STATE OF WISCONSIN

COURT OF APPEALS—DISTRICT III

Case No. 2021AP000943-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

HAJJI Y. MCREYNOLDS,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in the Eau Claire County Circuit Court, the Honorable William M. Gabler Presiding and Order Denying Postconviction Relief, the Honorable Emily M. Long Presiding

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BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

ISSUES PRESENTED

1. Whether Mr. McReynolds was denied his right to effective assistance of counsel at trial when his attorney failed to object to the State's repetitive introduction of improper vouching evidence in the form of a police officer testifying that he believed the informant was telling the truth and improper character evidence about Mr. McReynolds alleged gang affiliation.

The circuit court denied Mr. McReynolds' postconviction motion for a new trial. This court should reverse and remand for a *Machner* hearing.

2. Whether the circuit court violated Mr. McReynolds' right to be present at sentencing and his right to open proceedings by failing to state the reasons for his sentence in open court, instead filing a written memorandum on a later date.

The circuit court denied Mr. McReynolds' postconviction motion for a new sentencing hearing, concluding that Wis. Stat. § 973.017(10m)(b) permitted this procedure. The court did not address the constitutional claims.

This court should reverse and remand for a new sentencing hearing.

POSITION ON ORAL ARGUMENT AND PUBLICATION

There is no case law interpreting Wis. Stat. § 973.017(10m)b. Mr. McReynolds argues that the statute is unconstitutional as applied to him. Oral argument and publication may be warranted on this novel issue.

STATEMENT OF THE CASE AND FACTS

The State charged Mr. McReynolds with Count 1, delivery of cocaine more than 1 gram but less than 5 grams, Count 2, misdemeanor bail jumping, Count 3, delivery of cocaine less than 1 gram, and Count 4, misdemeanor bail jumping. R.1:1-2. [1]

On April 9-10, 2015, a jury trial took place,[2] the Honorable William M. Gabler presiding. The witnesses were three law enforcement officers, the informant, and a crime lab analyst.

Investigator Aaron Ranallo testified that on August 10, 2014, an informant contacted him and told him Mr. McReynolds was dealing cocaine. The informant offered to participate in a controlled buy.

[1] Before the trial began, the State moved to dismiss Counts 2 and 4, the misdemeanor bail jumping charges. R.293:33. It also moved to amend Count 1 to a reduced charge of delivery of cocaine less than 1 gram. *Id.* The court granted both motions. *Id.*

[2] The trial transcripts were produced in seven parts. R.293-299.

R.295:14. The alleged controlled buy took place on August 11, 2014. R.295:16. The informant was searched beforehand. R.295: 41. Police checked his pockets and patted him down. R.295:42. They did not do a body cavity search. R.295:44.

Police gave the informant $150 in prerecorded cash and outfitted him with a body wire and video recording device. R.295:17. They dropped him off near where the buy was supposed to take place. R.295:18. They saw him walk toward a BP gas station. They heard him call someone. The informant told them it was Mr. McReynolds. R.295:19. However, police did not listen in to the call to confirm this. R.295:26.

After the informant reached the BP station, police lost sight of him. R.295:19-20. A few minutes later the informant and Mr. McReynolds were seen walking together and parting ways. R.295:22. The informant met back with police and gave them three plastic bags, containing a white substance that turned out to be cocaine. R.295:23-25. Ranallo acknowledged that the bags were smaller than marbles and due to their size could be easily hidden on a person. R.295:25. Police never recovered the prerecorded money. R.295:26. The informant was paid $100 for his work. R.295:28.

The informant testified that when he met with Mr. McReynolds, he bought drugs from him. R.296:10. The two spoke briefly and Mr. McReynolds remarked that there were a lot of police officers around. R.296:10. The State played a clip of the alleged buy.

R.72 (7 minutes and 47 seconds). R.296:14. The informant testified that the exchange was not visible on camera. Instead, the camera was in the palm of his hand. 296:19.

The informant provided a statement to Ranallo and Ranallo wrote it out for him. R.296:25; R.73. The State asked Ranallo to read the statement aloud.[3] The State then asked Ranallo, "so do you believe this to be a truthful and accurate statement?" and he responded "Yes, I do." R.296:42. The State asked, "[a]nd do you have any reason to believe that [the informant] was in any way untruthful with respect to the information he provided to you?" and Ranallo responded, "No." *Id.* Later during the examination, Ranallo testified that he was "not given any information to lead [him] to believe that he [informant] was not being truthful." R.296:45.

