



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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February 5, 2021

Sheila T. Reiff
Clerk, Supreme Court of Wisconsin
110 East Main Street
Post Office Box 1688
Madison, Wisconsin 53701-1688

Re: *State of Wisconsin v. Richard A. Boie*
Case No. 2019AP520-CR

Dear Ms. Reiff:

The State submits this letter brief pursuant to the Wisconsin Supreme Court's order dated January 25, 2021. Richard A. Boie filed a petition for review in this case in March 2020. The State filed a formal response opposing the petition for review in April. In May, this Court ordered the petition for review to be held in abeyance pending its decision in *State v. Mercado*, No. 2018AP2419-CR. This Court issued its *Mercado* decision on January 21, 2021. *State v. Mercado*, 2021 WI 2. On January 25, 2021 this Court ordered "that the parties file simultaneous letters/briefs by February 8, 2021 discussing the impact of the Mercado case, if any, on the issues raised in the petition for review."

The *Mercado* decision resolved one of Boie's three issues presented for review, and it weighs against reviewing the other two issues.

1. *First issue presented*

Boie's first issue presented asks whether his constitutional right to confrontation was violated. (Pet. 2.) *Mercado* did not directly resolve this issue because no confrontation issue was raised in *Mercado*. But *Mercado* suggests that Boie's confrontation claim is forfeited and meritless.

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In *Mercado*, this Court reaffirmed that Wis. Stat. § 908.08(5)(a)—which allows a defendant to cross-examine a child witness after his or her video-recording is played for a jury—satisfies the right to confrontation. In discussing section 908.08(5)(a), this Court noted that the court of appeals has “held that the statutory procedure satisfies the Confrontation Clause as long as the child testifies.” *Mercado*, 2021 WI 2, ¶ 51 (citing *State v. James*, 2005 WI App 188, ¶ 11, 285 Wis. 2d 783, 703 N.W.2d 727). This Court stated, “We agree with this interpretation of Wis. Stat. § 908.08(5)(a).” *Id.* ¶ 52. This reaffirmation of *James*’s confrontation holding weighs against reviewing Boie’s first issue presented.

To be sure, this Court in *Mercado* did not address Boie’s specific issue of whether presenting a child’s video-recording might violate the right to confrontation if the child testifies to a lack of memory. But the State maintains that this Court should not review this issue for two reasons: (1) this issue has no potential for law development because this Court would review it through the narrow framework of an ineffective assistance of counsel claim; and (2) binding precedent by the United States Supreme Court and Wisconsin Court of Appeals forecloses this claim. (State’s Pet. Resp. 1–9.)

Mercado supports the State’s argument that this Court would review this confrontation issue as an ineffective assistance of counsel claim if it were to grant review. As the State has noted, Boie forfeited this confrontation claim by not raising it at trial. (State’s Pet. Resp. 2.) “Two things are required before an appellate court may reverse evidentiary errors: (1) the violation of a party’s substantial right and (2) an objection or motion to strike.” *Mercado*, 2021 WI 2, ¶ 36 (footnote omitted). An appellate court may review a forfeited objection to the admission of evidence as an ineffective assistance claim. *Id.* ¶ 37. Reviewing Boie’s forfeited confrontation issue as an ineffective assistance claim would not provide this Court with an opportunity for law development. Indeed, binding precedent by the United States Supreme Court and Wisconsin Court of Appeals forecloses Boie’s confrontation claim. (State’s Pet. Resp. 1–9.)

2. *Second issue presented*

Boie’s second issue presented asks whether the child victim satisfied Wis. Stat. § 908.08(1)’s availability requirement even though she testified to a lack of memory. (Pet. 2, 4–5.) This Court in *Mercado* did not directly address this issue because this subsection of the statute was not in question. But *Mercado* suggests that Boie’s availability argument is forfeited and meritless.

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This Court's reasoning in *Mercado* undercuts Boie's argument. Boie argues that, pursuant to Wis. Stat. § 908.04(3)(c), a child who testifies to a lack of memory is unavailable for purposes of Wis. Stat. § 908.08. (Pet. 24–25.) That argument is problematic because, under Boie's logic, "a forgetful child's video statement would be admissible under section 908.08 only if it meets one of the hearsay exceptions for unavailable witnesses in section 908.045." (State's Pet. Resp. 11.) This Court in *Mercado* explained that "[s]ection 908.08 provides two methods by which a party may introduce a child's video-recording." *Mercado*, 2021 WI 2, ¶ 66. One method is to satisfy the requirements in section 908.08(2) and (3). *Id.* ¶ 66. The other method is to satisfy any other applicable hearsay exception. *Id.* So, although *Mercado* did not directly address Boie's availability argument, this Court rejected Boie's logic that a child's video-statement can be required to satisfy some other hearsay exception before being admitted under section 908.08.

In addition, Boie forfeited this issue by not raising it at trial. (State's Pet. Resp. 10.) This Court would thus be limited to reviewing this issue as an ineffective assistance claim if it were to review this issue at all. (State's Pet. Resp. 10–12.) *Mercado* supports the State's forfeiture argument, as explained above regarding the first issue presented. *See Mercado*, 2021 WI 2, ¶¶ 35–38. There is no reason for this Court to review the narrow issue of whether Boie's trial counsel was ineffective.

3. *Third issue presented*

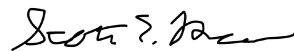
Mercado resolved Boie's third issue presented. This issue asks whether this Court should overrule or modify *James*'s "holding" that Wis. Stat. § 908.08 requires a circuit court to play a child's video-statement for the jury before allowing the child to testify. (Pet. 2.) This Court in *Mercado* rejected that reading of *James*: "To the extent that *James* has been interpreted as concluding that Wis. Stat. § 908.08(5)(a) precludes circuit courts from also calling a child witness before a video-recording is shown, that interpretation is erroneous. *James* did not so hold." *Mercado*, 2021 WI 2, ¶ 53. Boie wants this Court to hold that a child may testify before his or her video-recording is played for the jury. (Pet. 27.) This Court so held in *Mercado*, 2021 WI 2, ¶¶ 48–53. There is no reason to review this issue.

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Conclusion

This Court should deny Boie's petition for review.

Sincerely,



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