STATE OF WISCONSIN

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

DISTRICT III

Case No. 2021AP943-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

HAJJI J. MCREYNOLDS,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE EAU CLAIRE COUNTY CIRCUIT COURT, THE HONORABLE WILLIAM M. GABLER, SR. PRESIDING AND ORDER DENYING POSTCONVICTION RELIEF, THE HONORABLE EMILY M. LONG PRESIDING

BRIEF IF PLAINTIFF-RESPONDENT

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INTRODUCTION

Seeking to overcome Wisconsin's procedural hurdles, Hajji McReynolds appeals the circuit court's denial of his successive postconviction motion. However, McReynolds is precluded from filing successive postconviction motions when he has not shown sufficient reason that the new arguments could not have been raised in his previously denied motion. This case is procedurally barred, and this Court should not permit McReynolds to circumvent well-settled rules of procedure. This Court should affirm the decision and order of the circuit court on that ground alone.

If this Court addresses the merits of McReynolds' claims, it should still affirm.

First, there was no vouching evidence and no character evidence, so McReynolds' counsel was not deficient for failing to object to either. Even if counsel was deficient, McReynolds was not prejudiced by that deficient performance because there was ample evidence before the jury with which it could convict McReynolds.

Second, Wis. Stat. § 973.017(10m)(b) plainly permits a circuit court to exercise its discretion and put its reasons for its sentencing decision in writing if it deems doing so in person is against the defendant's interest. The circuit court's use of the statute had no impact on McReynolds' right to be present at sentencing or his right to a public trial.

Accordingly, this Court should affirm.

ISSUES PRESENTED

1. McReynolds filed a successive postconviction motion after the circuit court denied his first postconviction motion. None of the issues presented in the postconviction motion that gives rise to this appeal were raised in McReynolds' initial postconviction motion. Is this appeal procedurally barred because McReynolds has not shown

sufficient reason for failing to raise these arguments in his first postconviction motion?

The circuit court did not apply *Escalona-Naranjo*'s procedural bar and decided the postconviction motion on the merits.

This Court should answer: Yes.

2. If this Court reaches the merits, was McReynolds' trial counsel ineffective for failing to object to alleged vouching evidence and alleged character evidence?

The circuit court denied McReynolds' motion alleging ineffective assistance of counsel without a *Machner* hearing.

This Court should answer: No.

3. Did the circuit court violate McReynolds' constitutional right to be present at sentencing and his right to a public trial when it utilized Wis. Stat. § 973.017(10m)(b)?

The circuit court did not reach the merits of McReynolds' constitutional claim because it determined that the circuit court's use of Wis. Stat. § 973.017(10m)(b) comported with the statute.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument because the briefs should adequately set forth the facts and applicable precedent. To the extent that this Court reaches the merits of McReynolds' constitutional claim and interprets Wis. Stat. § 973.017(10m)(b), publication may be warranted.

STATEMENT OF THE CASE

Factual Background and Trial

In August of 2014, a confidential informant approached the Eau Claire County Sheriff's Department to set up a controlled buy of cocaine from McReynolds. (R. 295:14; 296:3.) The confidential informant participated in two controlled buys during which McReynolds sold cocaine to the confidential informant. For each controlled buy, the confidential informant wore a wire and carried a video camera. (R. 295:17; 296:6, 47; 297:16.) The officers provided the confidential informant with prerecorded money to purchase the drugs. (R. 295:17; 296:8, 47; 297:16.) An officer searched the confidential informant for contraband before and after both controlled buys—none of the four searches yielded anything. (R. 295:17, 41; 296:6, 12, 23, 25; 297:5–6, 15, 23, 37; 298:14.) After each controlled buy, the confidential gave an oral statement, which Investigator Ranallo reduced to writing. (R. 296:25, 27, 41; 297:37; 298:15–17.)

