STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2020AP266-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL JAMES BREHM,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVCTION RELIEF ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT THE HONORABLE DAVID A. HANSHER, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1) Did the circuit court properly and constitutionally interpret and apply Wis. Stat. § 941.29(4m)(a) to Defendant-Appellant Michael J. Brehm when it sentenced him to the three-year mandatory minimum period of confinement that is required for a defendant convicted of being a felon in possession of a firearm?

The circuit court answered: Yes.

This Court should answer: Yes.

2) Did the circuit court properly exercise its discretion to deny Brehm's postconviction motion in which he alleged that his trial counsel was ineffective because counsel did not request a PSI report, enter evidence of Brehm's alleged "nonpossession" of the firearm, and failed to advise Brehm to stay silent after his initial confession without holding an evidentiary hearing?

The circuit court (implicitly) answered: Yes. The circuit court concluded that the claims were insufficiently pleaded and without merit.

This Court should answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiff-Respondent State of Wisconsin does not request oral argument or publication. The parties' briefs adequately develop the law and facts necessary for disposition of the appeal. Publication is unwarranted because the case may be decided by applying well-established legal principles to the facts.

INTRODUCTION

Brehm argues that he was improperly sentenced to a three-year period of initial confinement for being a felon in

possession of a firearm under Wis. Stat. § 941.29(4m)(a). After pleading guilty, Brehm argues that the circuit court erred in sentencing him based on an erroneous interpretation of Wis. Stat. § 941.29(4m)(a) that he must serve an initial confinement period of three years. Brehm claims that the statute's terms allow for a circuit court to stay the imposition of an actual sentence and instead impose a term of probation. Brehm advances several claims as to why Wis. Stat. § 941.29(4m)(a) should be read to have allowed the circuit court to stay his sentence and impose probation.

Brehm's claims fail because they are inconsistent with the plain language of Wis. Stat. § 941.29(4m)(a) and the way a reviewing court should examine statutory language in determining its meaning. Brehm's arguments about the constitutionally of applying the mandatory minimum set forth in the statute have no merit because his actions in firing a loaded Glock into the air outside his apartment plainly implicate the public safety concern that are at the heart of Wis. Stat. § 941.29's prohibition against being a felon in possession of a firearm.

Separately, Brehm claims he received ineffective assistance of trial counsel. He seeks resentencing and/or plea withdrawal because he believes that his attorney was ineffective because counsel did not ask for a Presentence Investigative Report (PSI) be done before sentencing, because counsel did not challenge the propriety of Brehm's admission to possessing and firing the Glock because Brehm was intoxicated at the time he made those admissions, and because counsel did not advise Brehm to remain silent after these initial admissions. But because none of Brehm's claims have merit, and some were insufficiently pled, the circuit court was able to appropriately exercise its discretion to deny Brehm's motion without first holding an evidentiary hearing.

This Court should affirm Brehm's judgment of conviction and the order denying his motion for postconviction relief without a hearing.

STATEMENT OF THE CASE

Brehm's criminal complaint and guilty plea. By criminal complaint dated July 12, 2018, the State charged Brehm with one count of possession of a firearm by a felon. (R. 1:1.) The complaint alleged that Brehm's neighbors called 911 after they observed Brehm "holding a firearm out of the upstairs window . . . discharging the firearm into the air." (R. 1:1.) Officers found a Glock handgun in Brehm's apartment and several spent bullets casings that matched the Glock outside. (R. 1:1.) After waiving his *Miranda*[1] rights, Brehm gave an interview to law enforcement in which he admitted that he "shot a couple of rounds into the air" from the Glock. (R. 1:1.) Brehm's PBT (preliminary breath test) at the scene registered at 0.71. (R. 1:1.)

On May 2, 2019, Brehm elected to plead guilty pursuant to plea agreement. (R. 44:2–3.) As the court began to recite the agreement, the State noted that Brehm's case was a "mandatory minimum felon in possession case" because Wis. Stat. § 941.29(4m)(a) mandated that a person convicted of being a felon in possession must serve at least three years of initial confinement. (R. 44:2.) Thus, in exchange for Brehm's guilty plea, the State recommended that Brehm serve a six-year term of incarceration consisting of three years of initial confinement (the mandatory minimum) to be followed by three years of extended supervision. (R. 44:3.) Both Brehm's trial counsel, Attorney Colin McGinn, and Brehm agreed that the State's recitation of their agreement was correct. (R. 44:3.)

The circuit court, the Honorable David A. Hansher, presiding, engaged Brehm in a colloquy before accepting his

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

guilty plea. (R. 44:3–6.) As relevant here, Brehm stated that he had reviewed the plea questionnaire/waiver of rights form with Attorney McGinn before he signed it, that Brehm understood the elements of being a felon in possession of a firearm, and that the crime of being a felon in possession of a firearm carried "a three-year minimum mandatory [sentence] in this case." (R. 44:3–5.) Further, Brehm specifically stated that he waived his right to present several defenses one of which was intoxication. (R. 44:5.) Finally, Attorney McGinn agreed that the criminal complaint could "serve as a basis for [Brehm's] plea." (R. 44:6.) The circuit court accepted Brehm's plea. (R. 44:6.)

However, the court set off an immediate sentencing at Brehm's request because Brehm had an upcoming appointment for his "degenerative neck and back" issues. (R. 44:2.) On June 12, 2019, the courted granted a second request by Brehm to set over his sentencing again on account of his health, but noted that the matter could not be set over "indefinitely," and that it was "suspicious" of the set over request because "it's a mandatory minimum" case. (R. 45:4.) The court was concerned that Brehm did not "want to go to prison today." (R. 45:10.)

Sentencing. The circuit court sentenced Brehm on July 25, 2019. (R. 46:1.) At the outset of the hearing, Attorney McGinn asked the court to "impose . . . and stay" the State's recommended sentence of three years of initial confinement followed by three years of extended supervision and give Brehm "a year in the House of Corrections as a condition of that sentence." (R. 46:4.) Attorney McGinn argued that the circuit court had authority to stay the sentence because statutes such as Wis. Stat. §§ 939.617(2) and 939.619(2) that also contained mandatory minimum sentences expressly stated that a sentencing court "may not" place a defendant on probation following conviction. (R. 46:5–6.) Therefore, Attorney McGinn argued that under Wis. Stat.

