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STATE OF WISCONSIN
IN SUPREME COURT

No. 2020AP1746-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSEPH M. MARKS,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

KIERAN M. O'DAY
Assistant Attorney General
State Bar #1113772

Attorneys for Plaintiff-
Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2065
(608) 294-2907 (Fax)
odaykm@doj.state.wi.us

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The State opposes Joseph M. Marks' petition for review. In a published opinion, the court of appeals applied the correct principles of law and standards of review when it affirmed the circuit court's decision and order denying Marks' postconviction motion. *State v. Marks*, 2022 WI App 20, __ Wis. 2d __, __ N.W.2d __. Marks' petition does not present any special or compelling reason for this Court to disturb the court of appeals' decision in this case. Marks, by his own admission, seeks only error correction, and he does not otherwise present any compelling reasons for this Court's review. (Pet. 10–11.) Conversely, the court of appeals dutifully applied both well-settled precedent and well-settled principles of statutory interpretation to Marks' various arguments.

**THIS COURT SHOULD DENY THE PETITION FOR
REVIEW BECAUSE IT DOES NOT SATISFY THE
CRITERIA IN WIS. STAT. § (RULE) 809.62(1R).**

This Court should deny Marks' petition for review. Marks was convicted of one count of first-degree sexual assault of a child under the age of thirteen and one count of exposing genitals to a child after a jury found him guilty. The issue on appeal centers around the circuit court's decision to admit a modified version of Renee's¹ original forensic interview under Wis. Stat. § 908.08. Marks contended that he way in which the police "modified" the DVD of the forensic interview ran afoul of Wis. Stat. § 908.08(3)(b)'s requirement that the video be "accurate and free from excision, alteration and visual or audio distortion." He also alleged that the video did not otherwise comport with sections 908.08(3)(c) and (d). The circuit court disagreed and admitted the video. It found that the modification to the DVD, which *enhanced* the audio quality, did not negatively affect the accuracy of the video.

¹ Pursuant to Wis. Stat. § (Rule) 809.86, the victim is referred to by the pseudonym employed by the court of appeals.

Moreover, the court found that Renee understood that false statements are punishable, the importance of telling the truth, and displayed other indicia of trustworthiness.²

To begin, Marks' petition, though philosophical and grandiose in its criticisms of the court of appeals, does not actually demonstrate any need for this Court's review. In fact, by his own admission, Marks seeks only error correction. (Pet. 10–11.) However, he does not specifically identify *any* errors by the court of appeals—he merely disagrees with its decision. (See, e.g., Pet. 10 (making the conclusory argument that the “Court of Appeal’s [sic] errors stem from a fundamental misunderstanding of *how to interpret law*” without identifying those errors). Even if he had identified correctable errors, error correcting is not a special or compelling reason for this Court to accept review of this case. *State v. Minued*, 141 Wis. 2d 325, 328, 415 N.W.2d 515 (1987) (per curiam) (“[i]t is not [the supreme] court’s institutional role to perform this error correcting function”); *State ex rel. Swan v. Elections Bd.*, 133 Wis. 2d 87, 93, 394 N.W.2d 732 (1986) (the supreme court is not an error-correcting court but a court “intended to make final determinations affecting state law, to supervise the development of the common law, and to assure uniformity of precedent throughout the state.”). This Court “is primarily concerned with the institutional functions of our judicial system, while the court of appeals is charged primarily with error correcting in the individual case[s].” *Id.* at 93–94.

Further, as discussed below, Marks' petition does not otherwise satisfy the criteria for this Court's review.

² Marks also raised a claim of ineffective assistance of counsel, which the circuit court and court of appeals rejected. He does not raise that issue in his petition, and the issue is therefore “not before [this Court].” *State v. Sulla*, 2016 WI 46, ¶ 7 n.5, 369 Wis. 2d 225, 880 N.W.2d 659.

I. The court of appeals properly interpreted Wis. Stat. § 908.08(3)(b) to avoid an absurd result.

In this case, the audio portion of Renee's forensic interview was of poor quality, continually cutting in and out. *Marks*, 2022 WI App. 20, ¶ 9. However, the interviewer had a contemporaneous audio recording going during the interview as well. *Id.* Through a process described in great detail in the court of appeals' decision, the State was able to merge the audio recording with the video recording to create clear audio. *Id.* ¶¶ 9–10. Importantly, the modification of the original video did not alter the *content* of Renee's forensic interview. *Id.* ¶ 10 ("Flessert determined that Moyer's recording and the video 'matched perfectly.'"). Rather than altering the content, the modified video merely had clearer audio.