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[3]The statement read:

> I talked to Cass yesterday, and he said, "I'm all good." I talked to Cass at 9:30 this morning and he said, " I'm still all good" and to come buy. Around 10:15 this morning he asked when I would be coming through. After I got dropped off, I called Cass and said I was coming through. I met with Cass on the sidewalk and walked toward BP. I handed the $150 to Cast, and he handed me three rocks.

R.73.

The informant acknowledged that he had previously been convicted of a crime ten times. R.295:47. He also admitted that he was a drug user, but testified that he was recently in recovery. *Id.* He described his relationship with Mr. McReynolds as "fair," but also admitted that they were in a physical fight around the time he contacted police about Mr. McReynolds. R.295:48, 296:29. He said the fight took place a couple days after August 11, 2014, *i.e.* between the first alleged deal (August 11, 2014) and the second alleged deal (August 18, 2014) and was about money the informant owed Mr. McReynolds' friend. R.296:29. The State asked who the money was for and the informant said it was for KG. R.296:30. The State then asked "who is KG," and the informant replied, "One of Mr. Cast's Vice Lord friends." R.296:30.[4] The informant testified that the fight was unrelated to the alleged controlled buy. R.295:31, 44.

On August 18, 2014, the informant contacted Ranallo and again offered his services. R.296:44. The informant admitted that his motivation for offering to do the second buy was that he was "mad" at Mr. McReynolds about the fight. R.297:13. Police took the informant to the area the buy was supposedly to take place. R.296:46. He was searched. R.297:5. He was given $150 pre-marked cash. He was given recording devices. R.296:47. He made a phone call,

[4] The informant testified that Cast and Outcast were Mr. McReynolds' nicknames. R.298:17-18. The written statements refer to Mr. McReynolds as "Cass."

allegedly to Mr. McReynolds, but again police did not listen in R.296:24.

Ranallo testified that he lost sight of the informant "for some time" both before and after the alleged buy. R.298:21. He acknowledged that it was possible that the informant picked up drugs somewhere during those times, although he found it unlikely. R.298: 21, 23. When the informant approached Mr. McReynolds, he saw that KG was there too. The State again asked, "who is KG" and this time the informant answered, his "Vice Lord brother." R.297:18.

The State played a clip of the alleged buy. R.298:14; R.72. It took place in a car. The informant testified that Mr. McReynolds handed him drugs. R.298:32. However, although the video shows Mr. McReynolds reaching back from the front seat to the back seat, where the informant was sitting, it does not show what was exchanged. No drugs or drug paraphernalia are depicted. R.72: 28 mins, 39 sec.; R.298:19. The informant met back up with police and gave them a substance, which was later determined to be cocaine. R.298:11.

The informant provided a statement to Ranallo, and Ranallo wrote it out for him. R.74.[5] The State

[5] The statement read:

> I talked to Outcast this morning and asked him if "he was good." He said, yes. I arranged to purchase $150 and he said he was going to give

asked Ranallo to read the statement aloud. R.298:17. The State then asked Ranallo, "Do you have any reason to believe that [the informant] was in any way untruthful about his observations that day?" and Ranallo answered, "No." R.298:18.

The informant was again paid $100 for his work. The informant acknowledged that the money was a "real incentive" for doing the buys. R.297:41. Ranallo testified that between the first and second alleged buys, the informant also contacted him about setting up KG. The informant said he had a $100 drug debt he owed KG. R.298:21-22. Ranallo acknowledged that the informant would not have received the $100 for his work had he not given statements. R.298:22.

This concluded the evidentiary portion of the trial. After closing arguments and jury instructions, the jury deliberated and returned with guilty verdicts on both counts.

On July 27, 2015, the court held a sentencing hearing. The court imposed five years of initial confinement and five years of extended supervision on each count, concurrent. R.300:41-42; App.45-46 The

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> me 2 $100 rocks of cocaine. I met him in the park and he came with KG. We had a talk. I got in the car because we had to get the dope at a house. Outcast got out of the car and went behind a house. Outcast came back to the car and gave me the two rocks. I gave the $150 to Outcast. They then dropped me off and I left.

R.74.

court declined to state its reasons for the sentence in open court. Instead, with reference to Wis. Stat. § 973.017(10m)(b),[6] the court stated that it would put its reasoning in writing.