The State charged McReynolds with two counts of delivery of a controlled substance. (R. 8:1.)[1] Over the course of a two-day trial, the jury heard testimony from Investigator Ranallo (R. 295:3–32; 296:34–51; 297:1–3; 298:6–24), two other officers that assisted in the investigation (R. 295:39–44; 297:3–7), and the confidential informant (R. 295:45–50; 296:1–33; 297:11–42). The jury also saw the videos of each of the controlled buys. (R. 296:15; 297:25.) The jury ultimately found McReynolds guilty on both counts. (R. 299:56; 105:1–2.)

The circuit court sentenced McReynolds to five years of initial confinement followed by five years of extended supervision on each count. (R. 107.) During sentencing, the circuit court determined that it would be against McReynolds'

[1] The State also charged McReynolds with one count of felony bail jumping but moved to dismiss that charge.

interest to provide its sentencing decision reasons in open court—in part, based on past outbursts from McReynolds. Instead, the circuit court invoked Wis. Stat. § 973.017(10m)(b) and placed the reasons in writing. (R. 300:40–41; 108.)

Postconviction Proceedings

No merit appeal and first postconviction motion

McReynolds' initial postconviction counsel filed a no merit report pursuant to Wis. Stat. § (Rule) 809.32. (R. 120.) McReynolds filed a letter with this Court that it deemed his response. (R. 143:2.) This Court denied the no merit report, instructing McReynolds' initial postconviction counsel to consider the applicability of a particular instruction. (R. 152:2, 4.) Counsel informed this Court that counsel would file a Wis. Stat. § (Rule) 809.30 motion for postconviction relief. (R. 163:1.) Thereafter, this Court dismissed the no merit appeal. (R. 163:2.)

McReynolds filed a motion for postconviction relief under Wis. Stat. §§ 974.02(2) and (Rule) 809.30 on February 5, 2019. (R. 169.) In that motion, McReynolds argued only the issue that this Court identified. (R. 169:2–3.) The issues presented in this appeal were not raised in that motion. The circuit court denied McReynolds' initial motion for postconviction relief without a hearing on February 26, 2019. (R. 174.) For reasons unclear from the record, the circuit court held a motion hearing on June 14, 2019. (R. 301.) At that hearing, McReynolds' trial counsel testified. (R. 301:4–9.) The circuit court again denied the postconviction motion. (R. 301:27.)

First appeal and withdrawal of counsel

On August 14, 2019, McReynolds attempted to appeal from the circuit court's oral ruling issued on June 14. (R. 186.) Because the circuit court's decision from the hearing was not reduced to writing, this Court did not yet have jurisdiction over the appeal. (R. 205.) Accordingly, this Court issued an

order that (1) extended the deadline for the circuit court to decide the motion and (2) ordered the clerk of the circuit court to forward the written order of the circuit court to this Court. (R. 205:2.) The order also deemed McReynolds' appeal timely filed "on the date of the entry of the order on the postconviction motion." (R. 205:2.) Finally, this Court deemed the circuit court's February 26 order denying postconviction relief "superseded by the circuit court's decision to hold a hearing and rule further on the postconviction motion." (R. 205:2 n.2.) The circuit court filed the written order on September 26, 2019. (R. 204.)

In the interim, McReynolds' initial postconviction counsel moved to withdraw as counsel. (R. 193.) The circuit court granted that motion. (R. 214.) While the circuit court was deciding the withdrawal of counsel matter, this Court entered an order enlarging the time to file McReynolds' opening brief. (R. 213.)

Prior to appointing new counsel, and despite the pendency of McReynolds' initial appeal, the State Public Defender filed a motion to enlarge the deadline to file a postconviction motion or notice of appeal asserting that the time to file a notice of appeal lapsed while the motion to withdraw as counsel was occurring. (R. 217:4.) This Court granted that motion. (R. 220.) In a subsequent order, this Court clarified that it deemed the motion to enlarge a voluntary dismissal of the pending appeal[2]; this Court dismissed the pending appeal via that order. (R. 221.)