§ 941.29(4m)(a), "absent direct guidance from the legislature that says this Court does not have the authority to impose this sentence and stay it, that [the court does] . . . have . . . inherent authority" to stay the execution of his sentence and place Brehm on a period of probation. (R. 46:6.)

The State disagreed with Attorney McGinn's assessment of Wis. Stat. § 941.29(4m)(a). It argued that a plain reading of the statute's wording should honor the words "shall impose a bifurcated sentence" in the statute because "a bifurcated sentence . . . presume[s] the initial confinement and the extended supervision and all of the rules that go along with that." (R. 46:9.) Thus, the State reasoned that a "plain reading of the statute is [that] the Court shall impose a bifurcated sentence. The initial confinement must be at least three years. That's what the statute says." (R. 46:9.) The court agreed with the State. (R. 46:12.) It explained that the word "shall in Wis. Stat. § 941.29(4m)(a) "tie[d its] hands" and therefore the court had "no choice but to go with the minimum mandatory" sentence of three years of initial confinement followed by three years of extended supervision for which the State had argued. (R. 46:12–13.)

Before the court sentenced Brehm, Attorney McGinn discussed a series of letters that Brehm's family, clergyman, and a friend had written to the court as well as a "verification" of Brehm's medical history. (R. 21; 46:17.) The court said it had reviewed the documents. (R. 46:17.) The letters discussed Brehm's stated desire to be a better father to his children and contained several positive statements from his children about Brehm's impact on their lives, and generally detailed Brehm's mental health and addiction issues. (R. 21:2–8.)

Brehm made a statement to the court in which he said that he made a "very poor decision" to fire the Glock into the air. (R. 46:21.) Brehm said that, while he "d[id]n't even fully remember everything that happened that day," he was "just very happy that nobody got hurt or [that there was not]

property damage from the bullets, [which] obviously had to come down somewhere." (R. 46:21.) Brehm explained that he had taken responsibility for his actions "from the beginning" and "knew [he] was wrong" to fire the Glock. (R. 46:21.) The court imposed a six-year sentence which included the mandatory minimum three years of initial confinement to be followed by three years of extended supervision. (R. 46:23.)

Postconviction proceedings. After sentencing Brehm, through present counsel, filed a motion that sought "plea withdrawal, sentence modification, or resentencing." (R. 35; 36:1.) Brehm alleged that the court relied on inaccurate and unreliable information at sentencing based on its understanding that Wis. Stat. § 941.29(4m)(a) required a three-year mandatory minimum sentence. (R. 36:3.) Brehm also argued that Wis. Stat. § 941.29(4m)(a) was unconstitutionally overbroad.[2] (R. 36:5.) Finally, Brehm argued that Attorney McGinn was ineffective because he did not (1) request a PSI report before sentencing, (2) enter "evidence of non-possession" of the firearm into the record; and, (3) did not advise Brehm "not to make statements to his detriment." (R. 36:6.)

The circuit court denied Brehm's motion. (R. 36:6, 9.) It concluded that, "[w]hile the word 'probation' does not appear in section 941.29(4m)(a), the statute's language that 'the court *shall* impose a bifurcated sentence under s. 973.01 and the confinement portion of the bifurcated sentence imposed on the person *shall* not be less than 3 years' is not consistent with allowing probation." (R. 36:3–4.) The court supported this conclusion by an analysis of published caselaw that addressed and rejected substantially similar arguments. (R. 36:4–5.)

[2] As the court noted, Brehm's motion did not explain whether his challenge was a facial or as-applied challenge. (R. 36:5 n.1.)

The court also rejected Brehm's argument that Wis. Stat. § 941.29(4m)(a) was unconstitutionally overbroad. (R. 36:5–6.) Brehm argued that the statute was overbroad as applied to him because he only "grabbed his roommate's gun in the safety of his own home" but did not brandish it in public. (R. 36:5.) Thus, Brehm contended his actions did not negatively impact public safety and therefore did not concern the State's "inherent police power" as the defendant's conduct in *State v. Thomas*, 2004 WI App 115, 274 Wis. 2d 513, 683 N.W.2d 497. (R. 36:5.)

The court rejected this argument based on the facts set forth in the criminal complaint which Brehm agreed were correct and could serve as a basis for Brehm's guilty plea. (R. 36:6; 44:6.) It noted that the complaint stated that police responded to Brehm's location after citizens reported hearing "multiple gunshots, and that a neighbor observed [Brehm] holding a firearm out of his upstairs window and discharging it into the air. Police [also] found spent [bullet]shell casings on the scene." (R. 36:6.) The court therefore rejected Brehm's claim and further concluded that his challenge to the constitutionality of Wis. Stat. § 941.29 was "underdeveloped." (R. 36:6.)

Finally, the court rejected all three of Brehm's ineffective assistance of counsel claims without a *Machner*[3] hearing because it concluded that they were insufficiently plead under *State v. Bentley*.[4] (R. 36:6.) It noted that *Bentley* required that the "facts supporting plea withdrawal must be alleged in the petition and the defendant cannot rely on conclusory allegations . . . a 'bare bones allegation' that a defendant would have pled differently 'is no more than a 'conclusory allegation' and . . . [is] not sufficient to require the

[3] *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[4] *State v. Bentley,* 201 Wis. 2d 303, 548 N.W.2d 50 (1996).

trial court to direct that an evidentiary hearing be conducted.'" (R. 36:7 (alterations in original) (quoting *Bentley*, 201 Wis. 2d at 313, 316).) It held that Brehm's postconviction motion "did not even offer a bare-bones allegation about why he would not have pled guilty but for counsel's purported errors—he offered no allegation at all. Without alleging factual assertions, the court cannot meaningfully assess [Brehm's] various claims of prejudice." (R. 36:7.)