> I've never done that before, but I'm going to do it here today, and the reason for that is, Mr. McReynolds, really, as a courtesy to you, and I mean this sincerely, as a courtesy to you. I don't want to go through the long and ponderous explanation that I'm going to make in -- in writing because I just think that you may consider it demeaning and insulting. I don't want you to feel demeaned. I don't want you to feel insulted. I don't want you feel lectured to.

R.300:40-41; App.44-45.

The court also noted that Mr. McReynolds had twice previously refused to come to court and had been disruptive in the courtroom on the morning of trial before the proceedings began. The court concluded: "You ultimately did cooperate, but, really, I think that it is not in your interest for me to go through the long analysis that I am going to do in writing. It's for that

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[6] Section 973.017(10m) provides:

(10m) Statement of reasons for sentencing decision.

(a) The court shall state the reasons for its sentencing decision and, except as provided in par. (b), shall do so in open court and on the record.

(b) If the court determines that it is not in the interest of the defendant for it to state the reasons for its sentencing decision in the defendant's presence, the court shall state the reasons for its sentencing decision in writing and include the written statement in the record.

reason that I will impose the sentence and explain it later." R.300:41; App.45.

A judgment of conviction was entered on July 27, 2015. R.105. Three days later, on July 30, 2015, the court filed a document titled "written reasons for sentencing decision." R.108:1-11; App.29-39.

On August 4, 2020, by counsel, Mr. McReynolds filed a postconviction motion requesting a new trial and a new sentencing hearing. R.227. He argued that he was denied a fair trial when: (1) The State repeatedly elicited testimony from a police officer that he believed the informant was telling the truth, which was prohibited vouching testimony. *See State v. Haseltine*, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984); and (2) The State repeatedly elicited testimony from the informant that Mr. McReynolds was a Vice Lord affiliate, which was prohibited character evidence. R.227:2-6. To the extent the errors were waived by trial counsel's failure to object, Mr. McReynolds alleged ineffective assistance of counsel and requested a *Machner* hearing.[7] R.227:6.

Mr. McReynolds also requested a new sentencing hearing. R.227:6-9. He argued that he was denied his constitutional right to be present and to a public trial when the court failed to state the

[7] *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) (hearing required to give counsel the opportunity to respond to an ineffectiveness claim).

reasons for his sentence in open court. Although Wis. Stat. § 973.017(10m)b. states that a court can place its reasons for its sentence in writing if it finds that it is "not in the interest of the defendant for it to state the reasons for its sentencing decision in the defendant's presence," Mr. McReynolds argued that the statute was unconstitutional as applied to him. R.227:9.

Postconviction briefing followed.[8] On May 14, 2021, the circuit court, the Honorable Emily Long presiding, held a hearing on the motion. Mr. McReynolds had subpoenaed trial counsel. However, the court did not permit Mr. McReynolds to present trial counsel's testimony, *i.e.* the court did not conduct a *Machner* hearing. R.305:12-13; App.15-16. After hearing additional arguments form the parties, the court denied Mr. McReynolds' motion on all grounds. A written order followed. R.264; App.3. The court's rulings will be discussed where relevant in the Argument section below.

[8] *See* R.229 (State's letter); R.230 (defendant's letter); R.254 (State's response); R.260(defendant's reply). In addition to arguing the merits, the State argued that Mr. McReynolds' motion was procedurally barred due to previous postconviction proceedings. However, the State later retreated from this argument and deferred to the court. The court concluded "I think it's reasonable to hear the motions today rather than get stuck on whether there's a procedural bar." R.305:4; App.7.

ARGUMENT

I. Mr. McReynolds was Denied his Sixth Amendment Right to Effective Assistance of Counsel when Counsel Failed to Object to Inadmissible Vouching and Character Evidence.

A. Ineffective assistance of counsel standard and standard of review.

The Sixth Amendment guarantees a defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 684 (1984). A defendant must prove two prongs to establish ineffective assistance of counsel, deficient performance and prejudice. *Id.* at 687. If the case can be resolved on one prong, the court need not reach the other. *Id.* at 697.

Deficient performance is shown where counsel's advocacy fell below an objective standard of reasonableness. *Id.* at 688. Review of counsel's decisions is highly deferential, and a reasonable tactical decision will not be found to be deficient. *Id.* at 689. However, an attorney's strategic decision must be rational and based upon facts and law that an ordinarily prudent lawyer would have relied upon. *State v. Felton*, 110 Wis. 2d 485, 502-503, 329 N.W.2d 161 (1983). In Wisconsin, counsel must be given the opportunity to respond to alleged errors at a hearing. *Machner*, 92 Wis. 2d at 804.