Present postconviction motion and appeal

Thereafter, the State Public Defender appointed new postconviction counsel. (R. 218.) McReynolds, represented by new counsel, filed a motion to extend the deadline to file a postconviction motion or notice of appeal, which this Court

[2] Appeal No. 2019AP1521-CR.

granted. (R. 224; 225.) McReynolds then filed the postconviction motion that gave rise to this appeal. (R. 227.) McReynolds sought a new trial or a *Machner*[3] hearing based on alleged ineffective assistance of counsel. (R. 227:1.) He also sought resentencing based on the circuit court's use of Wis. Stat. § 973.017(10m)(b). (R.227:1.)

The State argued that this newest motion was procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). (R. 229; 254:1–2.) The State argued that none of the arguments in the present postconviction motion were raised in the original postconviction motion, which the circuit court had already decided and denied. (R. 229; 254:1–2.)

The circuit court denied McReynolds' motion after a hearing. (R. 305:21.) The court concluded, without testimony from McReynolds' trial counsel, that there was no vouching evidence and concluded that McReynolds was not prejudiced by counsel's failure to object to the alleged character evidence. (R. 305:10–12, 18–20.) The circuit court did not reach the merits of McReynolds' constitutional claims because it concluded that the court had the statutory authority to put the sentencing reasons in writing and properly exercised that authority. (R. 305:4.)

McReynolds now appeals his judgment of conviction and most recent order denying his second motion for postconviction relief. (R. 265:1.)[4]

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

[4] McReynolds has abandoned the issue presented in his first postconviction motion and appeal by failing to raise it in either his successive postconviction motion or on appeal. *A.O. Smith Corp v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) ("[A]n issue raised in the trial court, but not raised on appeal is deemed abandoned.").

STANDARD OF REVIEW

Whether a defendant has overcome *Escalona-Naranjo's* procedural bar with sufficient reason for failing to bring claims in an earlier proceeding is a question of law that this Court reviews independently. *State v. Romero-Georgana*, 2014 WI 83, ¶ 30, 360 Wis. 2d 522, 849 N.W.2d 668.

"Whether counsel was ineffective is a mixed question of fact and law." *State v. Balliette*, 2011 WI 79, ¶ 19, 336 Wis. 2d 358, 805 N.W.2d 334. A circuit court's findings of fact will not be disturbed unless they are clearly erroneous. *Id.* But, "[t]he ultimate conclusion as to whether there was ineffective assistance of counsel is a question of law." *Id.*

Finally, whether a statute is unconstitutional as applied is a question of law that this Court reviews independently. *See Waupaca Cnty. v. K.E.K.*, 2021 WI 9, ¶ 16, 395 Wis. 2d 460, 954 N.W.2d 366.

ARGUMENT

I. McReynolds' appeal is based on a successive postconviction motion that is procedurally barred by *Escalona-Naranjo*.

"We need finality in our litigation." *Escalona-Naranjo*, 185 Wis. 2d at 185. To achieve that goal of finality, "[a] defendant should raise the constitutional issues of which he or she is aware as part of the original postconviction proceedings." *Id.* at 185–86. *Escalona-Naranjo* bars defendants from raising issues in a postconviction motion that could have been raised in a prior proceeding or previously decided postconviction motion without sufficient reason for failing to raise the issues the first time. *See id.* Although *Escalona-Naranjo* dealt primarily with Wis. Stat. § 974.06 postconviction motions, the court found no reason that "a sec. 974.06 motion should be treated differently from a direct appeal or sec. 974.02 motion." *Id.* at 185.

