State of Wisconsin: **Circuit Court:** **Milwaukee County**

State of Wisconsin,

Plaintiff,

v. Case No. 2009CF001131

Matthew Laughrin,

Defendant.

Defendant's Postconviction Motion Pursuant to Sec. 809.30, Stats.

Now comes the above-named defendant, by his attorney, Jeffrey W. Jensen, and hereby moves the court as follows:

1. To permit the defendant to withdraw his guilty plea on the grounds that he received ineffective assistance of counsel at both the time of the guilty plea, and at the time he originally moved to withdraw the plea (prior to sentencing).

As grounds, the defendant alleges and shows to the court as follows:

2. On January 28, 2010, pursuant to a plea agreement, the defendant, Matthew Laughrin ("Laughrin"), entered guilty pleas to second degree reckless homicide for causing the death of M.K., possession of marijuana with intent to deliver (second or subsequent offense), and delivery of suboxone.

3. Prior to sentencing, though, Laughrin filed a motion to withdraw his guilty plea on the grounds of newly discovered evidence. In sum, the motion alleged that after Laughrin entered his guilty pleas, defense counsel consulted with an expert, Dr. Junig, who offered the opinion that the cause of death alleged by the State-- a combination of the drugs Suboxone and Clonopin-- was extremely rare. Consequently, Laughrin

would not have been aware of any danger of death or great bodily harm created by giving Suboxone to M.K. Specifically, the motion alleged:

> Dr. Junig has concluded, and would testify, that M.K.'s death occurred at or near the time M.K. ingested the Buprenorphine (Suboxone). He also opines, as an expert scientist and a former addict, that death at or near the time of ingestion of Buprenorphine is known to be extremely rare, and thus is not expected or reasonably predictable by either medical professionals or experienced drug users.

(motion to withdraw plea). Additionally, Dr. Junig's report, which was filed with the court, offers the following concerning the cause of death:

> There is no limit to the respiratory depressant effects of heroin and oxycodone; that is, if the does of either medication is progressively increased, at some point a level will be reached where the medication causes death. On the other hand, Suboxone and buprenorphine, because of the ceiling effect, do not generally cause death even when taken at high doses, even in people not tolerant to opioids.
>
> * * *
>
> In order to suffer death from buprenorphine, at least two factors must be present. First, the person must not be tolerant to opioids, namely does not take opioids on a regular basis. Second, the person must take additional respiratory depressants that the person is not tolerant to. The most commonly implicated medications for overdose due to buprenorphine would be members of a class of drugs called benzodiazepines, either clonazepam, brand name Klonopin, lorazepam, brand Ativan, or alprazolam, brand name Xanax.
>
> The tragic death of M.K. required a confluence of several unfortunate events. She had other, non-opioid respiratory depressants in her system that she was not tolerant to, namely clonazapam. She then was given/took buprenorphine, which because she was not tolerant to opioids caused significant respiratory depression. The combination of respiratory depression from the clonazepam and from the buprenorphine appears to have caused her death.

(Junig report p. 7-8)

4. The motion specifically alleged, though, that defense counsel was *not negligent* in failing to discover this evidence prior to the entry of Laughrin's guilty pleas.

5. The court conducted a hearing into the motion to withdraw the guilty pleas on June 1, 2010. At the motion hearing, Laughrin's attorney-- contrary to the allegation in the motion that trial counsel was not negligent-- told the court that after speaking to Dr. Junig, she called the prosecutor and said, "I may have screwed up here" and

then related to the prosecutor Dr. Junig's opinion. (Motion transcript p. 10) Moreover, counsel told the court:

> This has nothing to do with my client's character.
>
> It has to do with the fact that his lawyer should have researched the impact of a partial agonist, and instead I assumed that what I knew about heroin, that what I knew about OxyContin, what I knew about methadone also held true for buprenorphine (Suboxone). It doesn't.