Prejudice is shown where there is a reasonable probability that, but for counsel's errors, the result of

the proceeding would have been different. *Strickland*, 466 U.S. at 694. A "defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case," *id.* at 693, rather "a probability sufficient to undermine confidence in the outcome." *Id.* at 694. All instances of deficient performance are considered in the aggregate to determine prejudice. *State v. Thiel*, 2003 WI 111, ¶63, 264 Wis. 2d 571, 665 N.W.2d 305.

This Court reviews ineffective assistance of counsel claims under a two-step standard. The circuit court's findings of historical facts are reviewed for clear error. *State v. Smith*, 207 Wis. 2d 259, 273, 558 N.W.2d 379 (1997). The legal questions of deficient performance and prejudice are reviewed de novo. *Id.*

B. Failure to object to the State's repeated elicitation of improper testimony from the investigating officer that he believed the informant was telling the truth.

The State repeatedly elicited improper, prejudicial testimony from Investigator Ranallo that vouched for the informant's credibility. On the first day of trial, the State asked Ranallo, regarding the informant's statement, "so do you believe this to be a truthful and accurate statement?" and Ranallo responded "Yes, I do." R.296:42. The State then asked, "do you have any reason to believe that [the informant] was in any way untruthful with respect to the information he provided to you?" and Ranallo responded, "No." *Id.* Later during direct examination,

the investigator testified that he was "not given any information to lead [him] to believe that he [informant] was not being truthful." R.296:45. Finally, on the second day of trial the State again asked Ranallo, "do you have any reason to believe that [the informant] was in any way untruthful about his observations that day?" and Ranallo answered, "No." R.298:18.

One witness may not give an opinion on the veracity of another witness's statements. *State v. Haseltine*, 120 Wis. 2d at 96. "Such testimony invades the province of the fact-finder as the sole determiner of credibility." *State v. Kleser*, 2010 WI 88, ¶104, 328 Wis. 2d 42, 786 N.W.2d 144. The rule against vouching can be violated even if the witness does not use the specific words "I believe her" or "she's telling the truth." *Id.*, ¶102. The seminal case on vouching is *Haseltine*, which discussed vouching for another witness's in-court testimony. *Haseltine*, 120 Wis. 2d at 96. In *Kleser*, 328 Wis. 2d 42, ¶104, the *Haseltine* rule was extended to prohibiting vouching for a witness's out-of-court statements as well.

This Court considered facts akin to Mr. McReynolds' case in *State v. Patterson*, 2009 WI App 161, 321 Wis. 2d 752, 776 N.W.2d 602. In that case, the defendant was charged with various crimes after delivering Oxycodone. At trial, two witness's recollections were in tension. This Court found a *Haseltine* violation when:

> The prosecutor asked a police investigator: "Do you believe [a witness the investigator interviewed] was being truthful when she gave [certain] information to you . . .?" The investigator answered, "I believe she was being truthful." It does not appear that this exchange was offered for any purpose other than bolstering the credibility of the other witness. *Cf. State v. Snider*, 2003 WI App 172, ¶ 27, 266 Wis.2d 830, 668 N.W.2d 784 (detective's testimony offered to show the detective's thought process during his investigation); *State v. Smith*, 170 Wis.2d 701, 718–19, 490 N.W.2d 40 (Ct.App.1992) (a detective's testimony that he did not believe a witness was properly introduced to show why he continued interrogating the witness).[9] Accordingly, we will assume that the exchange ran afoul of *Haseltine*.

Id., ¶36.

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[9] In *Smith*, 170 Wis. 2d at 717, the detective testified that he continued an interrogation because he did not believe that he had received the full story yet. This was an obvious inference that the jury would have reached on its own. *Id.* at 718.

In *Snider*, 266 Wis. 2d 830, ¶27, the detective testified about what he believed in the past "at the time he was conducting the investigation." *Id.* In contrast, in McReynolds' case, the State asked the investigator in the present tense whether he believed that the informant was truthful. It is logical to apply a different rule when a witness testifies about retrospective versus current beliefs. New facts arise during investigations that may cause officers to adjust their views. But when a detective testifies in the present tense at trial, they are communicating to the jury that after a presumably full and final investigation, they have settled on believing the State's witness.