This makes sense because nothing in Wisconsin's appellate procedure permits a defendant to file *an entirely new* Wis. Stat. § 974.02 motion[5] after the circuit court denies a defendant's first motion. In fact, after a "circuit court denies a defendant's Wis. Stat. § 974.02 motion, the defendant *may appeal to the court of appeals*." *State v. Evans*, 2004 WI 84, ¶ 29, 273 Wis. 2d 192, 682 N.W.2d 784 (emphasis added) *(abrogated on other grounds by State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶ 29, 290 Wis. 2d 352, 714 N.W.2d 900). Said differently, after a circuit court denies a postconviction motion, a defendant may exercise his or her right to direct appeal or let the time to appeal lapse and not exercise the right. But a defendant may not simply file a successive motion without sufficient reasons for doing so.

After a defendant has exhausted his right to direct appeal "or the time for filing an appeal has expired, the defendant may collaterally attack his conviction via a motion under Wis. Stat. § 974.06." *Id.* ¶ 32. However, "all grounds for relief available to a person . . . must be raised in his or her original, supplemental or amended motion." Wis. Stat. § 974.06(4). "Any ground finally adjudicated or not so raised . . . in the proceeding that resulted in the conviction or sentence *or in any other proceeding the person has taken to secure relief* may not be the basis for a subsequent motion." *Id.*

Because the circuit court already denied McReynolds' postconviction motion, this present motion is a successive motion and is procedurally barred. Once the circuit court denied McReynolds' original postconviction motion, McReynolds had the option to appeal that decision to this

[5] McReynolds' motion is labeled as a Wis. Stat. § (Rule) 809.30(2)(h) motion. For clarity's sake, the State will refer to his motion as a § 974.02 motion throughout this section. The label is, in reality, irrelevant—§ 974.02 enables the motion and requires appellants to follow the procedure set out in § (Rule) 809.30.

Court or let the time to appeal lapse. *See Evans*, 273 Wis. 2d 192, ¶ 27. He did not have the option to file a successive Wis. Stat. § 974.02 motion that raised entirely new arguments.

The procedure here is strikingly similar to *Evans* where Evans filed a "supplemental" Wis. Stat. § 974.06 motion after his first § 974.06 motion was denied. *Id.* ¶ 10. Evans' "supplemental" § 974.06 motion was actually his second § 974.06 motion because the circuit court had already denied his first § 974.06 motion. *Id.* It was not a "supplemental" motion despite its label. *Id.* Because Evans did not give a sufficient reason for not bringing the claim in the prior motion, this Court rejected his argument. *Id.*

What occurred here is, for all intents and purposes, the same; the result should therefore be the same. After this Court denied the no merit report, McReynolds filed his first postconviction motion alleging ineffective assistance of counsel. That motion contended that McReynolds' trial counsel was ineffective based solely on the jury instruction issue that this Court identified. The circuit court denied that motion in 2019. McReynolds' second Wis. Stat. § 974.02 motion is therefore a successive motion. Notably, McReynolds' second (present) motion did not include the original claim.

Further, the bases for this current motion are issues that McReynolds was aware of when he filed his first postconviction motion. *See Escalona-Naranjo*, 185 Wis. 2d at 184. McReynolds knew what questions the State asked and how Investigator Ranallo and the confidential informant answered. He knew that his trial counsel did not object to the alleged vouching or alleged character evidence. He also knew that the circuit court utilized Wis. Stat. § 973.017(10m)(b) to put its sentencing reasons in writing. There is simply no reason that McReynolds could not have made the arguments that he now makes in his first postconviction motion.

McReynolds has not shown a sufficient reason for not bringing these claims in the initial motion. In fact, on appeal, he does not substantively address the procedural bar at all. (*See generally* McReynolds' Br.) Rather, in a footnote, McReynolds notes that the State argued that the current postconviction motion was procedurally barred but later "retreated from this argument." (McReynolds' Br. 17 n.8.) The record reflects that the State did not "retreat" from its position. In reality, the State recognized that if the circuit court ruled that McReynolds' motion was procedurally barred, it arguably could open the door for a Wis. Stat. § 974.06 postconviction motion alleging ineffective assistance of postconviction counsel. (R. 254:2; 305:3.) Acknowledging that potential issue, the State deferred to the circuit court. (R. 305:3.)

