 1, 2 and 3 that included Martell's waiver of a preliminary hearing on the remaining counts. Preliminary, January 15, 2009. That same day the State filed the Information, Exhibit B, and Martell - by his SPD appointed attorney - waived "any formal reading," reserving all jurisdictional objections. Preliminary, id.

A month after the plea agreement, the State indicated its intent to withdraw the plea deal and Martell objected. Status, March 16, 2009. Ultimately, the State did withdraw from the plea agreement and Martell requested that a preliminary hearing on counts 4 through 12 be set for April 30, 2009. Status, April 12, 2009. But this date would be adjourned, Adjourment, April 30, 2009, and on May 6, 2009, the preliminary hearing was held where Martell would be bound over for trial on counts 4, 5, and 7 through 12; count 6 was dismissed. Preliminary, May 6, 2009, p. 18, 26. And two weeks later, the State filed an Amended Information excluding counts 4, 5 and 6. See Exhibit C.

Successor SPD counsel would be appointed on January 19, 2010, and, on August 31, 2010, Martell pleaded guilty to counts 1, 2 and 3 of the amended information - without an offer. Plea Hearing, August 31, 2010, p. 2. A jury trial on the balance of counts was scheduled to commence on November 9, 2010. Id. at 4.

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2 Underlined text indicate the Transcript of Proceedings, as so named.

On September 1, 2010, the State filed a "2nd Amended Criminal Complaint"[3] and a 2nd Amended Information that included count 6 - which had been dismissed at the preliminary hearing on May 6, 2009 - of the original criminal complaint and information. Compare Exhibits D and E with A and B. At a hearing, held seven weeks later, Martell requested the opportunity to file a formal objection to the 2nd Amended Information. Status, October 18, 2010, p. 2. And a month later, the Defendant's Objection to State's Request to Amend the Information was filed. See Exhibit H. Thereafter, a hearing was held and the State's request to amend was granted. Motion, December 13, 2010.

On the eve of trial, the State moved to dismiss count 10 "[o]f the second amended criminal complaint," Trial - Day 1, January 18, 2011, p. 3, and filed a "3rd Amended Information." Exhibit F. Jury trial commenced the very next day and two days later, after both sides had rested the case, the State moved - and was allowed - to amend counts 3 and 4 of the third amended information; to conform to the proof at trial. Trial - Day 4, January 21, 2011, p. 17-23; see Exhibit G. The jury found Martell guilty on each of the counts in the fourth amended information and the court subsequently sentenced him to a total of 44 years - with 27 years of initial confinement and 17 years of extended supervision. Id.; Sentence, April 18, 2011.

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3 The "2nd Amended Criminal Complaint" is actually the first "amended" criminal complaint - the "second" criminal complaint of record.

Notice of Intent to Pursue Post Conviction Relief was filed on May 6, 2011, and the SPD appointed attorney Benbow Cheesman to represent Martell. Notice of appeal was filed on October 14, 2011, and one year later, the Wisconsin Court of Appeals affirmed the Circuit Court Judgment. State v. Martell D. Rogers, 2011AP00 2428-CR. Petition for Wisconsin Supreme Court Review was denied on February 11. 2013. Other relevant facts may appear in appropriate sections throughout this Motion.

(III) Procedural Bar

(a) standard

Because this Motion is filed - after the direct appeal - claiming that the sentence is subject to collateral attack, WSA § 974.06 (1), Wisconsin criminal procedure require an explanation as to why the claims asserted were not raised in a prior post-conviction motion, or the appeal. WSA § 974.06 (4); State v. Escalona-Naranjo, 185 Wis. 2d 168, 185, 517 N.W. 2d 157 (1994). Such explanation must provide a "sufficient reason" for not asserting the claims in an original, supplemental or amended motion. WSA § 974.06 (4); State v. Escalona-Naranjo, 185 Wis. 2d at 181-82.

