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Case No. 2018AP1694-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

VAYLAN G. MORRIS,

Defendant-Appellant.

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ON APPEAL FROM A JUDGMENT OF CONVICTION AND  
POSTCONVICTION ORDER, BOTH ENTERED IN  
MILWAUKEE COUNTY CIRCUIT COURT, THE  
HONORABLE JANET PROTASIEWICZ, PRESIDING

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**PLAINTIFF-RESPONDENT'S BRIEF**

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## ISSUES PRESENTED FOR REVIEW

1. Vaylan G. Morris claims a violation of his due process right to a sentence based on accurate information. Has he forfeited his right to raise this claim by not objecting to the presentation of the information at sentencing?

Not answered by the circuit court.

This Court should answer “yes.”

2. Alternatively, has Morris proven by clear and convincing evidence that the circuit court relied on materially inaccurate information at sentencing, such that it violated his right to due process?

The circuit court answered “no.”

This Court should answer “no.”

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument would add little to the briefs. This Court’s opinion is unlikely to satisfy the statutory standards for publication. Wis. Stat. § (Rule) 809.23.

## INTRODUCTION

Morris’s behavior graphically and tragically demonstrated criminal recklessness. His decision to smoke “K2” (synthetic marijuana) to the point of stupor while responsible for the welfare and safety of his 55-day-old infant, Olive<sup>1</sup>, exposed her to serious dangers.

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<sup>1</sup> A gender-specific pseudonym. Morris refers to her as “O.M.” in his brief. Morris also refers to her as a “nearly three-month old baby.” (Morris’s Br. 1–2.) He overstates her age. Olive was born on October 1, 2015. (R. 1:1.) She died on November 25, 2015. (*Id.*) That is a 55-day duration, or 1 month and 25 days.

Olive's ingestion of synthetic marijuana was one such danger.<sup>2</sup> Her placement in a hazardous, potentially fatal sleeping environment was another.<sup>3</sup> Both occurred here, and she died.

Morris pleaded guilty to second-degree recklessly endangering safety.

The prosecutor told the circuit court at sentencing that Olive had synthetic marijuana in her body at the time of her death, but the State did not know whether it could have caused her death. That was partially erroneous. The medical examiner had determined that, while Olive did have synthetic marijuana in her body, it did not cause her death because it had not reached her bloodstream and nervous system.

Morris argues that the error resulted in a due process violation because the prosecutor's information was materially false, and the circuit court actually relied on it in imposing sentence. He claims he is entitled to resentencing. He is not, for at least four reasons.

First, Morris has forfeited his right to raise this due process claim by failing to object to the presentation of the inaccurate information at sentencing.

Second, the information was not materially false.

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<sup>2</sup> For information regarding health risks related to use of synthetic marijuana, *see, e.g.*, Wisconsin Department of Health Services, *Synthetic Cannabinoids (K2, Spice)*, located at <https://www.dhs.wisconsin.gov/chemical/synthetic-cannabinoids.htm> (last viewed Jan. 15, 2019).

<sup>3</sup> For information regarding hazardous, potentially fatal sleeping environments for infants, *see, e.g.*, Kim A. Collins, M.D., *Death by Overlaying and Wedging: A 15-Year Retrospective Study*, *The American Journal of Forensic Medicine and Pathology*, 22(2): 155–59 (2001) (hereafter, *Death by Overlaying*).

Third, the circuit court did not actually rely on it in imposing sentence.

And fourth, even if error occurred, it was harmless. Had the error not occurred, the circuit court would have imposed the same sentence.

Resentencing is not warranted.

### **RELEVANT STATUTE**

Under Wis. Stat. § 941.30(2), the crime of second-degree recklessly endangering safety has two elements. First, the defendant must endanger the safety of another human being. Second, the defendant must endanger the safety of another by criminally reckless conduct. Wis. JI–Criminal 1347 (2015). The second element requires that the defendant’s conduct created an unreasonable and substantial risk of death or great bodily harm to another, and the defendant was aware that his conduct created such a risk. *See id.* (defining criminally reckless conduct).

The completed crime of second-degree recklessly endangering safety does not require the victim’s death. It is the risk posed by the defendant’s conduct toward the victim that matters.

### **STATEMENT OF THE CASE**

#### **The nature of the case.**

Morris appeals the judgment of conviction entered on his guilty plea to second-degree recklessly endangering safety as a party to the crime. (R. 1; 4; 7; 13; 47.) He also appeals the order denying his postconviction motion for resentencing. (R. 29; 30; 35; 39; 40; 41; 48.)