McReynolds did, however, address *Escalona-Naranjo* in the circuit court. In a letter response to the State's initial *Escalona-Naranjo* argument, McReynolds argued that *Escalona-Naranjo* does not affect direct appeal rights and that this postconviction motion is "a Wis. Stat. §§ 974.02/809.30(2)(h) motion, which is part of the direct appeal." (R. 230:2.) To this end, McReynolds contended that this Court's dismissal of the original appeal and grant of his motion to extend reinstated his direct appeal rights and that this new motion is part of that direct appeal. (R. 230:2.)

However, such an argument ignores that McReynolds already filed a postconviction motion, ignores that the circuit court already decided that motion, and ignores that McReynolds attempted to appeal that first postconviction motion. That this Court dismissed the prior appeal and granted another motion to extend does not give McReynolds *carte blanche* to file a brand new postconviction motion raising brand new arguments that could have been raised in his prior motion. To conclude otherwise would be directly contrary to the policy of finality espoused in *Escalona-*

Naranjo. Such a conclusion would permit defendants to file an endless string of postconviction motions merely because they thought of new arguments regardless of if the prior motions had been denied. *C.f. Evans*, 273 Wis. 2d 192, ¶ 54 (explaining that Evans' use of Wis. Stat. § (Rule) 809.82 to reinstate his direct appeal rights and litigate ineffective assistance of appellate counsel would "render our decision in *Escalona-Naranjo* meaningless").

Instead, as *Escalona-Naranjo* dictates, defendants are expected to consolidate their arguments into a single postconviction motion or show sufficient reason why that was not possible. Absent sufficient reasons, successive motions are barred. McReynolds does not allege a sufficient reason.

Finally, McReynolds' case is also likely barred by *State v. Tillman*, 2005 WI App 71, 281 Wis. 2d 157, 696 N.W.2d 574. There, this Court held that "when a defendant's postconviction issues have been addressed by the no merit procedure under Wis. Stat. Rule 809.32, the defendant may not thereafter again raise those issues or other issues that could have been raised in the previous motion." *Tillman*, 281 Wis. 2d 157, ¶ 19.

McReynolds' response to the no merit appeal is referenced in this Court's order rejecting the no merit report, (R. 152:1, 3), but the response itself is not found in the record. The State is therefore unable to definitively address what McReynolds argued in response. However, *Tillman* realistically leaves two options: McReynolds either raised the current issues in response to the no merit report or he did not raise them. In either event *Tillman* dictates that he may not relitigate these issues if he did raise them nor may he raise new issues that could have and should have been included in the response absent sufficient reason. *Tillman*, 281 Wis. 2d 157, ¶ 19. Accordingly, *Tillman*'s procedural bar should apply here as well.

In sum, the statutory label that McReynolds attaches to this second postconviction motion is irrelevant. It is a successive postconviction motion that raises issues that could have been raised in his first, already decided postconviction motion. *See Evans*, 273 Wis. 2d 192, ¶¶ 10, 54; *Romero-Georgana*, 360 Wis. 2d 522, ¶ 33. Because he has not, and cannot, show sufficient reasons for failing to bring these arguments in the original postconviction motion, McReynolds' successive motion is barred. This Court should therefore affirm the decision of the circuit court. *See State v. Hunt*, 2003 WI 81, ¶ 52, 263 Wis. 2d 1, 666 N.W.2d 771 (noting that appellate courts "may affirm [a] circuit court's decision for reasons not stated by the circuit court").[6]

II. Even if this Court reaches the merits of McReynolds' claims, it should affirm because McReynolds' trial counsel was not ineffective.