(b) sufficient reason

The Wisconsin Supreme Court in Escalona-Naranjo, indicated that "sufficient reason" may be shown "for either the failure to allege or to adequately raise the issue in the original, supplemental or amended motion. Id. (footnote omitted). In State ex rel. Rothering v. McCaughtry, the Wisconsin Court of Appeals

noted that there had not been much occasion to explicate the circumstances which may constitute a sufficient reason, but that it may be that "the failure of postconviction counsel to bring a postconviction motion before the trial court . . . constitutes a sufficient reason as to why an issue which could have been raised on direct appeal was not." 205 Wis. 2d 675, 676-68, 682 N.W. 2d 136 (Ct. App. 1996) (paraphrased).

Here, the failure to raise the claims in a postconviction motion before the circuit court is two-fold: **First,** the law does not afford Martell a right to concurrent self-representation and representation by an attorney. **Second,** postconviction counsel's failure to raise the claims in a postconviction motion before the circuit court forfeited Martell's right to raise the claims on direct appeal. These objective extraneous factors may constitute a sufficient reason as for why the claims were not raised in an original, supplemental or amended motion, and the direct appeal.

The SPD appointed attorney Benbow Cheesman to represent Martell at postconviction and on appeal. On October 5, 2011, Martell communicated - in writing - to counsel a number of claims for consideration on the initial review. Exhibit I. The summary analysis of the claims and drafting of the letter was completed with the assistance of (Sean) Butler, D.O.C. #00532721, located at Waupun Correctional Institution, Post Office Box 351, Waupun, Wisconsin 53963-0351. See Exhibit J. Eight days after the mailing of this letter, and without further communication, counsel filed the Notice of Appeal with the circuit court. That same day,

counsel wrote a letter to Martell explaining why he would not be filing any postconviction motions in the circuit court. Exhibit K. Upon receipt of counsel's letter, Martell conferred on the option of filing a **pro se** postconviction motion in the circuit court. See Exhibit J. Martell was advised that the law did not afford an attorney-represented defendant the right to concurrent self-representation. Id. In particular, Martell was given a copy of Robinson v. State, 100 Wis. 2d 152, 301 N.W. 2d 429 (1981) and Moore v. State, 83 Wis. 2d 285, 265 N.W. 2d 540 (1978), in which each indeed confirmed that a defendant has the right to be represented by counsel or to proceed **pro se** but not both. Robinson, 100 Wis. 2d at 164-65; Moore, 83 Wis. 2d at 297-302; see Exhibit J.

The fact that postconviction counsel unilaterally decided not to present a postconviction motion in the circuit court may be viewed, in and of itself, as a sufficient reason instead of in the context of a substantive claim of ineffective assistance of postconviction counsel. First, Rothering merely "suggested that a claim of ineffective assistance of postconviction counsel could be asserted as a sufficient reason . . . " State ex rel. Panama v. Hepp, 2008 WI App 146, ¶ 24, 314 Wis. 2d 112, 758 N.W. 2d 806. And second, Escalona-Naranjo, only indicate that a sufficient reason may be shown "for either the failure to allege or to adequately raise" an issue. 185 Wis. 2d at 181-82. Neither decision hold that a defendant must do more than show that the attorney did in fact fail to "allege or to adequately raise" an

an issue.

Since Escalona-Naranjo, courts have resolved instances involving attorney error which constitute a sufficient reason without consideration of ineffective assistance analysis, See e.g., State v. Robinson, 177 Wis. 2d 46, 53, 501 N.W. 2d 831 (Ct. App. 1993) (holding that where a defendant is represented by the same attorney at trial and on appeal, the inability to assert counsel's own ineffectiveness constitute a sufficient reason); State v. Fortier, 2006 WI App 11, ¶ 28 n. 5, 289 Wis. 2d 179, 709 N.W. 2d 893 ("best understood as concluding that counsel's failure to raise an arguably meritorious issue in a no-merit report is a 'sufficient reason' under Escalona-Naranjo . . . , regardless of whether counsel's failure met both the deficient performance and prejudice standards of an ineffective assistance claim." State ex rel. Panama v. Hepp, id. at ¶ 16).