The first of the four instances of vouching was the most problematic, where the State asked, "so do you believe this to be a truthful and accurate statement," and Ranallo answered "Yes, I do." R.296:42. This was nearly identical to the erroneous statement in *Patterson*. Ranallo's other statements were arguably focused on external indicators of untruthfulness. However, those statements served to bolster the investigator's first statement, which was clearly vouching. This Court found the instance of vouching in *Patterson* nonprejudicial because it was isolated. However, the error was repetitive in Mr. McReynolds' case, which should lead to a finding of prejudice.

In Mr. McReynolds' case, the circuit court ruled that the evidence was not vouching. The court stated:

> Is this -- did you have any reason to suspect that the procedure wasn't followed correctly, is in essence what was being asked rather than, is this informant a truthful person. But I don't find that the specific language that was used either by the state's questioning or by the witness's responses would constitute vouching.

R.305:11-12; App.14-15.

This ruling was erroneous.[10] To establish that procedures were followed, all the State needed to ask

[10] This Court determines whether the evidence constituted vouching as a question of law. *See Smith*, 170 Wis. 2d at 718; *Snider*, 266 Wis. 2d 803, ¶27; *Patterson*, 321 Wis. 2d 752, ¶¶35-36.

Ranallo was whether it was proper procedure to take down statements from informants after controlled buys. It is irrelevant whether the investigator believes the statements. Law enforcement officers routinely record statements whether or not they believe them to be true. Whether the statements are true is for the jury to decide.

Trial counsel should have objected and moved to strike. The rule against vouching is longstanding and well-established. The vouching was recurrent. Even if the first instance could be excused by a desire not to highlight it, there was no reason not to call a sidebar or object the next time the State attempted to introduce the same evidence. It was clear from the State's questions what answer was contemplated. Counsel also should have requested a curative jury instruction, instructing the jury not to consider the evidence. Wisconsin requires a *Machner* hearing as prerequisite to establishing deficient performance. The court denied Mr. McReynolds' request for a *Machner* hearing. This Court should grant him one.

Mr. McReynolds was prejudiced by trial counsel's deficient performance. This case hinged on the informant's credibility. There were no direct references to drugs during the meetings. No drugs were depicted on video. R.296:19; R.72:28 mins, 39 sec. In both instances, police lost sight of the informant both before and after the alleged buys. R.295:19-20. The bags were very small and Ranallo acknowledged they could easily be hidden on a person. R.295:25. Police never recovered the pre-recorded buy money.

R.295:26. The informant had preexisting bad will toward Mr. McReynolds. He owed money to Mr. McReynolds' friend. R.296:29. He admitted his motivation for setting the meeting up was that he was "mad" at Mr. McReynolds. R.297:13. He was paid $100 each time. R.295:28; R.298:41. This was a "real incentive" to him and $100 was the exact sum of money he owed KG. R.298:41, 21-22. The informant would not have gotten paid had he not provided statements. R.298:22.

As the circuit court observed, this was a case of a "confidential informant who comes and says, I don't like this guy, I'd like to get him, I want to help you. That -- that is a bit unusual to have that circumstance." R.305:10; App.13. Under these circumstances, the court noted, "the defense could credibly argue that this confidential informant came into this with a goal in mind, and that was to get Mr. McReynolds." *Id.* While there was circumstantial evidence presented suggesting criminal activity was afoot, the State had no real case if the informant was not believed. Hearing a detective whose job was to evaluate witness statements opine that he believed that the informant was telling the truth significantly and unfairly bolstered the State's case.

C. Failure to object to the State's repeated elicitation of improper character evidence about Mr. McReynolds allegedly being affiliated with the Vice Lord gang.

The State repeatedly elicited improper, prejudicial character evidence when it invited the informant to characterize Mr. McReynolds as a gang member. At trial, a man named KG came up because the informant owed him money and he was present during the second alleged drug deal. The State repeatedly asked the informant who KG was. The first time the State asked, the informant answered that KG was Mr. McReynolds' "Vice Lord friend." R.295:30. The second time the State asked who KG was, the informant answered that KG was Mr. McReynolds' "Vice Lord brother." R.297:18. There was no foundation laid for these accusations.