A. Defendants face a heavy burden to demonstrate ineffective assistance of counsel.

It is well-settled that criminal defendants have a constitutional right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To prove

[6] If this Court agrees with the State that McReynolds' current motion is procedurally barred by *Tillman* or *Escalona-Naranjo*, the proper framework to analyze these claims would be ineffective assistance of postconviction counsel. *C.f. State v. Carprue*, 2004 WI 111, ¶ 47, 274 Wis. 2d 656, 683 N.W.2d 31 (noting that in the absence of an objection, it is proper to analyze a forfeited issue under the "normal procedure in criminal cases," which, in that case, was ineffective assistance of counsel). In the event McReynolds advances an ineffective assistance of postconviction counsel argument in his reply brief, this Court can still affirm because, as explained below, his claims in this appeal are meritless and therefore not clearly stronger than the one he raised in his initial postconviction motion and appeal. *See State v. Romero-Georgana*, 2014 WI 83, ¶ 46, 360 Wis. 2d 522, 849 N.W.2d 668 (holding that the "clearly stronger standard is . . . appropriate in evaluating the alleged deficiencies in an attorney's performance as postconviction counsel").

that trial counsel was ineffective, a defendant must show that (1) "counsel's performance was deficient" and (2) "the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. A defendant must show both deficient performance and prejudice to succeed on a claim of ineffective assistance of counsel. *Id.* If a defendant fails to show either, the inquiry stops. *Id.* "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

To prove deficient performance, a "defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. However, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. In turn, "[c]ounsel need not be perfect, indeed not even very good, to be constitutionally adequate." *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted). "[A] court looks to whether the attorney's performance was reasonably effective considering all the circumstances." *Balliette*, 336 Wis. 2d 358, ¶ 22.

To prove prejudice, a defendant "must show that [counsel's deficient performance] actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693. "It is not sufficient for the defendant to show that his counsel's errors 'had some conceivable effect on the outcome of the proceeding.'" *State v. Domke*, 2011 WI 95, ¶ 54, 337 Wis. 2d 268, 805 N.W.2d 364 (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 would have been different." *Strickland*, 466 U.S. at 694. "[R]eviewing courts are instructed to consider the totality of the evidence before the trier of fact." *State v. Johnson*, 153 Wis. 2d 121, 129–30, 449 N.W.2d 845 (1990).

B. McReynolds did not receive ineffective assistance of trial counsel.

1. There was no improper vouching testimony because no witness commented on the truthfulness of another witness' testimony.

McReynolds alleges that his trial counsel's performance was deficient for failing to object to allegedly improper vouching testimony on four occasions. Vouching runs afoul of the rule that "no witness . . . should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." *State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). "*Haseltine* prohibits a witness from testifying that another witness is telling the truth *at trial*." *State v. Snider*, 2003 WI App 172, ¶ 27, 266 Wis. 2d 830, 668 N.W.2d 784 (emphasis added). "The *Haseltine* rule is intended to prevent witnesses from interfering with the jury's role as the 'lie detector in the courtroom.'" *Id.* (quoting *Haseltine* 120 Wis. 2d at 96).

None of the four allegedly improper statements here impermissibly interfered with the province of the jury to determine the credibility of any witness at trial. In context, the challenged statements were not bolstering the confidential informant's credibility—three of the four were establishing whether the statements that the confidential informant gave the on the days of the controlled buys were consistent with Investigator Ranallo's observations. The other statement surrounded an altercation between McReynolds and the confidential informant that occurred between the two controlled buys.

The State begins with the third statement that McReynolds challenges because it is wholly unlike the other three. The context of the third statement that McReynolds challenges revolved around the altercation that McReynolds

and the confidential informant were in in the days between the controlled buys. The prosecutor asked, "[W]ere you concerned about [the confidential informant's] credibility at that point?" (R. 296:45.) Contextually, "at that point" referred to the point in time when Investigator Ranallo discussed the altercation with the confidential informant. Investigator Ranallo explained that he observed the confidential informant's injuries and that he "was not given any information to lead [him] to believe that [the confidential informant] was not being truthful." (R. 296:45.)