The court also rejected Brehm's ineffective assistance of counsel claims. (R. 36:7–9.) As to the claim that a PSI could have offered "additional insight" into Brehm's "mental health, physical health, and the type of man [he] is," the court concluded that Brehm failed to "specifically identify any non-cumulative information the court did not have at the time of sentencing, nor d[id] he explain why this claim presents a basis for plea withdrawal." (R. 36:7–8.) The court noted that it had information about Brehm's "physical health, mental health, and addiction issues" by virtue of the letters and medical history that were submitted prior to the court's sentencing decision. (R. 36:8 n.3.) Therefore, Brehm's argument "about his attorney's failure to request a PSI [was] wholly speculative and [did] not warrant an evidentiary hearing." (R. 36:8.)

As for Brehm's claim that Attorney McGinn was ineffective because he did not enter evidence of Brehm's "non-possession" of the firearm, the court rejected the idea that Brehm did not possess the firearm just because he claimed that he did not own it and was too drunk to remember what happened. (R. 36:8–9.) The court noted that, during its plea colloquy with Brehm, it had specifically asked Brehm if he understood that by pleading guilty that he was giving up several possible defenses including a possible intoxication defense. (R. 36:8; 44:5.) Moreover, during the colloquy Brehm said that he had reviewed the plea questionnaire/waiver of rights form which included the elements of possession of a

firearm that specifically stated that "[i]t [was] not required that a person own an item in order to possess it. What is required is that the person exercise control over the item." (R. 36:8–9; 44:3; R-App. 101.)

Finally, the court concluded that Brehm's ineffective assistance of counsel claim for Attorney McGinn's alleged failure to "advise[ ] him against every statement after the initial interview" was insufficiently pled under *Bentley*. (R. 36:9.) It found that Brehm did "not specify what statements he made after his initial interview except to point to his allocution at sentencing" and that Brehm "fail[ed] to offer any explanation as to why those statements prejudiced him." (R. 36:9.) Thus, Brehm's allegations on this point were also conclusory and did not warrant an evidentiary hearing. (R. 36:9.) *Bentley*, 201 Wis. 2d at 309–10.

Brehm appeals. (R. 37.)

ARGUMENT

I. The plain language of Wis. Stat. § 941.29(4m)(a) requires the court to impose the mandatory minimum period of confinement. The mandatory minimum imposed by the statute is constitutional as applied to Brehm.

Brehm makes several arguments as to why his sentence was allegedly improper. All involve the meaning and application of Wis. Stat. § 941.29(4m)(a). Thus, Brehm's challenge to his sentence hinges on statutory interpretation.

A. Statutory interpretation begins with the language of the statute, but a statute's plain language and purpose are both relevant in determining its meaning as well as its breadth of constitutional application.

The mandatory minimum statute applicable to Brehm's crime and Wisconsin's probation statute. In pertinent part, Wis. Stat. § 941.29(4m)(a) holds that "[i]f a person commits a violation of the [felon in possession statute], the court *shall* impose a bifurcated sentence under s. 973.01 and the confinement portion of the bifurcated sentence imposed on the person *shall* not be less than 3 years." (emphasis added). Wisconsin's Probation statute, § 973.09(1)(a), provides that a court "may withhold sentence or impose sentence . . . and stay its execution, and in either case place the person on probation." Wis. Stat. § 973.09(1)(a) also states that probation is not available as a sentencing option if "probation is prohibited for a particular offense by statute." *Id.*

Principles of statutory interpretation. Courts employ statutory interpretation to determine the meaning of a statute "so that it may be given its full, proper, and intended effect." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. "[S]tatutory interpretation begins with the language of the statute." *Id.* ¶ 45 (citation omitted). This requires a reviewing court to begin with the language of the statute and give its words their "common, ordinary, and accepted meaning." *Id.* ¶ 45. If the language of a statute is clear and unambiguous, the court applies the statute according to its plain meaning and the inquiry ceases. *Kalal*, 271 Wis. 2d 633, ¶ 46. "[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* A court may consider a statute's purpose in this analysis. *Id.* ¶ 49.

Statutory interpretation is a question of law that this Court reviews de novo. *State v. Shoeder*, 2019 WI App 60, ¶ 6, 389 Wis. 2d 244, 936 N.W.2d 172.

The rule of lenity. "The rule of lenity provides that when doubt exists as to the meaning of a criminal statute, 'a court should apply the rule of lenity and interpret the statute in favor of the accused.'" *State v. Guarnero*, 2015 WI 72, ¶ 26, 363 Wis. 2d 857, 867 N.W.2d 400 (citation omitted). "Stated otherwise, the rule of lenity is a canon of strict construction, ensuring fair warning by applying criminal statutes to 'conduct clearly covered.'" *Id.* However, the rule only applies "if a 'grievous ambiguity' remains after a court has determined the statute's meaning by considering statutory language, context, structure and purpose, such that the court must 'simply guess' at the meaning of the statute." *Id.* ¶ 27 (citation omitted).

B. Brehm's conviction carried a mandatory minimum period of confinement which is evident from the plain reading of the statute and the statute is constitutional as applied to him.

Brehm argues that the ostensible mandatory minimum period of confinement set forth in Wis. Stat. § 941.29(4m)(a) should not apply to him for four reasons. (Brehm's Br. 2–11.) First, he claims that a sentencing court has inherent authority to order a term of probation in the absence of any statutory directive to the contrary, citing *State v. Strohbeen*, 147 Wis. 2d 566, 433 N.W.2d 288 (Ct. App 1988). (Brehm's Br. 3–6.) Second, Brehm contends that Wis. Stat. § 941.29 "is unconstitutional" (although he does not explain if his challenge as a facial or as an as applied), based on *Thomas*, 274 Wis. 2d 513. (Brehm's Br. 6–7.) Third, Brehm argues that the circuit court's belief that Wis. Stat. § 941.29(4m)(a) obligated the court to impose an actual period of confinement on him constituted an improper factor and/or unreliable

information at sentencing. (Brehm's Br. 7–9.) Finally, Brehm contends that public policy and the "rule of lenity" required that the circuit court interpret Wis. Stat. § 941.29(4m)(a) in favor of Brehm's argument that a mandatory period of confinement was not actually required. (Brehm's Br. 9–11.)