(Motion transcript p. 11)

Remarkably, though, Laughrin's motion to withdraw his plea *did not* allege ineffective assistance of counsel as an alternative basis for permitting him to withdraw his plea.

6. In denying the motion the court accepted Dr. Junig's testimony as being true. (Motion transcript p. 39), but then stated:

> All of the things that Dr. Junig is basing his opinion on *were known to the defense at the time of the plea*, you know, and even some of the things that Miss. Shellow said everybody know that admits aren't truth, you know [sic].
>
> * * *
>
> It's a new interpretation of evidence, and those interpretations as I said before can be found at all different times by all different people, and I have no doubt if Miss Shellow had more time she could find another expert . .

(Motion transcript p. 44, 45).

7. The court then conducted a sentencing hearing on July 16, 2010. Dr. Jeffrey Junig testified at the sentencing hearing. With regard to Laughrin's knowledge of the risk of his behavior in giving M.K. one pill of Suboxone, Dr. Junig testified that in approximately 1200 overdose deaths in Milwaukee over the past six years, in only two cases was Suboxone listed as one of the drugs that was taken. (Sentencing transcript p. 84) Dr. Junig also described the fact that Suboxone has a "ceiling effect", which means that once the drug reaches a certain level in the body, additional doses will not create an additional effect. This, according to Dr. Junig makes Suboxone a very safe drug. (Sentencing transcript p. 74)

8. Laughrin's trial counsel was ineffective in the following respects: (1) prior to the entry of the guilty plea, defense counsel failed to adequately investigate the

properties of Suboxone, the risk of death or great bodily in administering Suboxone in conjunction with Klonopin, and whether or not Suboxone was a substantial factor in causing MK's death; and, (2) once trial counsel did conduct an investigation, she knew or should have known that this created a conflict of interest because trial counsel was ineffective in investigating the defense, but counsel failed to withdraw as Laughrin's trial counsel. Consequently, even though trial counsel told the prosecutor and the trial judge that she may have "screwed up", ineffective assistance of counsel was not alleged as a basis for withdrawing Laughrin's guilty pleas at a time when the standard for withdrawing the plea was much lower (i.e. prior to sentencing).

Wherefore, it is respectfully requested that the court permit the defendant to withdraw his guilty plea.

This motion is further based upon the attached Memorandum of Law.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2011

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State of Wisconsin: **Circuit Court:** **Milwaukee County**

State of Wisconsin,

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Matthew Laughrin,

Defendant.

Memorandum of Law in Support of Defendant's Postconviction Motion Pursuant to Sec. 809.30, Stats.

Argument

I. Laughrin's attorney was ineffective at the plea hearing for failing to properly investigate the cause of death.

Where, as here, a defendant moves to withdraw a guilty plea after sentencing, he has the burden of establishing, by clear and convincing evidence, that plea withdrawal is necessary to correct a manifest injustice. *State v. Thomas*, 2000 WI 13, P16, 232 Wis. 2d 714, 605 N.W.2d 836. The manifest injustice test is met if the defendant was denied effective assistance of counsel. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). The two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), applies to challenges to guilty pleas alleging ineffective assistance of counsel. *Bentley*, 201 Wis. 2d at 311-12. Under that test, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. *Strickland*, 466 U.S. at 687. To prove deficient performance,

the defendant must show that counsel's performance fell below an objective standard of reasonableness. *Hill v. Lockhart*, 474 U.S. 52, 57, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). The prejudice inquiry focuses on whether counsel's performance affected the outcome of the plea process. *Id*. at 59. To satisfy the prejudice prong, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Bentley*, 201 Wis. 2d at 312.

Here, Laughrin's claim is that, prior to advising him to enter a guilty plea, trial counsel failed to adequately investigate the properties of Suboxone insofar as those properties relate to the risk of death or great bodily harm created by giving M.K. one pill of Suboxone; and, further, whether Laughrin was aware of this risk.