This was character evidence. Character evidence is inadmissible unless the State proves that a statutorily defined exception applies. Wis. Stat. §§ 904.04, 904.04(2). The circuit court agreed that the evidence was improper and admonished the State for not preparing its witness or taking corrective action once the first Vice Lord reference had been made. R.305:19-20; App.22-23. The court ruled that "it's an absolutely not proper reference." *Id.*

Trial counsel should have objected and moved to strike. Although the circuit court agreed it was improper evidence, without hearing testimony the court concluded that counsel not only had a reason for

not objecting but that it was the right decision to make: "So do you object and bring great attention, shine the light on this? That -- that is generally, I would say, probably best to avoid that." R.305: 20; App.23. There is no evidence that trial counsel considered objecting. Nor would it necessarily be "best" not to do so. Even if the first mention of Vice Lords could be excused by not wanting to call attention to it, there was no reason not to call a sidebar or object the next time the State attempted to introduce the same evidence. It was clear from the State's question what answer was contemplated. Counsel also should have requested a curative jury instruction. This Court should remand for a *Machner* hearing so that Mr. McReynolds can complete his ineffectiveness claim.

Mr. McReynolds was prejudiced by trial counsel's deficient performance. The Vice Lord gang is notorious for drugs and violence. *See State v. Burton*, 2007 WI App 237, 306 Wis. 2d 403, 743 N.W.2d 152. Testimony linking Mr. McReynolds to a gang implied that Mr. McReynolds had a propensity for crime. Not only was this character evidence, there was no foundation for the accusation.

As summarized *supra* pp. 19-20, The State's case had significant weaknesses. The only direct evidence of the crime was the informant's testimony. And the informant had clear motive and bias. The State improperly bolstered its case by disparaging Mr. McReynolds' character.

II. Mr. McReynolds was Denied his Constitutional Rights to be Present at Sentencing and to a Public Trial when the Court Failed to State the Reasons for His Sentence in Open Court, Instead Filing a Written Statement after the Judgment of Conviction was Entered.

A. Applicable statute and standard of review.

Wisconsin law requires that the circuit court "shall state the reasons for its sentencing decision and, except as provided in par. (b), shall do so in open court and on the record." Wis. Stat. § 973.017(10m)a.

Under Wis. Stat. § 973.017(10m)a., the court may deviate from the open court requirement as follows:

> If the court determines that it is not in the interest of the defendant for it to state the reasons for its sentencing decision in the defendant's presence, the court shall state the reasons for its sentencing decision in writing and include the written statement in the record.

There is no caselaw interpreting Wis. Stat. § 973.017(10m)b.

Mr. McReynolds argues that Wis. Stat. § 973.017(10m)b. is unconstitutional as applied to him. There are two general types of constitutional challenges: facial and as-applied. *Michels v. Lyons*, 2019 WI 57, ¶11, 387 Wis. 2d 1, 927 N.W.2d 486. In a facial challenge, the party must show that the law

cannot be constitutionally enforced under any circumstances. *Id.,* ¶18 (citation omitted).

By contrast, in an as-applied challenge, the challenging party succeeds if they show that their rights were violated under the particular facts of their case. *State v. Wood*, 2010 WI 17, ¶13, 323 Wis. 2d 321, 780 N.W.2d 63. If the party shows that their rights were violated, "the operation of the law is void as to the facts presented for the party asserting the claim." *Id.* This Court presumes that the statute is constitutional. The challenging party must prove that the statute has been applied in an unconstitutional manner beyond a reasonable doubt. *Id.,* ¶15.

The constitutionality of a statute is a question of law, reviewed by this Court de novo. *Id.*

B. As applied to Mr. McReynolds, Wis. Stat. § 973.017(10m)b. violated his constitutional right to be present at sentencing.

At Mr. McReynolds' sentencing hearing, the court stated the numerical sentence in open court. However, it did not pronounce the sentence in full. Instead, it omitted its exercise of discretion and reasons for imposing the sentence, stating that pursuant to Wis. Stat. § 973.017(10m)b., it would place its reasons in writing. The court did not give advance notice to the parties. Nor did it conduct a colloquy with Mr. McReynolds to determine whether he was agreeable to the procedure.

The court stated:

> [T]he reason for that is, Mr. McReynolds, really, as a courtesy to you, and
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> I mean this sincerely, as a courtesy to you. I don't want to go through the long and ponderous explanation that I'm going to make in - - in writing because I just think that you may consider it demeaning and insulting. I don't want you to feel demeaned. I don't want you to feel insulted. I don't want you to feel lectured to.

R.300:40-41; App.44-45.

The court concluded, "I really think that it is not in your interest for me to go through the long analysis that I am going to do in writing. It's for that reason that I will impose the sentence and explain it later." R.300:41; App.45.