At any rate, "[i]f counsel's error in commencing the post-conviction process causes deprivation of the entire process, prejudice is presumed." State v. Quackenbush, 2005 WI App 2, ¶ 17, 278 Wis. 2d 611, 692 N.W. 2d 340 (citing Roe v. Flores-Ortega, 528 U.S. 470, 481-86, 145 L. Ed. 2d 985, 120 S. Ct. 1029 (2000) (parenthetical omitted)). To this regard, counsel did not file any postconviction motions and a claim of ineffective assistance of trial counsel not preserved by raising it in a postconviction motion is deemed waived, See State v. Waites, 158 Wis. 2d 376, 392-93, 462 N.W. 2d 206 (1990); see also Page v. Frank, 343 F. 3d 901, 906-08 (7th Cir. 2003).

It is to be recognized that recently in State v. Starks, the Wisconsin Supreme Court held "that Starks improperly cast his **claim of ineffective assistance of appellate counsel as a claim of ineffective assistance of postconviction counsel**" because the attorney, like in this case, "did not file any postconviction motions with the circuit court and instead pursued a direct appeal . . . " 2013 WI 69, ¶¶ 15 and 30, 833 N.W. 2d 146 (emphasis added). Starks is of no consequence here because (1) it at best reaffirms the proper forum for raising a claim of ineffective assistance of appellate counsel, see 2013 WI at ¶ 35 (citing State v. Knight, 168 Wis. 2d 509, 520, 484 N.W. 2d 540 (1992)); whereas (2) Rothering holds that the failure of postconviction counsel to file a postconviction motion may constitute a sufficient reason, see 205 Wis. 2d at 676; and (3) Starks cites Rothering as a controlling authority, see Starks, id.

Thus, because Martell avers only that his postconviction attorney unilaterally decided not "to allege" any postconviction claims; and that but for the law limiting his choice to **pro se** or attorney representation - but not both, he would have filed a postconviction motion himself, these extraneous objective factors constitute the kind of sufficient reason that comports with the important interests of comity, finality, and Justice. Even so, it is but a rendering in futility unless it is shown that the errors asserted demonstrate the constitutional violations claimed. See State v. Ziebart 2003 WI App 258, ¶ 15, 268 Wis.2d 468, 673 N.W. 2d 369.

B. ARGUMENT

I. The Due Process right to be informed of the nature and cause of the accusations was denied, and trial counsel's failure to object constitute ineffective assistance of counsel

Martell's Due Process right to be informed of the nature and cause of the accusations against him were violated based on two independent errors:

(a) Martell was held to answer for infamous crimes on an information by the district attorney.

(b) The failure to establish probable cause at a second preliminary examination deprived the trial court of personal jurisdiction.

And trial counsel's failure to object demonstrates deficiency and prejudice

(a) Martell was held to answer for infamous crimes on an information by the district attorney

After three separate amendments of an original information by Racine County District Attorney, Michael E. Nieskes, Martell was held to answer for multiple felonious counts at a jury trial. Martell's trial attorney, Douglas I Henderson, did not object: that an information of a prosecutor deprived Martell of his United States Constitution Fifth Amendment guarantee not to be "held to answer for a . . . infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law[.]"

The United States Constitution entitles the Citizens of each State all of the privileges and immunities of Citizens in the

several States. See Article IV § 2; Amendment XIV § 1. Of such immunities is the Fifth Amendment right to be tried for a felony on a presentment (information) or indictment of a Grand Jury. This right serves as a vital process, providing for a body of Citizens - not district attorneys or judges - to act as a buffer on prosecutorial power, see United States v. Cotton, 535 U.S. 625, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002), by determining whether there is probable cause to believe that a crime has been committed; and for the protection of Citizens against unfounded criminal prosecutions. See Brazenburg v. Hayes, 408 U.S. 665, 686-87, 30 L. Ed. 2d 722, 92 S. Ct. 746 (1972). This right to have the Grand Jury make the charge on its own judgment is a "substantial right" which cannot be taken away with or without court amendment. Stirone v. United States, 361 U.S. 212, 218-19, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960).

While only few states today continue to provide a charging process that is not in conformity with the Fifth Amendment guarantee, compare WSA Chapters 970 and 971, modernization commands full acknowledgment of the United States Constitution as the "supreme law of the land; and [that] the judges in every state shall be bound thereby, . . . " see Article IV. In fact, many Justices have deemed the Fourteenth Amendment to incorporate all of the first eight amendment, see Gideon v. Wainwright, 372 U.S. 335, 346, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), "because a denial of them would be a denial of due process of law." Malloy v. Hogan, 378 U.S. 1, 15, 84 S. Ct. 1489, 12 L. Ed. 2d (1963)

(citation omitted).