Brehm is incorrect on all counts. The circuit court correctly held that probation was not an option for Brehm because it would nullify the effect of the legislatively prescribed mandatory minimum for being a felon in possession of a firearm, and that both the plain language of the statute and caselaw involving similar challenges cut against Brehm's interpretation. (R. 36:4–5.) It also rightly rejected Brehm's constitutional challenge because Brehm's conduct (firing a loaded weapon into the air outside his apartment) clearly implicated public safety concerns that are at the heart of the prohibition against being a felon in possession. (R. 36:5.) Further, the court's conclusion that Wis. Stat. § 941.29(4m)(a) mandated an actual period of confinement and not probation was neither inaccurate or improper, so the court did not sentence Brehm on inaccurate information or an improper factor. Finally, public policy and the rule of lenity do not warrant any modification to Brehm's sentence because Wis. Stat. § 941.29(4m)(a) properly imposed a mandatory minimum period of confinement on Brehm based on his conduct and the plain language of the statute.

1. The circuit court properly interpreted Wis. Stat. § 941.29(4m)(a)'s plain language which required it to impose a three-year minimum period of initial confinement on Brehm.

a. The plain meaning of the statute and its purpose require a mandatory three-year minimum period of confinement.

Brehm first claims that the circuit court erred in concluding that it could not impose a term of probation on him instead of the mandatory minimum period of confinement because "no part of Wis. Stat. § 941.29(4m)(a)" indicates that a sentence . . . cannot be stayed. (Brehm's Br. 4.) He further insists that, because a sentencing court has inherent authority under Wis. Stat. § 973.09(1)(a) to impose probation, the court wrongly concluded that it could not impose probation on Brehm based on the words "the court shall impose a bifurcated sentence under s. 973.01 and the confinement period of the bifurcated sentence imposed on the person shall not be less than 3 years." Wis. Stat. § 941.29(4m)(a).

Brehm is wrong. Wisconsin Stat. § 941.29(4m)(a) explicitly states that a person convicted of being a felon in possession of a firearm must be sentenced to a bifurcated sentence which by definition includes a period of initial confinement. "A bifurcated sentence is a sentence that consists of a term of confinement in prison followed by a term of extended supervision." Wis. Stat. § 973.01(2). And Wis. Stat. § 941.29(4m)(a) plainly states that a sentencing court "shall" impose a bifurcated sentence that "shall" include a minimum three-year period of initial confinement. *Id.*

Brehm's desired interpretation of Wis. Stat. § 941.29(4m)(a) is fundamentally inconsistent with the language of the statute and the way reviewing courts

interpret statutory language. "The general rule is that the word 'shall' is presumed mandatory when it appears in a statute." *State ex rel. Dep't of Nat. Res. v. Wis. Court of Appeals, Dist. IV*, 2018 WI 25, ¶ 57 n.7, 380 Wis. 2d 354, 909 N.W.2d 114. Moreover, it is black-letter law that "*probation is not a sentence* and . . . the imposition of incarceration as a condition of probation is likewise not a sentence." *State v. Hays*, 173 Wis. 2d 439, 444, 496 N.W.2d 645 (Ct. App. 1992) (emphasis added).

Therefore, if the circuit court had done what Brehm had suggested and imposed a period of jail time as a condition of probation, the court would have violated Wis. Stat. § 941.29(4m)(a) in two significant respects. First, the statute's choice of the word "shall" would not be given its presumptively mandatory effect because the court here would not have imposed an actual period of initial confinement on Brehm but only the *possibility* of actual confinement if Brehm violated the terms of probation. Second, the court would not have imposed a bifurcated sentence as required by Wis. Stat. § 973.01(2) because a term of probation with a stayed period of incarceration that could be imposed if a defendant violated the terms of probation is by definition not a "sentence." *Hays*, 173 Wis. 2d at 444. Thus, the statute's own explicit terms do not give a sentencing court the option to impose and stay the sentence as Brehm argues.

Indeed, if it did, that exception would defeat the mandatory minimum imposed by the Legislature because if a defendant who had their sentence stayed went on to successfully complete their term of probation, that defendant would never actually serve any period of initial confinement. And that defendant therefore certainly would not serve the mandatory 3 years of initial confinement set forth in Wis. Stat. § 941.29(4m)(a). Brehm's interpretation of the statute would therefore produce an absurd result in which a defendant did not actually serve any period of confinement,

something that a court interpreting a statute's language must avoid. *Kalal*, 271 Wis. 2d 633, ¶ 46.

Further, as the circuit court recognized in its postconviction decision, in *State v. Williams*, 2014 WI 61, 355 Wis. 2d 581, 852 N.W.2d 467, the Wisconsin Supreme Court rejected a substantially similar challenge to the mandatory minimum mandate in Wis. Stat. § 346.65(2)(am)6 that also imposes a three year confinement period of "not less than 3 years." *Id.* In *Williams*, the defendant asked the sentencing court to place him on probation because Wis. Stat. § 346.65(2)(am)6 did not specifically prohibit probation as an option at sentencing. *Williams*, 355 Wis. 2d 581, ¶¶ 4, 34. The Wisconsin Supreme Court rejected Williams' interpretation of the statute, explaining that his argument "assumes his conclusion. If the statute imposes a mandatory minimum in prison, there would be no reason to prohibit probation." *Id.* ¶ 34. Thus, just like in this case, that Wis. Stat. § 941.29(4m)(a)'s does not contain language specifically prohibiting a circuit court from staying a defendant's service of a sentence and ordering a term of probation is irrelevant because the Legislature already rejected that option by requiring that a defendant who is convicted of being a felon in possession of a firearm must serve a mandatory minimum period of initial confinement.

Still, Brehm argues that this Court's decision in *Strohbeen*, 147 Wis. 2d 566, supports his argument that the circuit court could order his sentenced stayed. (Brehm's Br. 5–6.) *Strohbeen* is of no help to Brehm because its facts are fundamentally different than his, so they do not compel any conclusion here.