Although he does not say it in his petition, it was the merging of the audio and video that Marks contends ran afoul of the statute. *Id.* ¶ 21. However, at no point has Marks contended that the video that the jury saw was unclear, inaccurate in its content, or distorted in any way. *Id.* Instead, Marks merely takes issue with the *process* used to enhance the audio. *Id.*

The court of appeals aptly applied well-settled principles of statutory interpretation in determining whether Wis. Stat. § 908.08(3)(b) permits the process that occurred here. The court began with the overall purpose of Wis. Stat. § 908.08, noting that the statute exists "to make it easier to use the videotaped statements of children in criminal and related proceedings, while preserving the defendant's constitutional right to cross-examine witnesses." *Marks*, 2022 WI App. 20, ¶ 22. That purpose is advanced in section 908.08(3)(b) by ensuring, "in fairness to the defendant, that the recording faithfully represent the actual content of the interview." *Id.*

That the court interpreted the statute in light of that purpose is entirely permissible and consistent with this Court's precedent. *State v. Mercado*, 2021 WI 2, ¶ 41, 395 Wis. 2d 296, 953 N.W.2d 337 (describing the "important purposes" of Wis. Stat. § 908.08 and discussing its requirements "with th[at] background in mind"); *see also State ex. rel Kalal v. Circuit Court for Dane Cnty*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110 ("[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect."); Antonin Scalia & Brian Garner, *Reading Law: The Interpretation of Legal Text*, 56 (2012) ("Of course, words are given meaning by their context, and context includes the purpose of the text.").

After placing its interpretation in the proper context, the court of appeals then assessed the plain language of the statute. *Marks*, 2022 WI App. 20, ¶ 23. The court interpreted what it means to be "accurate" under the statute. *Id.* ¶ 24. It concluded that "a recording that is impermissibly excised, altered, or distorted does not present to the fact finder a true and complete depiction of the interview, and thus is not accurate." *Id.* Because it is the accuracy of the interview that ensures its admissibility and fairness to the defendant, the court framed the question as "whether the manipulation . . . that occurred here impacted the accuracy or completeness of the final recording shown to the jury." *Id.*

Looking at the modification that occurred here, a merger of contemporaneous audio-recording with the video-recording, the court answered the above question in the negative. The court carefully assessed what it means to "distort," "alter," and "excise," and held that "an alteration . . . that *restores* sound quality as to *more precisely capture* the content of the interview. . . . enhances (as opposed to obscures) the accuracy of the recording and thus is consistent with the purpose and intent of the statute." *Id.* ¶¶ 25–26 (emphases in

original). Importantly, the court of appeals clarified that “our holding is narrow and applies to the facts before us.” *Id.* ¶ 27. Its opinion says nothing of any potential similar modifications that may negatively impact the accuracy of a child’s video-recorded interview.³ *See generally, id.*

Any other interpretation based on these facts would lead to an absurd and unreasonable result. An absurd result arises “when an interpretation would render the relevant statute contextually inconsistent or would be contrary to the clearly stated purpose of the statute.” *State v. Grunke*, 2008 WI 82, ¶ 31, 311 Wis. 2d 439, 752 N.W.2d 769 (footnote omitted). Marks’ interpretation does both.

First, Marks’ interpretation is internally inconsistent because it would lead to the exclusion of an entirely accurate child forensic interview because of a modification that *positively* impacted its accuracy. That is inconsistent and nonsensical. Second, Marks’ interpretation runs contrary to the purpose of the statute, which, again, is to make it *easier* not harder to admit recordings of child forensic interviews. *Marks*, 2022 WI App. 20, ¶ 22; *see also Mercado*, 395 Wis. 2d 296, ¶ 41; *State v. Snider*, 2003 WI App 172, ¶ 13, 266 Wis. 2d 830, 668 N.W.2d 784. A party seeking to admit a video-recorded forensic interview under these limited and unique circumstances would be faced with the impossible decision of attempting to admit a clearly inadequate video or foregoing a vital piece of evidence because the party could not modify the video to cure the poor quality in a way that does not

³ Perhaps those facts could exist in a different case, but because Marks has never contested the accuracy of the video here, this Court would merely be rendering an advisory opinion on that hypothetical scenario.

undermine its accuracy.⁴ Contrary to Marks' petition, (Pet. 12–13), this Sophie's choice runs contrary to the purpose of the statute and protects neither the children of this State nor the rights of criminal defendants.

Based on the unique facts of this case, the court of appeals' interpretation is the only one that gives meaningful effect to the words of the statute given their specific purpose. Because the court of appeals properly interpreted the statute, there is no need for this Court to further clarify or develop the law. Wis. Stat. § (Rule) 809.62(1r)(c).