In short, WSA Chapters 970 and 971 do not afford criminal defendants the Grand Jury procedural guarantee of the Fifth Amendment and as such, Martell's liberty is deprived without Due Process of law, and the equal protection of the law. On that basis, Martell's trial attorney was prejudicially deficient for failing to object, because had he done so, the United States Constitution commands Martell immune from prosecution on an information of a prosecutor. A primary reason trial counsel's failure to object is ignominious and reprehensible, also compels the provision of a remedy: The Oath or Affirmation to "support the constitution of the United States . . . " See Wisconsin Constitution Article I § 9; see also SCR 40.15. To be sure, the very protections that the Grand Jury right affords would have at least prevented Martell from being tried for a felony to which there was no probable cause.

(b) The failure to establish probable cause at a second preliminary examination deprived the trial court of personal jurisdiction

As noted above, Count 6 of the original complaint and information was dismissed at the preliminary hearing held on May 6, 2009. See ante at 4. The reason for the dismissal came from the State itself:

> "If it will save time, I don't think I could prove-up Count 6. I would be willing to dismiss that to shorten the hearing up-"

Preliminary, May 6, 2009, p. 18. Accepting this proposition, the Court dismissed Count 6. Id. Two weeks later, the State amended

the Information, excluding (the dismissed) count. See Exhibit C. Four months afterwards, the State filed another complaint, titled as a 2nd Amended Criminal Complaint. Exhibit D. The very same day, the State filed a 2nd Amended Information. Exhibit E. In both of these filings, "the dismissed" Count 6 is re-issued as Count 4. See id. D and E. After obtaining court permission, see Status, October 18, 2010, p. 2, trial counsel filed Martell's objection to the State's request to amend on ground that the information is amended in violation of WSA § 971.29 and Whitaker v. State, 83 Wis. 2d 368, 265 N.W. 2d 575 (1978). See Exhibit H. The State was ultimately allowed to proceed to trial on the re-charged count. See Motion, December 13, 2010.

In a multiple-count complaint, the district attorney is required to establish probable cause as to each transactionally distinct count, State v. Akins, 198 Wis. 2d 495, 506, 544 N.W. 2d 392 (1996), and it is necessary for a circuit court to find probable cause as to each count. State v. Williams, 198 Wis. 2d 479, 484 n. 3, 544 N.W. 2d 400 (1996). In Martell's case, the trial court noted that:

> " . . . At the preliminary hearing, allegations in Counts 4, 5, and 6 were dismissed for lack of probable cause, . . . "

Motion, March 25, 2010, pp. 15 and 22.

When counts are ordered dismissed, facts arising therefrom cannot be the basis for any count in a subsequent information pursuant to WSA Chapter 971, see WSA § 970.03 (10), except that "the district attorney may file another complaint if [she or he]

has or discovers additional evidence." WSA § 970.04. At the same time, when a district attorney issues another complaint for a charge that was dismissed at a previous preliminary examination for lack of probable cause, if challenged, the district attorney "should summarize for the court how, in his or her judgment, the new or unused evidence will support a finding of probable cause. Such a procedure gives the judge an opportunity to assess the reasonableness of the State's effort to pursue a second preliminary examination." State v. Brown, 96 Wis. 2d 258, 267, 291 N.W. 2d 538 (1980).

Through his trial attorney, Martell challenged the re-charged count. Exhibit H. But this challenge erroneously attacked the State's failure "to get leave of the court to amend," id. at 1, asserting that the "doctrine of judicial estoppel" precluded the State from re-issuing the charge in the information. Id. at 2. Counsel failed to challenge the fact that the State bypassed a finding of probable cause at a second preliminary examination, and that there is no evidence summarized or presented to support such a finding for the re-charged count. See Brown, 96 Wis. 2d at 267.