In *Strohbeen*, the defendant argued that the court could not stay his sentence because he did not request it and Strohbeen read Wis. Stat. § 973.15(8)(c), "[t]he sentencing court may stay execution of a sentence of imprisonment . . . [f]or not more than 60 days," to only allow a stayed sentence

if a defendant requested one. *Strohbeen*, 147 Wis. 2d at 570. This Court concluded that Wis. Stat. § 973.15(8)(c) did not require a defendant to ask for a stayed sentence because the plain language of the statute did not require it; instead, it "clearly state[d] that a sentencing court may stay execution of a sentence '[f]or not more than 60 days.'" *Id.* at 574. Brehm's situation is the reversed: not only did Brehm ask that his sentence be stayed, he is also asking that the circuit court impose a stay where no express language of Wis. Stat. § 941.29(4m(a) authorizes it. Thus, *Strohbeen*'s holding has no application to Brehm's case.

b. The rule of lenity does not require a different interpretation.

Brehm contends that the rule of lenity supports his argument that Wis. Stat. § 941.29(4m)(a) allows a circuit to impose and stay his sentence. (Brehm's Br. 9–11.) He discusses some other statutes which also include mandatory minimums in support of his view that the mandatory minimums should only apply to the "worst of the worst crimes." (Brehm's Br. 9.)

Brehm is wrong. The rule of lenity applies only if a "grievous ambiguity" remains after a court has determined a statute's meaning but must "'simply guess' at the meaning of the statute." *Guarnero*, 363 Wis. 2d 857, ¶ 27 (citation omitted). But there is no ambiguity, let alone a "grievous ambiguity," in Wis. Stat. § 941.29(4m)(a). The plain language of the statute simply states that a circuit court "shall" impose a bifurcated sentence which also includes an initial "confinement period" that "shall be not less than 3 years" long. *Id.* Indeed, as explained above, because probation is not a sentence, and a bifurcated sentence necessarily involves an actual period of initial confinement, Brehm's reading of Wis. Stat. § 941.29(4m)(a) is fundamentally inconsistent with the

statute's requirement that a sentencing court actually impose a period of initial confinement that is no less than three years long.

Brehm's discussion of other mandatory minimum sentencing which he alleges apply only to the "worst of the worst of crimes" is no help to him because those statutes do not have any bearing on Wis. Stat. § 941.29(4m)(a) plain meaning. Indeed, as the Supreme Court definitively explained in *Williams*, "[t]he fact that other unrelated statutes do explicitly prohibit probation in an abundance of caution is irrelevant" to an assessment of the statute at issue. *Williams*, 355 Wis. 2d 581, ¶ 34. As the *Williams* court explained, "where a statute explicitly includes a mandatory minimum period of confinement," as Wis. Stat. § 941.29(4m)(a) does, "there [is] no reason to prohibit probation." *Id.*

2. Brehm fails to show that Wis. Stat. § 941.29(4m)(a) is unconstitutionally overbroad, or that it does not apply to his act of firing a Glock into the air at the expense of public safety.

Brehm argues that Wis. Stat. § 941.29(4m)(a) is unconstitutional. (Brehm's Br. 6–7.) Although it is unclear whether he is arguing that the statute is facially unconstitutional or only as-applied to him, he cites this Court's decision in *Thomas*, 274 Wis. 2d 513, in support of his claim that Wis. Stat. § 941.29(4m)(a) is "unconstitutionally over broad." (Brehm's Br. 7.)

Both facial and as-applied constitutional challenges require the challenger to overcome the presumption of a statute's constitutionality and prove the statute is unconstitutional beyond a reasonable doubt. *State v. Wood*, 2010 WI 17, ¶ 15, 323 Wis. 2d 321, 780 N.W.2d 63. "A statute is overbroad when the normal meaning of its language is so

sweeping that its sanctions may be applied to conduct which the statute is not permitted to regulate." *Thomas*, 274 Wis. 2d 513, ¶ 22 (citation omitted).

Brehm's challenge fails because the statute fairly applies to his actions. As the circuit court recognized, neighbors saw Brehm fire several rounds from a 9mm Glock into the air outside of his apartment. (R. 36:6.) Indeed, at his sentencing Brehm said he was just "very happy that nobody got hurt" when he fired the Glock into the air outside his apartment at random. (R. 46:21.) These actions plainly implicate public safety in an even more direct way as the defendant in *Thomas*, in which the defendant merely carried a concealed black handgun in his waistband. *Thomas*, 274 Wis. 2d 513, ¶ 3.

In that case, this Court held that Wis. Stat. § 941.29's prohibition on felons possessing a firearm was not overbroad because "the legislature determined as a matter of public safety that it was desirable to keep weapons out of the hands of individuals who had committed felonies. 'Th[is] restriction . . . comes about incident to firearm regulation out of concerns of public safety.'" *Thomas*, 274 Wis. 2d 513, ¶ 23 (citation omitted). Possessing and firing a 9mm Glock at random into the air around Brehm's neighbors clearly implicates a "concern[ ] for public safety." *Id.*

Finally, Brehm does not even attempt to explain why Wis. Stat. § 941.29(4m)(a)'s language is "so sweeping that its sanctions may be applied to conduct which the statute is not permitted to regulate," *Thomas*, 274 Wis. 2d 513, ¶ 22. His argument that Wis. Stat. § 941.29(4m)(a) is unconstitutionally overbroad is therefore "inadequately briefed" and this Court should not consider it. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

3. The court's interpretation of Wis. Stat. § 941.29(4m)(a) was correct, so its reliance on the statute's plain language was neither inaccurate nor improper.

Brehm alleges that the circuit court sentenced him based on an improper factor and inaccurate information based on what he claims was the court's erroneous interpretation of Wis. Stat. § 941.29(4m)(a). A defendant has a constitutionally protected due process right to be sentenced upon accurate information and proper factors. *State v. Johnson*, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990) (citing *United States v. Tucker*, 404 U.S. 443 (1972)). The sentencing court erroneously exercises its discretion if it actually relies on clearly irrelevant or improper factors. *State v. Alexander,* 2015 WI 6, ¶ 17, 360 Wis. 2d 292, 858 N.W.2d 662 (quoting *State v. Harris*, 2010 WI 79, ¶ 66, 326 Wis. 2d 685, 786 N.W.2d 409). However, "[a] defendant 'cannot show actual reliance on inaccurate information if the information is accurate.'" *State v. Travis*, 2013 WI 38, ¶ 22, 347 Wis. 2d 142, 832 N.W.2d 491 (citation omitted).