#### **The relevant factual background.**

The State limits its discussion to those facts relevant to the issue on appeal. Some come from the complaint. (R.

1.) At the plea hearing, Morris agreed that the circuit court could rely upon the facts in the complaint to form the factual basis for his plea. (R. 47:18.) He also testified under oath that the facts contained in the complaint were true. (*Id.* at 19.)

Morris's conviction and sentence stemmed from his conduct on November 25, 2015. After repeatedly smoking synthetic marijuana, Morris and Olive's mother, Monica Gonzalez, went to sleep in a bed in an upstairs bedroom, with Olive placed between them. (R. 1:2–3.)

Gonzalez later awakened to find Olive dead or dying. Attempts to resuscitate her failed. She died at the scene. (*Id.* at 1–3.)

Morris told police he recalled falling asleep in the bed facing Olive, who was propped up on a pillow. (*Id.* at 4.) Morris awoke facing the opposite direction, with Olive no longer on the pillow. (*Id.*) The pillow was partially over Olive's face. (*Id.*) Morris said he believed he rolled over onto Olive while they co-slept. (*Id.*)

Morris admitted having smoked 4 to 5 "joints" of synthetic marijuana, and said he was "so fucked up" he fell on the basement floor before going into the upstairs bedroom to sleep. (*Id.* at 3.) He was so impaired, police had difficulty rousing him from sleep when they arrived. (*Id.* at 2.) Both Morris and Gonzalez appeared to be in trances. (*Id.*)

Police discovered packages of synthetic marijuana in the bedroom. (*Id.* at 2.) White fluid in a baby bottle found in the bedroom also tested positive for synthetic marijuana. (*Id.* at 2, 4.)

Forensic pathologist Brian Linert examined Olive post-mortem and conducted toxicology testing. (*Id.* at 4.) Samples of Olive's body fluids tested positive for synthetic



marijuana. (*Id.*) However, Dr. Linert could not determine the cause and manner of her death. (*Id.*)

The State charged Morris with second-degree recklessly endangering safety, as a party to a crime. (R. 4.) He pleaded guilty to that charge. (R. 47.)

### **The sentencing.**

The prosecutor began by restating the essential facts of the case—after repeatedly smoking synthetic marijuana, Morris and Gonzalez went to sleep with Olive in bed between them. (R. 48:4–8.) She died as they slept. (*Id.* at 7.) Morris told police he may have laid on top of Olive while he slept. (*Id.* at 9.)

Post-mortem analysis revealed synthetic marijuana in Olive’s feeding bottle and in her bodily fluids. (*Id.* at 9–10.) The prosecutor did not know whether Olive’s formula had accidentally been mixed with water containing synthetic marijuana, or whether Morris and Gonzalez intentionally gave the marijuana to her. (*Id.* at 10–11.)

The inaccuracy in this case lies in what the prosecutor told the circuit court about what role the synthetic marijuana in Olive’s body could have played in her death.

The prosecutor told the court that errors in collecting Olive’s bodily fluids prevented the medical examiner from determining whether the marijuana caused her death:

He indicated that there was some problems collecting the bodily fluids from [Olive’s] body and that there may have been some contamination or mixing of the fluids, the blood, and the stomach contents. So we know that this child had three different types of synthetic marijuana in her system, but we don’t know exactly how far the synthetic marijuana made it inside her system in order to say that that was the ultimate cause of her collapse and death.

(*Id.* at 11.)

Morris's trial defense counsel did not object to the prosecutor's argument. When, imposing sentence, the circuit court began by focusing its attention on Morris's previous antisocial behavior:

Mr. Morris, your criminal behavior, your disregard for following any of the laws of this society, your poor performance on probation, your poor parenting, to put it kindly, and again, breaking the laws -- and you're on probation while this happened, while you're smoking this synthetic marijuana -- has really all come to roost and reached a pinnacle tragedy of devastating proportions.

(*Id.* at 21–22.)

The circuit court then focused attention squarely on Morris's criminal recklessness: "It's not a tragedy. It's a horrible, horrible, completely preventable situation. [Olive] would be alive and well today if you and her mother had not engaged in the reckless criminal conduct the two of you chose to engage in. It's heartbreaking. She wasn't even 2 months old. The two people she counts on the most in her life, you and her mother, let her down, to put it mildly. I don't know how parenting gets any worse than this. (*Id.* at 21–22.) The court stressed Morris's "reckless abandon and flagrant disregard for any rules of this society." (*Id.* at 23.)