The court did not explain its sentence until three days after the judgment of conviction had been entered. The judgment was entered on July 27, 2021. R.105. On July 30, 2021, the court filed the reasons for the sentences it had imposed. The record does not reveal how long after that Mr. McReynolds received a copy of the memorandum and finally learned why he had lost 10 years of his liberty.

As applied to Mr. McReynolds, Wis. Stat. § 973.017(10m)b. violated his constitutional right to be present at sentencing. The postconviction court did not reach Mr. McReynolds' constitutional claims. Instead, the court stated that the sentencing memorandum

"very clearly laid out all of the reasons he decided to hear argument and then give a written decision on sentencing. I think all of those bases are appropriate and comply with the statutory requirements." R.305:4; App.7. Regardless, this Court reviews the claim de novo. *Wood*, 323 Wis. 2d 321, ¶13.

A defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome. *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987). Sentencing is a critical proceeding, and therefore, a defendant has a right to be present. *State v. Perez*, 170 Wis. 2d 130, 138, 487 N.W.2d 630 (Ct. App. 1992). In Wisconsin, a defendant also has a statutory right to be present at sentencing. Under Wis. Stat. § 971.04(g), a defendant "shall" be present during "the imposition of sentence."

Given that a defendant has a right to be present at sentencing, Wis. Stat. § 973.017(10m)b. may only be used where the defendant waives their right to be present.[11] The right to be present cannot be forfeited by inaction. *State v. Soto*, 2012 WI 93, ¶¶44, 46, 343 Wis. 2d 43, 817 N.W.2d 848. A valid waiver is "an intentional relinquishment or abandonment of a known right or privilege." *State v. Haynes*, 118 Wis. 2d 21, 25, 345 N.W.2d 892 (Ct. App. 1984). "Courts

[11] One can conceive a situation where a defendant wants to be sentenced under Wis. Stat. § 973.017(10m)b. and asks the court to find it to be in their "interest." For example, a defendant might be at risk of retaliation for their role in a crime. In those circumstances, the defendant would willingly waive their right to be present.

indulge in every reasonable presumption against waiver of fundamental constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

Here, Mr. McReynolds did not knowingly and voluntarily waive his right to be present. Instead, the circuit court *sua sponte* invoked the statute after speculating that Mr. McReynolds might feel "demeaned," "insulted," or "lectured to" if sentenced in his presence. This was erroneous. The court noted that Mr. McReynolds had intermittently been upset and disruptive during prior proceedings. However, Mr. McReynolds did not engage in any such behavior during the sentencing hearing. If he had disrupted the sentencing hearing, the court could have concluded he forfeited his right to be present. *See Illinois v. Allen*, 397 U.S. 337, 343 (1970) (defendant can forfeit the right to be present through disruptive conduct as long as the court forewarns them and provides them the chance to reclaim the right). However, the court could not presume in advance that misconduct rising to the level of forfeiture would occur.

In the circuit court, the State argued that Mr. McReynolds was present at sentencing because he was present when the court stated the numerical length of his sentence. R.254:5-6. The State offered a purported distinction between the court's "pronouncement of sentence" and its sentencing "rationale," and argued that it was only the rationale that was outside of Mr. McReynolds' presence. *Id.* This distinction should be rejected. The sentencing rationale is intrinsic to the pronouncement of

sentence. If a court were to simply announce numerical figures, the sentence would be summarily vacated on appeal. *See State v. Gallion*, 2004 WI 42, ¶3, 270 Wis. 2d 535, 678 N.W.2d 197 (an exercise of sentencing discretion is required and "discretion is not synonymous with decision-making . . . the term contemplates a process of reasoning.") (internal citation and quotation marks omitted).

Mr. McReynolds was denied his constitutional right to be present at sentencing.

C. As applied to Mr. McReynolds, Wis. Stat. § 973.017(10m)b. violated his constitutional right to a public trial.

The court's use of Wis. Stat. § 973.017(10m)b. violated Mr. McReynolds' constitutional right to a public trial.[12] A defendant's right to a public trial is protected under the Sixth and Fourteenth Amendments. *Presley v. Georgia*, 558 U.S. 209, 212 (2010). Despite the nomenclature, this right is not limited to the trial itself, but rather extends to in-court proceedings in general. *E.g., id.* at 212 (exclusion of one member of the public during voir dire violated right of public trial); *Waller v. Georgia*, 467 U.S. 39 (1984) (right of public trial at suppression hearing); *see also, United States v. Thompson*, 713 F.3d 388, 392

[12] As already noted, the postconviction court did not reach Mr. McReynolds' constitutional claims. *See* R.305:4; App.7. Regardless, this Court reviews the claim de novo. *State v. Wood*, 323 Wis. 2d 321, ¶13.