To establish actual reliance on an improper factor or inaccurate information, Brehm must prove by clear and convincing evidence that a circuit court relied on improper factors. *Alexander*, 360 Wis. 2d 292, ¶ 17. Therefore, to succeed on his challenge, Brehm must prove: (1) that the factor was improper; and (2) that the circuit court relied on it. *Id.* ¶¶ 18–27. An improper factor is one that is "totally irrelevant or immaterial to the type of decision to be made." *Elias v. State*, 93 Wis. 2d 278, 282, 286 N.W.2d 559 (1990). Actual reliance occurs only when the circuit court paid "explicit attention" to an improper factor, and when the improper factor formed the "basis for the sentence." *Alexander*, 360 Wis. 2d 292, ¶ 25.

Brehm contends that the circuit court's conclusion that Wis. Stat. § 941.29(4m)(a) required it to impose a mandatory minimum constituted actual reliance[5] on an improper factor during sentencing. (Brehm's Br. 7–9.) He likewise argues that this belief constituted an "unreliable" basis on which to sentence him. (Brehm's Br. 7–9.)

Brehm's arguments fail because, as discussed above, his interpretation of Wis. Stat. § 941.29(4m)(a) is wrong. Brehm thus cannot show that the circuit court improperly relied on the statute's language either as inaccurate information because "[a] defendant 'cannot show actual reliance on inaccurate information if the information is accurate.'" *Travis*, 347 Wis. 2d 142, ¶ 22 (citation omitted).

For the same reason, Brehm has not shown that the court relied on an "improper factor" because he does not dispute that Wis. Stat. § 941.29(4m)(a) applies to him; he simply argues that it should be read to allow for a term of probation because the statute does not expressly prohibit it. Thus, Brehm has not shown that the circuit court's reading of Wis. Stat. § 941.29(4m(a)'s language was "totally irrelevant or immaterial to the type of decision to be made." *Elias*, 93 Wis. 2d at 282.

[5] Because the circuit court expressly relied on Wis. Stat. § 941.29(4m)(a)'s language to impose a mandatory minimum period of confinement on Brehm, the State does not dispute that the court "actually relied" on this information at sentencing. *State v. Alexander*, 2015 WI 6, ¶ 25, 360 Wis. 2d 292, 858 N.W.2d 662.

II. Brehm's ineffective assistance of counsel claims were insufficiently pled before the circuit court and are without merit such that the circuit court was able to deny them without holding an evidentiary hearing first.

A. Appellate review of ineffective assistance of counsel claims where a defendant chooses to plead guilty includes an assessment of the likely outcome of his trial, and an evidentiary hearing is not required for a circuit court to make this determination.

Ineffective assistance of counsel claims where a defendant has pleaded guilty or no-contest. "Wisconsin criminal defendants are guaranteed the right to the effective assistance of counsel through the Sixth and Fourteenth Amendments to the federal constitution and Article I, Section 7 of the Wisconsin Constitution." *State v. Domke*, 2011 WI 95, ¶ 34, 337 Wis. 2d 268, 805 N.W.2d 364. Wisconsin uses the United States Supreme Court's two-pronged *Strickland* test to analyze ineffective assistance claims. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prevail under *Strickland*, a defendant must prove that his counsel's performance was both deficient and prejudicial. *Strickland*, 466 U.S. at 687. If the defendant fails on either prong, the claim fails. *Strickland*, 466 U.S. at 697.

"To prove deficient performance, a defendant must show specific acts or omissions of counsel that are 'outside the wide range of professionally competent assistance.'" *State v. Arredondo*, 2004 WI App 7, ¶ 24, 269 Wis. 2d 369, 674 N.W.2d 647 (citation omitted). And counsel is not ineffective simply because he or she does not file a meritless motion or lodge a meritless objection. *State v. Wheat*, 2002 WI App 153, ¶ 14, 256 Wis. 2d 270, 647 N.W.2d 441.

To prove prejudice, "[i]t is not sufficient for the defendant to show that his counsel's errors 'had some

conceivable effect on the outcome of the proceeding.'" *Domke*, 337 Wis. 2d 268, ¶ 54 (citation omitted). Rather, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding[6] would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

However, in a case in which a defendant seeks to withdraw[7] his or her guilty plea, in order to show prejudice *Hill v. Lockhart,* 474 U.S. 52 (1985) requires a "defendant . . . allege facts to show 'that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Bentley*, 201 Wis. 2d at 312 (quoting *Hill*, 474 U.S. at 59). *Hill*, 474 U.S. at 59, explained that the prejudice inquiry in plea withdrawal cases "will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through trial." Thus, whether a reasonable defendant would have pleaded guilty but-for counsel's errors

[6] This standard of review applies to the prejudice component of Brehm's claim that Attorney McGinn was ineffective because he did not request a PSI. (Brehm's Br. 13–18.) Brehm's preferred remedy for this claim would be a resentencing because he claims that a PSI report would have resulted in a "more favorable" sentence" for him. (Brehm's Br. 18.) Brehm is therefore not seeking plea withdrawal but to be resentenced after a PSI report has been prepared, so the usual *Strickland* prejudice analysis, that the outcome of his sentencing would have been different, should apply to this claim. *See id.* at 694.

[7] This standard of review applies to the prejudice component of Brehm's ineffective assistance of counsel claims where he is seeking plea withdrawal, including his claims that Attorney McGinn was ineffective because he did not advise Brehm to enter evidence of his "nonpossession" of the Glock, as well as Attorney McGinn's alleged failure to instruct Brehm to remain silent after his initial *Mirandized* confession to police. (Brehm's Br. 18–19.)

is informed by the likely "outcome of a trial." *Hill*, 474 U.S. at 59.

The pleading standard applicable to Brehm's postconviction motion. "A defendant's *Nelson/Bentley* motion must meet a higher standard for pleading than a *Bangert* motion," *State v. Howell*, 2007 WI 75, ¶ 75, 301 Wis. 2d 350, 734 N.W.2d 48, which involves the propriety of the defendant's on-record plea colloquy. A challenge to something extrinsic to that plea colloquy under *Nelson/Bentley* like Brehm's defendant must allege sufficient material facts that, if true, would entitle him to relief. *Howell*, 301 Wis. 2d 350, ¶ 75.