The circuit court asked and answered a rhetorical question: "And then in this case, Mr. Morris, how does it possibly get more reckless and more serious than this? According to Monica, you were, quote, so fucked up you fell down in the basement floor. Monica -- you and Monica decide to smoke a second K2 joint after going upstairs with [Olive]. Then you went back in the basement but you leave her in her car seat upstairs. I don't know how parenting gets any worse than this." (*Id.* at 24–25.)

Referring to Morris's statement to police that he believed he rolled over onto Olive, the circuit court continued:

She's propped up on a pillow and you fell asleep, if you can even remember what was going on. And you woke up, she was no longer on the pillow, had slid down near your back. The pillow was partially over her face. You believed you rolled over onto her. And then we've got all this synthetic marijuana in her system. So not only could you have suffocated her -- you certainly had been negligent enough. And I hope it was negligence. I hope the two of you weren't putting anything in her bottle to make her sleep soundly so she wouldn't bother you. But that certainly comes to mind.

(*Id.* at 25.)

The circuit court did not specifically refer to the prosecutor's statement regarding the State's ability to determine whether ingesting synthetic marijuana caused Olive's death. The court did not make any finding as to which act it believed caused Olive's death. Rather, it expressed its hope that, if Morris fathered other children after he served his sentence, he would think about "how you're going to parent them in a way where you're actually raising healthy children who aren't around drug-addicted parents and who are going to appropriately care for them." (*Id.* at 26.)

The circuit court imposed a nine-year prison sentence, with four years of initial confinement and five years of extended supervision for what, in its view, was a "completely preventable tragedy." (*Id.* at 27.)

### **Postconviction proceedings.**

Postconviction, Morris asserted that the circuit court violated his right to due process by relying on materially false information in imposing sentence. (R. 29; 30; 35; 39.)

At sentencing, the prosecutor told the circuit court that "we don't know exactly how far the synthetic marijuana made it inside her system in order to say that that was the ultimate cause of [Olive's] collapse and death." (R. 48:11.)

After sentencing, Morris obtained an affidavit from Dr. Linert. (R. 30.) Linert stated in pertinent part that, because the synthetic marijuana in Olive's body had not reached her bloodstream or nervous system, he believed that it did not cause her death. (*Id.* at 1.) Linert also stated that he could not determine what did cause Olive's death. (*Id.*)

The prosecutor conceded that, considering Dr. Linert's opinion, he had presented inaccurate information at sentencing. (R. 35:1.) But he also argued that the error was harmless. (*Id.* at 3–6.)

The circuit court denied Morris's request for resentencing. (R. 40.) The court concluded that Morris had not shown, by clear and convincing evidence, that the information in question was inaccurate, and that the court relied on it in imposing sentence. (*Id.* at 3.) The court reasoned as follows:

First, the information provided by the prosecutor at sentencing was generally correct:

Dr. Linert was unable to determine the cause of the victim's death. The prosecutor was very upfront about that during his sentencing argument. He told the court that there were no overt signs that she died as a result of suffocation, but that there are often no signs that a child has been suffocated. He also noted that the defendant admitted that he may have lain on top of the victim when he was in bed with the child. The prosecutor further informed the court that three different types of synthetic marijuana were found in the remaining contents of the victim's bottle and that these three types of synthetic marijuana were found in her system, but he stated that it was not known to what extent, if any, the drug played a role in the victim's death.

(*Id.*)

Second, Olive could have died as a result of suffocation by co-sleeping: "Could co-sleeping have caused

the victim's death? Absolutely. The defendant admitted that he may have lain on top of her while he was in bed with the child." (*Id.*)

Third, "different medical examiners can disagree about the cause of death. Dr. Linert's conclusion that K2 did not play a role in the victim's death in this case is only his medical *opinion*; it does not necessarily provide the defendant with clear and convincing evidence that the prosecutor's sentencing statements were inaccurate." (*Id.* at 4.)<sup>4</sup>

Fourth, Morris could not assume—as he did in his postconviction motion—that the circuit court relied on the misinformation in imposing sentence. (R. 29:5–6; 40:4.)