II. The court of appeals properly concluded that Renee's video-recorded statement met the requirements of Wis. Stat. §§ 908.08(3)(c) and (d).

Marks' remaining arguments are similarly unavailing. At the outset, none of the court of appeals' decision surrounding Wis. Stat. § 908.08(c) and (d) in this case present "purely legal question[s]." (Pet. 12.); Wis. Stat. § (Rule) 809.62(1r)(c)3. Assessing whether a video-recorded statement meets the requirements to sections (3)(c) and (d) is, to the contrary, fact-intensive and based on the characteristics of the particular child in question. *Mercado*, 395 Wis. 2d 296, ¶ 46 ("Recordings of children's testimonies will differ depending on the facts of the case and the attributes of the child."). Additionally, the court of appeals stated and applied the correct standard in these types of cases: "Whether a recording complies with Wis. Stat. § 908.08(3)(c) does not involve a rigid determination as to whether the child correctly answered every question. Rather, we must examine the

⁴ While it is true that it is usually the State that will be the party seeking admission, the statute governs "the party offering the statement," Wis. Stat. § 908.08(2)(a), which means Marks' interpretation could negatively impact defendants who wish to introduce a video-recorded forensic interview as well.

child's statement in its entirety." *Marks*, 2022 WI App. 20, ¶ 30.

The court of appeals viewed the recording in its entirety and reviewed it under a more favorable standard of review to *Marks*. *Marks*, 2022 WI App. 20, ¶ 19 n.6 (applying de novo review, "the standard most favorable to *Marks*"). It agreed with *Marks* that certain portions of the video "did not, in and of themselves, reflect [Renee's] understanding that false statements were punishable and that it was important to tell the truth." *Id.* ¶ 29. However, under its independent review, the court concluded that "other portions of the recording, and the recording as a whole, demonstrate that Renee understood these concepts." *Id.* The court specifically pointed to Renee's statement that "If you lie you get in trouble, if you tell the truth, you not [sic] get in trouble" and her affirmative answers and head nods to the interviewers related questions. *Id.* Ultimately, "Renee . . . articulated . . . *in her own words*[] the importance of telling the truth." *Id.* ¶30 (emphasis added).

Merely disagreeing with the court of appeals' review of Renee's video, *Marks* implores this Court to grant review to "resolve" an unnecessary question of legislative intent.⁵ (Pet. 9–10.) The language of the statute is plain, and the legislature's intent is articulated by what the text says. *Kalal*, 271 Wis. 2d 633, ¶ 44 ("We assume the legislature's intent is expressed in the statutory language."). The statute requires that the circuit court make a discretionary finding of whether "the child's statement was made upon . . . the child's understanding that false statements are punishable and of the importance of telling the truth." Wis. Stat. § 908.08(3)(c). Both courts below aptly assessed the totality of Renee's interview and concluded she understood the difference

⁵ Confusingly, this deviates from *Marks*' call to "restore the primacy of the statute's text in its interpretation" that he advanced a mere page prior. (Pet. 9.)

between the truth and a lie. *Marks*, 2022 WI App. 20, ¶¶ 12, 29–30. To the extent Marks asks this Court to inject “implicit” requirements that the legislature did not see fit to include, those arguments should be rejected. *Mercado*, 395 Wis. 2d 296, ¶ 50 (citation omitted) (this Court “will not read into the statute a limitation the plain language does not evidence.”).

Finally, Marks admonishes the court of appeals for “violat[ing] the presumptions of consistent usage and the canon of *in pari materia* [and] jettison[ing] *stare decisis*” relating to Wis. Stat. § 908.08(3)(d). (Pet. 10.) He complains that “[t]he Court of Appeal’s [sic] holding leaves the lower courts with no guidance for determining whether indicia of trustworthiness exist.”⁶ (Pet. 10.) As a result, he asks that this Court “firmly declare the *Sorenson*^[7] factors to guide throughout Wis. Stat. § 908.08, and refute this unequal treatment of similarly situated litigants.”⁸ (Pet. 10.) Marks’ argument is unpersuasive.

To begin, the Court of Appeals did not “jettison *stare decisis*”; rather, it acknowledged that “there [are] no specific facts that must be present in order for a court to conclude that a child’s statement is sufficiently truthful.” *Marks*, 2022 WI

⁶ Marks’ unexplained comparison to *Roberts v. Ohio*, 448 U.S. 56 (1980), does not merit a response.