Moreover, the law is clear that a postconviction motion alleging ineffective assistance of counsel does not automatically trigger a *Machner* hearing just because a defendant asks for one. *State v. Phillips*, 2009 WI App 179, ¶ 17, 322 Wis. 2d 576, 778 N.W.2d 157. "[N]o hearing is required if the defendant fails to allege sufficient facts in his or her motion, if the defendant presents only conclusory allegations or subjective opinions, or if the record conclusively demonstrates that he or she is not entitled to relief." *Id.* (citing *Bentley*, 201 Wis. 2d at 309–10). Whether Brehm's postconviction motion alleged sufficient facts to require a *Machner* hearing presents a mixed standard of review. *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433. As discussed above, this Court must first determine if Brehm alleged facts that, if true, would entitle him to relief. This is a question of law and is reviewed de novo. *Id.* Sufficient facts are facts that establish deficient performance and prejudice under *Strickland*. *Allen*, 274 Wis. 2d 568, ¶¶ 12, 26.

If the record "conclusively demonstrates that the defendant is not entitled to relief," *State v. Roberson*, 2006 WI 80, ¶ 43, 292 Wis. 2d 280, 717 N.W.2d 111, then the circuit court's decision to deny a postconviction motion without an evidentiary hearing is reviewed for an erroneous exercise of

discretion. *Phillips*, 322 Wis. 2d 576, ¶ 17. As the Wisconsin Supreme Court recently stated, "[t]o be clear, a circuit court has the discretion to deny a defendant's motion—even a properly pled motion—to withdraw his plea without holding an evidentiary hearing if the record conclusively demonstrates that the defendant is not entitled to relief." *State v. Sulla*, 2016 WI 46, ¶ 30, 369 Wis. 2d 225, 880 N.W.2d 659.

Ineffective assistance of counsel claims is reviewed under a mixed standard of review. *State v. Breitzman*, 2017 WI 100, ¶ 37, 378 Wis. 2d 431, 904 N.W.2d 93. "The factual circumstances of the case and trial counsel's conduct and strategy are findings of fact, which will not be overturned unless clearly erroneous . . . ." *Breitzman*, 378 Wis. 2d 431, ¶ 37. Whether trial counsel performed deficiently and whether any deficient performance prejudiced the defendant are both questions of law reviewed de novo. *Id.* ¶¶ 38–39.

B. Brehm's claims of ineffective assistance of counsel are without merit, and the circuit court was able to properly deny his motion without a hearing even if it was sufficiently pled.

1. Attorney McGinn did not perform deficiently because he did not request a PSI report before sentencing, and Brehm has not demonstrated that he was prejudiced by this alleged failure.

Brehm argues that Attorney McGinn was ineffective because he did not request a PSI report. (Brehm's Br. 13–18.) He claims that Attorney McGinn performed deficiently because a "reasonable attorney would [have] request[ed] a PSI in a felony case in which a substantial prison sentence [was] involved." (Brehm's Br. 16.) He argues McGinn's performance prejudiced him because, had a PSI report been

prepared, Brehm "could have received a more favorable sentence that reflected his mental health and other mitigating factors highlighted in the PSI." (Brehm's Br. 18.)

Brehm fails to show either deficient performance or prejudice. Moreover, as the circuit court correctly recognized in its postconviction order, Brehm's motion failed to allege what specific "additional insight" a PSI would have provided the court at sentencing, meaning that Brehm's postconviction motion failed to allege sufficient facts to require further analysis. (R. 36:7.)

First, Brehm has not demonstrated that Attorney McGinn performed deficiently simply because he did not request a PSI report. This is especially true because both the State and defense agreed that Brehm serve the 3-year, absolute minimum period of initial confinement available under Wis. Stat. § 941.29(4m)(a) where a maximum sentence available to the court was five years of initial confinement. (R. 46:2, 4.) Notably, the circuit court followed the parties' sentencing recommendation and gave Brehm a six-year sentence that consisted of three years of initial confinement and three years of extended supervision. (R. 46:23.) Brehm does not explain why a PSI would have made any difference to this decision and does not challenge the circuit court's exercise of discretion to impose a three-year period of extended supervision. Nor does he dispute the recitation of his criminal history that led the court to conclude that the three years of extended supervision was necessary to help Brehm "walk the straight and narrow" after failing during "chance, after chance, after chance" on previous terms of probation the result of which was that Brehm "just continually . . . pick[ed] up [new] cases." (R. 46:17)

Second, Brehm fails to articulate how he was prejudiced by this alleged failure. At sentencing, the circuit court did explicitly consider Brehm's mental and physical health by considering letters from Brehm's family and medical

statement all of which "discussed [his] family, as well as his physical health, mental health, and addiction issues." (R. 36:8 n.3; 46:17–19, 21–22.) Several of the letters specifically "referenced that [Brehm] is clearly a loving father, something which Brehm claims a PSI report would have shown. (R. 21:2–7, Brehm's Br. 17.) Brehm does not explain what concrete, specific additional information a PSI report would have provided the circuit court beyond the information that the court already considered in these letters. Further, the court imposed the statutorily imposed mandatory minimum sentence on Brehm, so it is unclear how a PSI report would have netted Brehm a "more favorable sentence" than the one the court imposed. (Brehm's Br. 18.) For all these reasons, Brehm has not shown that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of [his sentencing hearing] would have been different." *Strickland*, 466 U.S. at 694.

Separately, Brehm contends that he sufficiently alleged enough facts on this issue such that the circuit court was obligated to hold an evidentiary hearing. (Brehm's Br. 17.) Again, Brehm is wrong. Assuming *arguendo* that his postconviction motion was sufficiently pled such that the circuit court could have held a hearing if it chose, that does not mean Brehm was entitled to one. As the Wisconsin Supreme Court emphasized in *Sulla*, "[t]o be clear, a circuit court has the discretion to deny a defendant's motion—even a properly pled motion—to withdraw his plea without holding an evidentiary hearing if the record conclusively demonstrates that the defendant is not entitled to relief." *Sulla*, 369 Wis. 2d 225, ¶ 30.