Although WSA § 971.01 (1) "requires the prosecutor to file an information containing only charges based on evidence presented at the preliminary heaing," State v. Burke, 148 Wis. 2d 125, 128-29, 454 N.W. 2d 788 (Ct. App. 1988) (citing Whitaker, 83 Wis. 2d at 373; Lofton v. State, 83 Wis. 2d 472, 482, 266 N.W. 2d 576 (1978); and State v. Hooper, 101 Wis. 2d 517, 534, 305 N.W. 2d 110

(1981)), here, the trial court correctly dismissed the re-charged count because there was no evidence presented at the preliminary hearing to support the charge, Burke, 148 Wis. 2d at 129, and thus the State was required to proceed under WSA § 970.04 before filing the information incorporating that count. See State v. Williams 190 Wis. 2d 1, 7-10, 527 N.W. 2d 338 (Ct. App. 1994) (abrogated on other grounds, 198 Wis. 2d 479, 544 N.W. 2d 400 (1996)).

Obviously this did not happen. The State re-issued the criminal complaint re-charging "the dismissed" Count 6 as Count 4, and then filed an amended information the same day without obtaining a finding of probable cause as to the count at a second preliminary examination. Thus, the trial court was officially without personal jurisdiction as to that count. See Armstrong v. State, 55 Wis. 2d 282, 198 N.W. 2d 357 (1972); State v. Asmus, 2010 WI App 48, 324 Wis. 2d 427, 782 N.W. 2d 435.

Trial counsel's failure to object on this ground constitute ineffective assistance of counsel, cf. State v. Carter, 2002 WI App 55, ¶ 14, 250 Wis. 2d 851, 641 N.W. 2d 517 (holding that the failure to object can be ineffective assistance of counsel), as a matter of law because:

(1) The second amended information incorporated a count that was discharged on preliminary examination for lack of probable cause, in violation of WSA § 970. 03 (10).

(2) The State did not pursue a second preliminary examination as required under WSA § 970.04. See Brown, 96 Wis. 2d at 267; see also State v. Twaite, 110 Wis. 2d 214, 218-19, 327 N.W. 2d 700 (1983).

(3) When a second preliminary examination had not been had the trial court lost personal jurisdiction on the re-charged count. Armstrong, 55 Wis. 2d 282; Asmus, 2010 WI App 48.

(4) Failure to object that probable cause was not found before trial commenced is deemed a waiver of the claim under WSA § 971.31. See Bailey v. State, 65 Wis. 2d 331, 345, 222 N.W. 2d 871 (1974).

Therefore, it is reasonable to conclude that but for trial counsel's deficient performance, Martell would not have been convicted of the re-charged count because even the State did not "think [it] could prove-up" that count, and there was no evidence that support a finding of probable cause. See Preliminary, May 6, 2009, p. 18; State v. Street, 202 Wis. 2d 533, 546, 551 N.W. 2d 830 (Ct. App. 1996) (reasoning that an "attorney's failure to object when the trial court did not satisfy this requirement was prejudicial . . . , [because] there was not probable cause to believe that" the felony was committed); and SCR 20:3.8 (a) ("A prosecutor in a criminal case or a proceeding that could result in deprivation of liberty shall not prosecute a charge that the prosecutor knows is not supported by probable cause.").

II. The trial judge's vouching for the credibility of a State witness and allowing the State's knowing introduction of perjured testimony is objective judicial bias constituting structural defect trial counsel should have objected to

(a) vouching

On the second day of the trial,, the State called (Anthony) T. Scacco - a minor - to testify. Jury Trial - Day 2, January 19, 2011, p. 125. Before testifying, the trial court judge initiated a colloquy - in front of the jury - to ascertain Anthony's

understanding as to what it meant to tell the truth. Id. When defense counsel noted that Anthony "gave nonverbal responses," the court replied:

> "We'll make him talk but I'm -- I'm sure that he tells the truth in his answers."

Id. Trial counsel did not object.