⁷ *State v. Sorenson*, 143 Wis. 2d 226, 421 N.W.2d 77 (1988). Under *Sorenson*, courts assessing whether there are circumstantial guarantees of trustworthiness are to review: (1) “the attributes of the child making the statement”; (2) “the person to whom the statement was made, focusing on the person’s relationship to the child”; (3) “the circumstances under which the statement was made”; (4) “the content of the statement itself”; and (5) “other corroborating evidence.” *Id.* at 245–46.

⁸ Marks neither explains this point nor identifies any disparate treatment between “similarly situated” litigants. Regardless, the inquiry relates not to the defendants, but to the child’s video-recorded interview. This argument is irrelevant even if he had attempted to explain it.

App. 20, ¶ 32. In turn, it reaffirmed that courts should not “rigidly apply or rely on the facts of other cases as a benchmark.” *Id.* Instead, courts are to assess whether “the time, content and circumstances of the [child’s] statement provide indicia of trustworthiness” on a case-by-case basis based on the particular context of the specific interview. Wis. Stat. § 908.08(3)(d). Both lower courts here properly underwent that analysis.

Additionally, there is no reason for this Court to “declare” that the *Sorenson* factors must apply to a court’s assessment of Wis. Stat. § 908.08(3)(d). As a practical matter, this Court already rejected such a conclusion in *Mercado*. There, this Court reversed the decision of the court of appeals, among other reasons, for “conflat[ing] the first *Sorenson* factor with the child’s understanding of the importance of telling the truth, found in § 908.08(3)(c).” *Mercado*, 395 Wis. 2d 296, ¶ 65. The court of appeals appears to not have applied the *Sorenson* factors for that very reason.⁹ As the Court stated, “although the *Sorenson* factors may guide our application of Wis. Stat. § 908.08(3)(d), they do not control.” *Marks*, 2022 WI App. 20, ¶ 32 n.9.

To that end, the court of appeals’ decision provides sufficient guidance to lower courts. The court of appeals (and the circuit court) assessed things such as Renee’s age and the content of her statement related thereto, whether she displayed any animosity or negativity toward Marks, whether there was evidence of coaching, and the time between the assaults and the interview. *Id.* ¶¶ 33–34. Courts also *could* look to the *Sorenson* factors; courts could similarly look to their analyses under section (3)(c) of how the child’s

⁹ It also did not assess the *Sorenson* factors because Marks made no attempt to do so himself. *State v. Marks*, 2022 WI App 20, ¶ 32 n.9, __ Wis. 2d __, __ N.W.2d __ (citing *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992)).

statement demonstrated her understanding of the truth versus a lie. All this is to say, the court can look to a countless number of factors to determine whether the statement has sufficient indicia of trustworthiness. Those factors will differ child-by-child and case-by-case. *See id.* ¶ 32.

Finally, despite complaining that the court of appeals did not provide lower courts with any guidance, Marks does not point to any actual flaws in its analysis. He does not, for example, contend that the circuit court or court of appeals relied on improper or irrelevant factors when those courts assessed the indicia of trustworthiness of Renee's statement. Rather, he appears to just disagree with the little weight the court of appeals put on his expert's critique of the interview. But that disagreement alone does not present a reason for this Court's review.

In sum, Marks' petition does not demonstrate any special or compelling reason for this Court to grant review. His interpretation of Wis. Stat. § 908.08(3)(b) would lead to an absurd result that negatively impacts the State, defendants, and child victims. His remaining critiques of the court of appeals are not supported by its decision or the record. Finally, by his own admission, he seeks only error correction but does not identify any actual errors for this Court to correct. Because Marks' petition falls short of meeting this Court's criteria for granting review, it should deny the petition.

CONCLUSION

This Court should deny Marks' petition for review.

Dated this 9th day of June 2022.

Respectfully submitted,

JOSHUA L. KAUL

Attorney General of Wisconsin



KIERAN M. O'DAY

Assistant Attorney General

State Bar #1113772

Attorneys for Plaintiff-

Respondent

Wisconsin Department of Justice

Post Office Box 7857

Madison, Wisconsin 53707-7857

(608) 267-2065

(608) 294-2907 (Fax)

odaykm@doj.state.wi.us

Assistant Attorney General

FORM AND LENGTH CERTIFICATION

I hereby certify that this petition or response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition or response produced with a proportional serif font. The length of this petition or response is 3097 words.

Dated this 9th day of June 2022.



KIERAN M. O'DAY
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULES) 809.19(12) and 809.62(4)(b) (2019-20)

I hereby certify that:

I have submitted an electronic copy of this petition or response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.19(12) and 809.62(4)(b) (2019-20).

I further certify that:

This electronic petition or response 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 petition or response filed with the court and served on all opposing parties.

Dated this 9th day of June 2022.



KIERAN M. O'DAY
Assistant Attorney General