Fifth, the circuit court "did not rely upon any particular theory of the cause of death. The court understood that the cause of death was not determined and that the defendant was not being sentenced for a homicide. The court punished the defendant for his *reckless behavior*." (R. 40:4.)

Sixth,

[t]he exact cause of Olive's death was not a material factor in its sentencing determination. The defendant admitted to reckless behavior that endangered the safety of his child. The court relied upon *that* factor and the reasonable inferences derived therefrom in making its sentencing decision. Even if the victim's death could be attributed to some other factor, it doesn't change the incredibly poor parenting and reckless behavior the defendant showed towards his child, and therefore, to the extent that the prosecutor misquoted Dr. Linert's conclusions in this matter or provided the court

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<sup>4</sup> The circuit court cited to *State v. Slagoski*, 2001 WI App 112, 244 Wis. 2d 49, 629 N.W.2d 50. (R. 40:4.)

with inaccurate information about the cause of death, the error was truly harmless.

(*Id.* at 5.)

Morris now appeals.

## STANDARD OF REVIEW

Whether a defendant has been denied due process at sentencing presents a constitutional issue, reviewed by this Court de novo while benefitting from the circuit court's analysis. *State v. Travis*, 2013 WI 38, ¶ 20, 347 Wis. 2d 142, 832 N.W.2d 491.

## ARGUMENT

**Morris has failed to prove, by clear and convincing evidence, that the circuit court actually relied on materially inaccurate information at sentencing, such that it violated his right to due process.**

### A. The relevant law.

A sentence carelessly or deliberately pronounced on an extensive and materially false foundation, which the defendant had no opportunity to correct, may violate due process. *Townsend v. Burke*, 334 U.S. 736, 741 (1948); *United States v. Tucker*, 404 U.S. 443, 447 (1972). *Travis*, 347 Wis. 2d 142, ¶ 17.

“Inaccurate information standing alone does not require resentencing.” *United State ex rel. Villa v. Fairman*, 810 F.2d 715, 718 (7th Cir. 1987). To implicate due process, Morris must prove, by clear and convincing evidence, that the prosecutor put materially false information before the circuit court, and the court actually relied upon it in imposing sentence. *Tucker*, 404 U.S. at 447; *State v. Tiepelman*, 2006 WI 66, ¶ 26, 291 Wis. 2d 179, 717 N.W.2d 1; *Travis*, 347 Wis. 2d 142, ¶ 17.

Inaccurate information must be *materially* false. It must be material to the sentence imposed. “To obtain the remedy of resentencing, a defendant must establish that the sentencing court relied on critical inaccurate information when announcing the sentence.” *Simonson v. Hepp*, 549 F.3d 1101, 1107 (7th Cir. 2008).

And actual reliance requires more than mere reference to the inaccuracy. The circuit court must give explicit attention or specific consideration to it, so that it formed part of the basis for the sentence imposed. *Tiepelman*, 291 Wis. 2d 179, ¶ 14. Morris must prove such reliance to a “highly probable or reasonable certainty.” *State v. Harris*, 2010 WI 79, ¶¶ 34–35, 326 Wis. 2d 685, 786 N.W.2d 409 (citation omitted).

If Morris demonstrates both material falsity and actual reliance, then the burden shifts to the State to prove harmless error. *Tiepelman*, 291 Wis. 2d 179, ¶ 26. The State meets that burden by showing the circuit court would have imposed the same sentence absent the error. *Travis*, 347 Wis. 2d 142, ¶ 73.

Finally, the forfeiture rule applies to due process claims based on alleged reliance on misinformation of constitutional magnitude. *State v. Benson*, 2012 WI App 101, ¶ 17, 344 Wis. 2d 126, 822 N.W.2d 484; *State v. Leitner*, 2001 WI App 172, ¶ 41, 247 Wis. 2d 195, 633 N.W.2d 207.

**B. Morris forfeited his due process claim by not objecting to or challenging the factual accuracy of the prosecutor’s sentencing remarks.**

Morris’s failure to take advantage of multiple opportunities at sentencing to correct the prosecutor’s error constitutes forfeiture of his right to raise his due process claim on appeal.

Failure to object to an alleged error when it occurs forfeits a party's right to raise that error on appeal. *State v. Pinno*, 2014 WI 74, ¶ 56, 356 Wis. 2d 106, 850 N.W.2d 207. The forfeiture rule applies to claims that a court considered improper matters at sentencing, including inaccurate information. *Benson*, 344 Wis. 2d 126, ¶ 17; *Leitner*, 247 Wis. 2d 195, ¶ 41.