Therefore, because the circuit court concluded that it did take Brehm's mental, physical and family history into account at sentencing, and Brehm failed to articulate any specific issue that it did not consider that a PSI would have revealed, Brehm's postconviction motion "fail[ed] to

specifically identify any non-cumulative information the court did not have at the time of sentencing." (R. 36:8.) The court was therefore able to properly exercise its discretion and deny Brehm's motion without a hearing because of its determination that the record in the case "conclusively demonstrate[d] that [Brehm was] not entitled to relief." *Id.*

2. Attorney McGinn did not perform deficiently because he did not enter supposed evidence of Brehm's alleged "nonpossession" of a firearm.

Brehm contends that Attorney McGinn should have entered evidence of his "nonpossession" of the 9mm Glock because although Brehm admitted to firing the gun into the air Brehm was intoxicated at the time and did not actually own the 9mm. (Brehm's Br. 18–19.) Brehm is wrong because he does not allege, let alone explain, how his intoxication would render his admission that he fired the Glock unreliable. Nor does Brehm explain how the fact that he "borrowed" the gun from his neighbor mean that he did not "possess" it at the time of the shooting.

Attorney McGinn could not have performed deficiently because he did not raise a meritless challenge to the reliability of Brehm's statement in which he admitted that he possessed the Glock. *Wheat*, 256 Wis. 2d 270, ¶ 14. Moreover, Brehm cannot complain about this allege ineffectiveness because, when he decided to plead guilty, Brehm explicitly stated that he was waiving his ability to raise several defenses, one of which was intoxication. (R. 44:5.) "Solemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 73–74 (1977).

And, in any event, Brehm was not prejudiced by Attorney McGinn's alleged ineffectiveness because the elements of being do not require that a person own a weapon in order to have possessed it. Wis. JI–Criminal 1343 (2019),

the applicable jury instruction, states that in order to possess a firearm a defendant must only "knowingly ha[ve] actual physical control of a firearm." (R-App. 101.) The instruction further declares that "[i]t is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item." (R-App. 101.) Thus, even if Attorney McGinn had advised Brehm not to plead guilty based on a claim that he did not own the Glock which he fired into the air, that advice would not have benefitted Brehm because the State did not need to prove that Brehm owned the Glock as an element of being a felon in possession of a firearm. Brehm was undoubtedly aware of this fact because he stated that, before he pleaded guilty, he understood the elements of possession of a firearm by a felon. (R. 44:3.) Brehm therefore fails to show that he was prejudiced such that there "is a reasonable probability . . . he would not have pleaded guilty and would have insisted on going to trial.'" *Bentley*, 201 Wis. 2d at 312 (citation omitted).

3. Attorney McGinn did not perform deficiently because Brehm admitted that he possessed the firearm in his interview, and Brehm has failed to explain how he was prejudiced by counsel's failure to advise him to remain silent thereafter.

Finally, Brehm claims that Attorney McGinn was ineffective because he allegedly did not "advise Brehm to not make any statements to his detriment." (Brehm's Br. 19.) He again claims without explanation that his "dangerous level of intoxication" rendered his initial statement in which he admitted to possessing and firing the Glock "unusable." (Brehm's Br. 19.) Further, Brehm states that he "made statements to his detriment afterwards including at sentencing." (Brehm's Br. 19.) Brehm did admit to firing the

Glock in the air outside his apartment at sentencing. (R. 46:21.)

Brehm's argument fails because he does not explain why his initial confession was unreliable simply because he was intoxicated when he made it, so Brehm has not demonstrated that Attorney McGinn performed deficiently by failing to argue the point. Moreover, Brehm does not explain why his supposedly detrimental statements at sentencing after he had already pleaded guilty and expressly waived his right to challenge the voluntariness of his statements and any intoxication defense, were prejudicial to him. (R. 44:5.)

Because Brehm failed to explain why the plea colloquy during which he waived any right to challenge his initial statements was defective, Attorney McGinn could not performed deficiently because he did not advise Brehm "against every statement after the initial interview." (Brehm's Br. 19.) Attorney McGinn would not have had any basis to give such advice because Brehm does not explain why his initial *Mirandized* statements in which he admitted to possessing and firing the Glock were unreliable simply because he was intoxicated. Thus, Brehm failed to show that Attorney McGinn's performance was deficient because counsel cannot be deemed ineffective simply because he did argue such a meritless position. *Wheat*, 256 Wis. 2d 270, ¶ 14.

Even assuming that Attorney McGinn's performance was deficient on this point, Brehm fails to allege, much less demonstrate prejudice–that he would have withdrawn his guilty plea and instead gone to trial on the charge. *Bentley*, 201 Wis. 2d at 312 (citation omitted). As an initial matter, the circuit court held that Brehm did not explain why his statements at sentencing prejudiced him. (R. 36:9.) Thus, the court correctly rejected Brehm's argument without further consideration because his claim was conclusory under *Bentley*, 201 Wis. 2d at 309–10. (R. 36:9.)

But there was more evidence of Brehm's guilt than just his admissions: Brehm's neighbors saw him holding the Glock and firing it into the air, and law enforcement the Glock inside Brehm's apartment and several spent shell casings that matched the Glock in the immediate vicinity outside. (R. 1:1.) Therefore, even if Attorney McGinn were able to get Brehm's own statements to be excluded on reliability grounds, the State would have been able to successfully prosecute Brehm for being a felon in possession of a firearm. Brehm has therefore not shown that he would have gone to trial instead of pleading guilty because the likely "outcome of a trial," *Hill*, 474 U.S. at 59, was one in which Brehm still would have been found guilty.

CONCLUSION

This Court should affirm Brehm's judgment of conviction and the order denying his motion for postconviction relief.

Dated this 29th day of September 2020.

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 8,577 words.

Dated this 29th day of September 2020.

Robert Probst

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 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. § (Rule) 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 29th day of September 2020.

Robert Probst

ROBERT G. PROBST
Assistant Attorney General

Supplemental Appendix
State of Wisconsin v. Michael James Brehm
Case No. 2020AP266-CR

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § (Rule) 809.19(13).

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