A defendant who alleges a failure to investigate on the part of his or her counsel must allege with specificity what the investigation would have revealed, and how it would have altered the outcome of the case. *See* *State v. Flynn,* 190 Wis. 2d 31, 48, 527 N.W.2d 343, 349-50 (Ct. App. 1994).

In order to prove second degree reckless homicide, the State must prove that:

1. The defendant caused the death of M.K..

"Cause" means that the defendant's act was a substantial factor in producing the death.

2. The defendant caused the death by criminally reckless conduct.

"Criminally reckless conduct" means:

- the conduct created a risk of death or great bodily harm to another person; and
- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant was aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.

Wis. JI-Criminal 1060.

The minimum level of effective assistance of counsel, prior to entering a guilty plea to a charge of reckless homicide, is for counsel to make certain that the State possesses sufficient evidence to prove that the defendant's conduct was a substantial factor in causing death; and, more importantly, that the defendant's conduct created a

risk of death or great bodily harm and that the defendant was aware of the fact that his conduct created such a risk.

In this case, defense counsel-- by her own admission-- did not conduct an investigation into the properties of Suboxone until after Laughrin had already entered his guilty plea. Instead, she relied upon what she thought she knew about the drug. Trial counsel told the court, “It has to do with the fact that his lawyer should have researched the impact of a partial agonist, and instead I assumed that what I knew about heroin, that what I knew about OxyContin, what I knew about methadone also held true for buprenorphine (Suboxone). It doesn’t.” Thus, trial counsel was ineffective.

Trial counsel’s ineffectiveness was prejudicial, as well. Once trial counsel conducted the investigation, it was learned that, due to the “ceiling effect” of the drug, death caused by Suboxone is exceedingly rare. This fact has a profound impact that Laughrin’s defense. Firstly, it calls into question whether Laughrin’s conduct in giving M.K. one Suboxone pill, in fact, created a risk of death or great bodily harm that was unreasonable and substantial. Secondly, it calls into the question whether Laughrin was aware of any such risk.

The record is clear that, had Laughrin known of this evidence, he would not have entered a guilty plea. We know this because, upon learning of the evidence, Laughrin in fact moved to withdraw his guilty plea.

Therefore, trial counsel was ineffective, and counsel’s ineffectiveness affected Laughrin’s decision to enter a plea. Thus, a manifest injustice has occurred in that Laughrin was denied his Sixth Amendment right to effective assitance of counsel. For this reason, the court must permit Laughrin to withdraw his guilty plea.

II. Laughrin received ineffective assistance of counsel at the hearing on hi motion to withdraw his guilty plea because, knowing that there was an arguable claim of ineffective assistance of counsel, Laughrin's trial counsel did not withdraw.

Although trial counsel told the trial court that the failure to properly investigate the properties of Suboxone was her fault, ineffective assistance of counsel was not raised as a basis for permitting Laughrin to withdraw his guilty pleas. This is a signifcant failure on the part of trial counsel.

Firstly, a motion to withdraw a plea based on newly discovered evidence must be denied where the evidence should have been discovered by the defendant-- or by his attorney-- prior to the entry of the plea. Otherwise, the evidence is not truly "newly discovered." This is the precise basis upon which the trial court denied Laughrin's motion to withdraw his plea.

It stands to reason, then, that if the evidence should have been discovered prior to the plea, it was defense counsel's fault for not discovering it. In other words, as explained above, it is at least arguable that Laughrin received ineffective assistance of counsel in the entry of the guilty plea. Inexplicably, that basis was not raised in Laughrin's original motion to withdraw his plea.

The most reasonable explanation for this omission is that defense counsel's ability to zealously represent Laughrin was impaired by her own self-interest in avoiding a finding of ineffective assistance of counsel.