The forfeiture doctrine “facilitates fair and orderly administration of justice and encourages parties to be vigilant lest they lose a right by failing to object to its denial.” *Pinno*, 356 Wis. 2d 106, ¶ 56. Timely objection promotes timely error avoidance or correction, and so eliminates the need for appeal. *State v. Ndina*, 2009 WI 21, ¶ 30, 315 Wis. 2d 653, 761 N.W.2d 612.

Morris made no objection. He had three excellent opportunities to do so.

First, he or his trial counsel could have corrected the State when it mentioned the challenged information. (R. 48:11–12.).

Second, Morris himself could have said something on point during allocution. (*Id.* at 20–21.)

And third, the defense could have objected when the circuit court explained its sentence. (*Id.* at 21–28.)

Morris and his trial counsel did none of these things.

The forfeiture is exacerbated by Morris's failure to explain why, considering his lack of objection, he did not proceed in the manner specified in *Benson*. Morris could have sought resentencing on the ground that his trial counsel performed deficiently in dealing with the prosecutor's presentation of inaccurate information. *Benson*, 344 Wis. 2d 126, ¶ 17. That is the normal way to analyze forfeited issues. *See State v. Erickson*, 227 Wis. 2d 758, 768,



596 N.W.2d 749 (1999). Morris has not followed that process.

Forfeiture is a rule of judicial administration, not power. *See Leitner*, 247 Wis. 2d 195, ¶ 42. This Court may ignore a forfeiture and reach the merits of an issue. But it should not do so here. Morris had several opportunities to correct the inaccurate information at issue here. He also had the opportunity to challenge the constitutional adequacy of his trial counsel's performance at sentencing. He did not do so. Forfeiture of his due process claim is a reasonable result.

**C. Morris has not met his burden of showing that the circuit court actually relied on materially false information in imposing sentence.**

The prosecutor admitted presenting inaccurate information at sentencing. (R. 35:1.) But Morris has failed to establish a resulting due process violation. He has not proven that the inaccurate information was materially false—that it was material and critical to the sentence imposed. And he has not proven that, even if the information was materially false, the circuit court actually relied on it in imposing sentence.

The prosecutor presented inaccurate information as to whether the synthetic marijuana in Olive's body could have caused her death. But that information was not material and critical to the sentence imposed by the circuit court for the offense of conviction—second-degree recklessly endangering safety.

This was not a homicide case. Morris admitted committing the crime of second-degree recklessly endangering safety. He committed that crime not by causing Olive's death, but by endangering her safety through conduct that created an unreasonable risk of death or great

bodily harm to her. It was the risk posed by his conduct that mattered at sentencing, not whether Olive's ingestion of synthetic marijuana could have caused her death.

The circuit court understood this. The court said nothing at sentencing that expressly or impliedly suggested that it imposed sentence based on the mistaken belief that the synthetic marijuana in Olive's body could have caused her death. The court did not mention the word *death* once while explaining Morris's sentence. But the court specifically referred to Morris's behavior as *reckless* three different times. (R. 48:22, 23, 24.) The court was not occupied with what caused Olive's death, but with the totality of Morris's criminally reckless conduct.

The circuit court had the opportunity to clarify its sentencing statements during postconviction proceedings. *See State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994). The comments contained in the court's postconviction order should persuade this Court that the inaccurate information was not material to the sentence imposed. (R. 40.)

The material factor in sentencing was not the exact cause of Olive's death, but Morris's criminal recklessness, as the court made clear: "The court did not rely upon any particular theory of the cause of death. The court understood that the cause of death was not determined and that the defendant was not being sentenced for a homicide. The court punished [Morris] for his *reckless behavior* . . . . The exact cause of [Olive's] death was not a material factor in the court's sentencing decision. [Morris] admitted to reckless behavior that endangered the safety of his daughter. The court relied on *that* factor and the reasonable inferences derived therefrom in making its sentencing decision." (*Id.* at 4–5.)

But even if this Court disagrees and considers the inaccurate information materially false for purposes of due process analysis, the circuit court's sentencing comments confirm that the court did not actually rely on the inaccurate information in imposing sentence. The circuit court delved into the circumstances that constituted Morris's criminal recklessness: his smoking of synthetic marijuana and the placement of Olive in an unsafe co-sleeping arrangement afterward. (R. 48:22, 25, 26.) The court also focused on Morris's ongoing criminal behavior and his failure at rehabilitation through probation. (*Id.* at 21–22, 23–24.)