(b) allowing the State's knowing introduction of perjured testimony

The next day, the State called (Rachel) Ritacco to testify. Jury Trial - Day 3, January 20, 2011, p. 43. But because the testimony would implicate Rachel's Fifth Amendment privileges, the State requested "to make a record advising her," and to clarify the court's order limiting evidence to "only three incidents." Id., 45-46. Thereupon, outside of the jury's presence, the court commenced the advisement and clarification colloquy. Id. During the colloquy, the prosecutor "would, on behalf of the State, [offer Rachel] use immunity for the purpose of her testimony in this trial only." Id. at 48-49. The court expounded that:

> "That means the State is waiving and giving up their right to bring any charges or prosecute you in any way on the three incidents that we've just gone over."

Id. at 49. Rachel would accept the offer, id. at 50, and testify, in part, as follows:

PROSECUTOR: "Okay. Are you receiving any kind of consideration for testifying today?"

RACHEL: "No."

PROSECUTOR: "A reduction in sentence?"

RACHEL: "No."

PROSECUTOR: "Or reduction in charges?"

RACHEL: "No."

Id. at 82-83. Trial counsel did not object.

The Due Process Clause of the Fourteenth Amendment guarantee criminal defendants a "fair trial in a fair tribunal." Withrow v. Larkin, 421 U.S. 35, 46, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975). This entails a trial "before a judge with no actual bias against the defendant." Bracy v. Gramley, 520 U.S. 899, 905, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997). Judges are generally presumed to be fair and impartial. See State v. Gudgeon, 2006 WI App 143, ¶ 20, 295 Wis. 2d 189, 720 N.W. 2d 114. This presumption may be rebutted by demonstrating that judicial bias has occurred either subjectively or objectively. State v. Goodson, 2009 WI App 107, ¶ 8, 320 Wis. 2d 166, 771 N.W. 2d 385 (citation omitted).

Martell asserts that objective bias infected his trial in two ways. First, the record show that the trial court vouched that Anthony "tells the truth in his answers." Vouching for the credibility of a witness is, in and of itself, improper. State v. Romero, 147 Wis. 2d 264, 278, 432 N.W. 2d 899 (1988) (vouching for a witness' credibility outside of the evidence is improper because it usurp's the jury's role to determine the truth). Not only did the trial court's commentary - in front of the jury - lend the prestige of the court upon the testimony Anthony would give, it "essentially constituted unsworn testimony" against Martell, and provided legal conclusions "that should otherwise rest solely within the province of the jury." State v. Jorgensen,

2008 WI 60, ¶ 36, 310 Wis. 2d 138, 754 N.W. 2d 77. Thus "the court was actually bias because the record demonstrate that the judge in fact made up his mind" that whatever Anthony would testify to will be the truth, assuring that the jury should believe every word. Goodson, 2009 WI App at ¶ 15.

Second, the trial court allowing the State to knowingly introduce Rachel's perjured testimony "created an appearance of partiality" and substantial unfairness to Martell. Goodson, at ¶ 11. Where the State obtains a conviction by the knowing use of false testimony, due process is violated. See Napue v. Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. ed. 2d 1217 (1959); United States v. Bagley, 473 U.S. 667, 679 n. 8, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1984) (discussing the evolution of the rule in Napue). Not only do the record show that Rachel in fact testified falsely about receiving "use immunity" in exchange for her testimony, it also makes clear that the State, defense counsel, and the trial court knew Rachel was flat-out lying about this consideration and idly observe the perjury unfold. Additionally, it is without question that Rachel was the only person who identified Martell as a perpetrator in the several crimes charged.

In Wisconsin, a trial judge is required to be faithful to the law, maintain competence in it, and "require similar conduct of lawyers . . . and others subject to the judge's direction and control." SCR 60.04 (1) (b) and (d). Allowing the State to knowingly introduce perjured testimony - combined

with vouching for a State witness - "indicating that the judge was predisposed to a particular outcome is material to a judicial bias claim." Gudgeon, 2006 WI App at ¶ 19. The court should have intervened to clarify the perjured testimony, see SCR 60.04 (1) (d), so as to avoid even the appearance of bias. See In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 2d 942 (1955). Here, that simply did not happen.