The failure to raise the issue of ineffective assistance of counsel at the original motion to withdraw the guilty plea created a procedural impediment for Laughrin. At the time Laughrin's original motion was made, because it was made before sentencing, the court was obliged to "freely allow [the] defendant to withdraw his plea . . . for any fair and just reason, unless the prosecution [would] be substantially prejudiced." *State v. Bollig*, 2000 WI 6, P28, 232 Wis. 2d 561, 578, 605 N.W.2d 199.

Now, though, as mentioned in the previous section, because Laughrin has been sentenced, it is required that he show that a "manifest injustice" will occur unless he is permitted to withdraw his guilty plea. This is a much higher standard.

Laughrin claims that he was afforded ineffective assistance of counsel at his

original motion to withdraw his guilty plea. The theory is that defense counsel was impaired by her own self-interest from alleging ineffective assistance of counsel. Where ineffective assistance of counsel is based upon a conflict of interest, the defendant "must establish by clear and convincing evidence that an actual conflict of interest existed." *State v. Kaye,* 106 Wis.2d 1, 8, 315 N.W.2d 337, 340 (1982) (citation omitted) *(overruled in part on other grounds, State v. Miller,* 160 Wis.2d 646, 660-61, 467 N.W.2d 118, 123 (1991)). An "'actual' conflict of interest" exists "only when the lawyer's advocacy is somehow adversely affected by . . . competing loyalties." *State v. Foster,* 152 Wis.2d 386, 393, 448 N.W.2d 298, 301 (Ct. App. 1989). The attorney must do something that a reasonably competent attorney not burdened by a conflict would not have done or failed to do something that a reasonably competent attorney not burdened by a conflict would have done to effectively represent his client. *See State v. Thiel*, 2003 WI 111, P19, 264 Wis. 2d 571, 665 N.W.2d 305; *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990); *State v. Johnson*, 133 Wis. 2d 207, 217, 395 N.W.2d 176 (1986).

However, unlike the usual ineffective assistance claim where a defendant has a dual burden to prove both that his attorney's performance was deficient and that the deficient performance prejudiced his defense, *State v. Allen*, 2004 WI 106, P26, 274 Wis. 2d 568, 682 N.W.2d 433, a defendant who claims that his attorney was ineffective because of a conflict of interest need only meet his burden on the performance part of the test, *State v. Love*, 227 Wis. 2d 60, 68, 594 N.W.2d 806 (1999)

S.C.R. 20:1.7, recognizes that a conflict of interest exists where, “[t}here is a significant risk that the representation . . . . will be materially limited by the . . . . personal

interest of the lawyer.” On this point, the case notes provide that, “Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer’s . . . . interests.” *Case Notes* S.C.R. 20:1.7 “For example, if the probity of a lawyer’s own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.” *Ibid.*

One important reason, among many, that a conflict of interest is created whenever there is an argualbe claim of ineffective assistance of counsel is that trial counsel simply cannot objectively evaluate whether or not she was ineffective (i.e. she cannot give "detached" advice). One illustration of this principle is found in Wis. Admin. Code, sec. SPD 2.11, which provides:

> (2) The state public defender shall assign to independent private counsel any case in which a staff attorney of thes tate public defender's office provided trial representation and it is arguable that the client was not afforded effective representation.

Another important reason is that, where a claim of ineffective assistance of counsel is made, the defendant's attorney-client privilege is waived to the extent that counsel must answer questions relevant to the charge of ineffective assistance. Section 905.03(4)(c), Stats.

Given the profound impact that Dr. Junig's testimony has on the defense of this case, it is, at a minimum, arguable that trial counsel was ineffective. Thus, trial counsel had a conflict of interest at the hearing on the motion to withdraw Laughrin's guilty plea.

If the court finds-- as it certainly should-- that trial counsel was ineffective at the motion to withdraw Laughrin's guilty plea, then the remedy is for the court to apply the lower "fair and just reason" standard to this postconviction motion to withdraw the guilty plea.

Conclusion

For these reasons, it is respectfully requested that the court permit Laughrin to withdraw his guilty pleas.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2011

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