The circuit court did make one reference to the presence of synthetic marijuana in Olive's body. (R. 48:25.) That, of course, was an accurate observation. Dr. Linert stated in his affidavit that his testing revealed synthetic marijuana in Olive's body. (R. 30.)

But the circuit court did not speculate or draw any conclusions as to whether the presence of that synthetic marijuana in Olive's body could have caused her death. And the court never attempted to explain or justify its sentence by stating that Olive could have died as the result of ingesting synthetic marijuana.

The inaccurate information presented by the prosecutor did not matter in the circuit court's sentencing decision. Morris says nothing on appeal to suggest otherwise.

Morris asserts that the State's remarks concerning the role Olive's ingestion of synthetic marijuana could have played in her death constituted materially inaccurate information. (Morris's Br. 11–13.) The State has addressed that assertion *supra*. Morris does not explain precisely how inaccurate information regarding the possible cause of Olive's death is critical or material to the sentence the

circuit court imposed for the offense of conviction—second-degree recklessly endangering safety. Proof of what caused Olive’s death was not material to the sentence imposed. It was Morris’s creation of the risk of death or great bodily harm to Olive that mattered, and the inaccurate information before the circuit court did not change that fact—or affect it—one bit. Morris created that risk by consuming synthetic marijuana to the point of stupor, by doing so under circumstances that led to the discovery of such marijuana in Olive’s body, and by exposing Olive to a potentially fatal hazard by co-sleeping with her and Gonzalez while under the stupefying effect of the synthetic marijuana.

Morris also asserts that the sentencing record reveals the circuit court’s actual reliance on the inaccurate information at sentencing. (*Id.* at 14–16.) Recall that in his postconviction motion, Morris claimed that actual reliance could be “assumed” in this case. (R. 29:5–6.) It cannot. It must be proven by clear and convincing evidence, and Morris has not done so.

Morris asserts that “[g]enerally as a practical matter, the subject and nature of the inaccurate information at issue here is highly relevant to a determination of the appropriate sentence in this case.” (Morris’s Br. 14.) Perhaps it would be if causation of death were an element of the crime of second-degree recklessly endangering safety. It is not. Again, it is the risk posed by the defendant’s conduct that matters.

Morris points to a question the circuit court asked during the parties’ sentencing arguments about what may have caused Olive’s death. (R. 48:9.) From this, Morris infers that the court “found the cause of [Olive’s] death directly relevant to the sentencing determination.” (Morris’s Br. 15.) But that conclusion does not follow inexorably from that fact, as the circuit court pointed out in its

postconviction order: “The court did not rely upon any particular theory of the cause of death. The court understood that the cause of death was not determined and that the defendant was not being sentenced for a homicide. The court punished the defendant for his *reckless behavior*.” (R. 40:4.)

Morris infers actual reliance from the circuit court’s description of Olive’s death as a “completely preventable tragedy,” and the court’s comment that “[y]ou know, two of you killed her.” (Morris’s Br. 15, 16.) The State has three responses.

First, the circuit court did not say anything about Olive dying as the result of ingesting synthetic marijuana.

Second, it was perfectly reasonable for the circuit court to refer to Olive’s death as a “completely preventable tragedy.” Had Morris and Gonzalez not smoked the synthetic marijuana, they would have been in the position to avoid placing Olive at risk from dangerous co-sleeping.

And third, to the extent Morris believes that the cause of Olive’s death is material to the sentence imposed by the circuit court, that court could reasonably conclude on the strength of this record that Olive died as a result of overlaying, and that Morris’s stuporous condition made him more likely to roll onto her, and less likely to be roused by her.

The fact that Dr. Linert was unwilling to identify overlaying as the cause of Olive’s death does not make it unreasonable for the circuit court to draw that conclusion. “Overlaying, the accidental death by smothering caused by a larger individual sleeping on top of an infant, is a cause of death that has been documented for centuries . . . . Studies show that infants sleeping in the same bed as their parents are at an increased risk of death, predominantly by overlaying . . . . Death by overlaying is a form of mechanical

asphyxia . . . . When an infant is overlain by an adult or older child, the infant's airway may be obstructed, the thorax or abdomen may be compromised, or the neck circulation impaired. The autopsy findings in cases of overlaying are usually essentially negative." *Death by Overlaying* at 155.