(8th Cir. 2013) (discussing right of public trial at sentencing hearing).[13]

In *Ndina*, our supreme court emphasized the importance of the public trial requirement to ensuring the fairness of the criminal justice system:

> The Sixth Amendment right to a public trial is an important constitutional safeguard of a fair criminal trial. The United States Supreme Court has stated that the Sixth Amendment right to a public trial "'has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution'" and that "'[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on the possible abuse of judicial power.'" The Sixth Amendment guarantee of a public criminal trial "'is for the protection of all persons accused of crime-the innocently accused, that they may not become the victim of an unjust prosecution, as well as the guilty, that they may be awarded a fair trial....'" The public trial is premised on "[t]he principle that justice cannot survive behind walls of silence...."

State v. Ndina, 2009 WI 21, ¶¶42, 315 Wis. 2d 653, 761 N.W.2d 612 (internal citations omitted).

On review, this Court applies a two-step analysis. This Court first determines whether the

[13] In addition to the defendant's Sixth Amendment right to a public trial, the public also has a First Amendment right to attend criminal proceedings. *Waller*, 467 U.S. at 44.

closure at issue implicated the Sixth Amendment right to a public trial. If it did, this Court then determines whether the closure was justified under the circumstances. *Id.*, ¶46. Violation of a defendant's right to a public trial is not subject to the harmless error doctrine. *Id.*, ¶43.

Closure of a criminal trial is only justified when four conditions are met: (1) the party who wishes to close the proceedings must show an overriding interest which is likely to be prejudiced by a public trial, (2) the closure must be narrowly tailored to protect that interest, (3) alternatives to closure must be considered by the trial court, and (4) the court must make findings sufficient to support the closure. *State v. Ndina*, 2009 315 Wis. 2d 653, ¶¶41, 56 (citing *Waller*, 467 U.S. 39 and describing these as the "Waller" factors).

In Mr. McReynolds' case, the sentencing court did not consider the Waller factors or make findings in this regard. It performed no analysis of the issue whatsoever. This violated Mr. McReynolds' right to a public trial. The violation of the public trial right can be forfeited under certain circumstances at certain proceedings. *State v. Pinno*, 2014 WI 74, ¶63, 356 Wis. 2d 106, 850 N.W.2d 207 (when defendant knew of court's order to exclude the public from voir dire and did not object, the error was forfeited).

Mr. McReynolds' trial counsel did not object to the use of Wis. Stat. § 973.017(10m)b. However, under the Wisconsin Supreme Court's reasoning in *State v. Coffee*, 2020 WI 1, 389 Wis. 2d 627, 937 N.W.2d 579,

this Court should not find that the contemporaneous objection rule applies under the particular circumstances. *Id*., ¶26. In *Coffee*, the court determined that failure to contemporaneously object to inaccurate information first presented by the State during a sentencing hearing does not forfeit the error. Rather, "a postconviction motion is also a timely manner in which to assert that claim." *Id*., ¶31. The *Coffee* court reasoned that defense counsel is in a difficult position to object at that late juncture. *Id*., ¶26. The same is true here. When the court revealed it was using the procedure, it was too late for counsel to realistically object. The court was already in the process of sentencing. Failure to object during the sentencing hearing when the court has not given prior notice of its intent to use the statute should not be deemed a forfeiture.

As applied to Mr. McReynolds, Wis. Stat. § 973.017(10m)b. violated his constitutional right to a pubic trial.

CONCLUSION

For the reasons state above, Mr. McReynolds asks this Court to reverse the circuit court's order denying his postconviction motion and to remand to the circuit court with directions to grant a *Machner* hearing and a new sentencing hearing.

Dated this 9th day of August, 2021.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. the length of this brief is 5,718 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 one or more initials or other appropriate pseudonym or designation 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.

Dated this 9th day of August, 2021.

Signed:
Electronically signed by
Colleen Marion
COLLEEN MARION
Assistant State Public Defender

STATE OF WISCONSIN

COURT OF APPEALS—DISTRICT III

Case No. 2021AP000943-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

HAJJI Y. MCREYNOLDS,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in the Eau Claire County Circuit Court the Honorable William M. Gabler Presiding and Order Denying Postconviction Relief Entered in the Eau Claire County Circuit Court the Honorable Emily M. Long Presiding

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TABLE OF CONTENTS