Judicial bias has been deemed to constitute the kind of structural defect upon which the harmless error analysis is irrelevant. See Edwards v. Balisok, 520 U.S. 641, 647, 117 S. Ct. 1584, 137 L. Ed. 2d 906 (1997); Gudgeon, at ¶ 10 (citing Franklin v. McCaughtry, 398 F. 3d 955, 961 (7th Cir. 2005)). In fact, it has been reasoned "that the deprivation of an impartial and unbiased tribunal transcends procedural mechanisms affecting collateral attack. Gudgeon, at ¶ 19. But, standing authority requires timely objection to alleged judicial misconduct. State v. Caprue, 2004 WI 111, ¶ 36, 274 Wis. 2d 656, 683 N.W. 2d 31 (citing State v. Wolter, 85 Wis. 2d 353, 373, 270 N.W. 2d 230 (Ct. App. 1978)).

Thus trial counsel's failure to object and seek a mistrial can constitute ineffective assistance, cf. State v. Carter, 2002 WI App 55, ¶ 14, 250 Wis. 2d 851, 641 N.W. 2d 517 (failure to object can be ineffective assistance of counsel), because the failure to timely object to judicial misconduct constitutes a waiver. Caprue, 2004 WI App at ¶ 36 (Wolter, 85 Wis. 2d at 373). And but for counsel's failure to object here, the claims

of judicial bias would not have been waived. Because of the waiver, however, the tinge of judicial bias and prosecutorial misconduct deprived Martell fundamental due process protections. And the only effective remedy upon objection would have been a mistrial - eliminating the need for appeal. But even if the objection had been overruled, the record would have adequately facilitated direct appellate review. Caprue, at ¶ 37.

C. CUMULATIVE EFFECT

"The fundamental purpose of the Sixth Amendment's guarantee of effective assistance of counsel is not to assess the overall performance of counsel but to ensure that the adversarial process functions fairly and reliably." State v. Thiel, 2003 WI 111, ¶ 62, 264 Wis. 2d 571, 665 N.W. 2d 305. Thus it is not necessary to evaluate "the prejudice of each deficient act or omission in isolation" when the cumulative effect of counsel's errors undermines confidence in the outcome of the trial. Thiel, 2003 WI at ¶ 63.

First, counsel's failure to object to the re-charging of a count dismissed for lack of probable cause - that even the State did not think it could prove - allowed Martell to be convicted and sentenced for a crime that the court did not have personal jurisdiction of. **Second,** when counsel did not challenge the trial of his client on the information of a prosecutor, Martell was deprived his Fifth Amendment right to be tried on a presentment or indictment of a Grand Jury, guaranteed by the Due Process Clause of the Fourteenth Amendment. **Third,** counsel's

failure to object to: (a) the trial court's vouching for the credibility of a State witness in front of the jury; (b) the States' knowing introduction of perjured testimony; and (c) the court's allowing of the knowing introduction of perjured testimony, personify the egregious violation of fundamental due process that counsel was willing to allow in ensuring that the adversarial process functioned unfairly and without reliability. Thiel, at ¶ 62.

D. CONCLUSION

In any event, it may be necessary "to engage in fact-finding to rule on the sufficiency of the reason" why these claims were not raised in a prior postconviction motion or the direct appeal, State v. Balliete, 2011 WI 79, ¶ 37, 336 Wis. 2d 358, 805 N.W. 2d 334 (citing State v. Allen, 2010 WI 89, 328 Wis. 2d 1, 31, 786 N.W. 2d 124), and "to preserve the testimony of trial counsel." Balliette, 2011 WI at ¶ 31 (quoting State v. Machner, 92 Wis. 2d 797, 285 N.W. 2d 905 (Ct. App. 1979)). And therefore, an evidentiary hearing is required to determine the issues and make findings of fact and conclusions of law. WSA § 974.06 (3) (c) & (d).

E. OATH AND NOTARY

STATE OF WISCONSIN)
) ss
COUNTY OF DODGE)

Martell D. Rogers, Department of Corrections # 00413244, being first duly sworn under oath, states that he has subscribed

his name to this Motion to Vacate Sentence, and further states that the information therein is true and correct to the best of his knowledge and belief.

Martell D. Rogers, 413244

Waupun Correctional Institution
Post Office Box 351
Waupun Wisconsin 53963-0351

Pro se.

Subscribed and sworn to before me this 9, day of January, 2014.

My commission:
21June 2015

Notary Official