The record in this case does not demonstrate to a "highly probable or reasonabl[e] certain[ty]" that the circuit court relied on the inaccurate information when it imposed sentence. *See Harris*, 326 Wis. 2d 685, ¶ 35 (citation omitted). There was no due process violation.

**D. If this Court concludes that Morris has demonstrated both material falsity and actual reliance, it should also conclude that any resulting error was harmless because the circuit court would have imposed the same sentence absent the error.**

If a circuit court relies on erroneous information at sentencing, the State can meet its burden to prove harmless error by showing that "the sentencing court would have imposed the same sentence absent the error." *Travis*, 347 Wis. 2d 142, ¶ 73.

That is the situation here. The circuit court declared any error harmless. (R. 40:5.) The facts and circumstances of this case—and the court's sentencing comments—prove the point.

The circuit court faced a grim evidentiary picture at sentencing. The court could reasonably conclude that Morris had endangered Olive's safety—and created an unreasonable, substantial, and obvious risk of death or great bodily harm to her—in at least three different ways.

First, by rendering himself insensate through use of synthetic marijuana, he was in no condition to protect Olive from any danger she might face.

Second, he exposed Olive to synthetic marijuana in a manner that led to some of it finding its way into her body.

Third, while in his stuporous state, he joined Olive and Gonzalez in a patently hazardous co-sleeping situation.

The circuit court knew Olive died during these events.

The circuit court knew the defense had never tried to prove that Olive died of natural causes.

And the circuit court had heard the prosecutor say—erroneously—that the State did not know whether the synthetic marijuana in Olive’s body could have caused her death.

What possible difference would it have made to the circuit court—and to the imposition of sentence—if the court had *not* heard that erroneous information?

Morris would still have been stuporous, unable to protect Olive. She would still have been exposed to synthetic marijuana. She would still have had some of it in her formula and in her 55-day-old body. She would still have been placed in a patently hazardous co-sleeping situation.

And she would still be dead.

The reckless nature of Morris’s behavior is not reduced by the fact that the synthetic marijuana found in Olive’s body did not cause her death. And as demonstrated in the recitation of facts regarding sentencing at pages 5–7 of this brief, the circuit court focused on that recklessness when imposing sentence. Whether or not Olive died as a result of ingesting synthetic marijuana did not play a part in the circuit court’s sentencing calculus. With or without the erroneous information, the court would have imposed the same sentence.

Morris's corresponding appellate argument fails to persuade. He says the State cannot prove harmless error because "the record reveals that the inaccurate information set the tone of the sentencing hearing and was the topic of discussion throughout the circuit court's remarks and sentence pronouncement." (Morris's Br. 17.)

But set against that assertion is the transcript of the sentencing hearing, which contains only one reference to the presence of synthetic marijuana in Olive's body. (R. 48:25.) The circuit court did not speculate or draw any conclusions as to whether the presence of that synthetic marijuana in Olive's body could have caused her death. And the court never attempted to explain or justify its sentence by stating that Olive could have died as the result of ingesting synthetic marijuana.

Morris says that a finding of harmless error in this case would "derail[ ] the thrust" of the decision in—that "a defendant has not been properly sentenced if the court relied in any way on 'evidence' that turned out to be materially untrue." (Morris's Br. 17.) It is, perhaps, enough to note in response that *Tiepelman* unambiguously holds that harmless error analysis applies to due process claims involving the presence of inaccurate information. *Tiepelman*, 291 Wis. 2d 179, ¶ 26. A finding of harmlessness here would do no violence to the decision in *Tiepelman*.

Finally, Morris declares that a finding of harmless error in this case would be "unreasonable." (Morris's Br. 17.) The State obviously disagrees. The reckless nature of Morris's behavior is not reduced by the fact that the synthetic marijuana found in Olive's body did not cause her death. If the prosecutor had not provided the erroneous information, the circuit court would have imposed the same manifestly reasonable sentence. The cause of Olive's death was not a material factor in the court's sentencing determination.



## CONCLUSION

This Court should affirm the judgment of conviction and postconviction order.

Dated at Madison, Wisconsin, this 17th day of January, 2019.

Respectfully submitted,

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## **CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,402 words.

Dated this 17th day of January, 2019.

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## **CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 17th day of January, 2019.

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