It is very clear that the above statement was regarding whether the confidential informant was being truthful about the altercation between him and McReynolds. It did not go to his credibility at trial, or even his credibility during the controlled buys. Like *Snider*, Investigator Ranallo's answer was related directly to the investigation. *Snider*, 266 Wis. 2d 830, ¶ 27.[7] Further, Investigator Ranallo's answer here did not relate to the first statement that McReynolds challenges; it is unclear how this statement would have bolstered the first allegedly improper statement at all. (*See* McReynolds' Br. 22.)

The remaining portions of testimony that McReynolds challenges are similar to each other. In the first two instances, the State had just gone through the oral statement that the confidential informant gave on the day of the first controlled buy. (R. 296:41–42.) These two instances happened in close

[7] As an aside, this third statement would also satisfy McReynolds' proffered semantic distinction between questions asked in the present tense versus questions asked in the past tense. (McReynolds' Br. 21 n.9.) The prosecutor asked the investigator "*were* you concerned . . . *at that point*." (R. 296:45.) This question was asked and answered in the past tense and, even under McReynolds' framework, is in accord with *Snider*. This Court does not need to establish such a distinction, however, because *Haseltine* issues should be decided based on context, not semantics. *See State v. Patterson*, 2010 WI 130, ¶ 64, 329 Wis. 2d 599, 790 N.W.2d 909.

succession. After Investigator Ranallo read the confidential informant's statement, the following exchange occurred:

> Q: And is that what [the confidential informant] told you to write down?
>
> A: Yes.
>
> Q: Based on your involvement with this controlled buy, is that consistent with what happened that day?
>
> A: Yes.
>
> Q: So do you believe this to be a truthful and accurate statement?
>
> A: Yes, I do.
>
> . . .
>
> Q: And do you have any reason to believe that [the confidential informant] was in any way untruthful with respect to the information he provided to you?
>
> A: No.

(R. 296:41–42.) The record demonstrates that, like *Snider*, the State was not eliciting whether the confidential informant was credible at trial, but rather, whether the statement that he gave on August 11, 2014, was consistent with the officers' observations on the day of the first controlled buy. *See Snider*, 266 Wis. 2d 830, ¶ 27. In context, the questions relate directly to the investigative process and not the confidential informant's overall credibility.

The last allegedly improper statement, like the first two, went to whether the confidential informant's August 18, 2014, post-controlled buy statement was consistent with the officer's observations and the totality of the investigation. Again, immediately after reading the confidential informant's second statement, the following exchange occurred:

> Q: Is this statement consistent with what you observed or perceived during your observations of the controlled buy?
>
> A: Yes.
>
> Q: And you now have had a chance to watch the video that relates to the controlled buy as well, correct?
>
> A: Correct.

> Q: Is that statement corroborated by what's on the video?
>
> A: Yes.
>
> Q: Do you have any reason to believe that [the confidential informant] was in any way untruthful about his observations that day?
>
> A: No.

(R. 298:18). The context demonstrates that the prosecutor's question merely served to confirm that there was no intervening information *at the time of the controlled buys* that would have caused the confidential informant's statement to be invalid.

McReynolds admits that at least three of the four statements "were arguably focused on external indicators of untruthfulness." (McReynolds' Br. 22.) He does not adequately explain how those three supposedly proper statements "served to bolster the investigator's first statement, which was clearly vouching." (McReynolds' Br. 22.) In fact, only one of the other three statements was even related to the same line of questioning as the first "clearly vouching" statement. It follows that if only one of the allegedly four statements was vouching, counsel was clearly not deficient for failing to object. *See State v. Patterson*, 2010 WI 130, ¶ 64, 329 Wis. 2d 599, 790 N.W.2d 909 (citation omitted) (a single instance of a possible *Haseltine* violation "did not 'create[ ] too great a possibility that the jury abdicated its fact-finding role'"). As explained above, even if this Court considers all four of the statements, McReynolds' argument still fails.

As the circuit court noted, "the law is full of nuance." (R. 305:10.) The context here matters to that nuance, and it reveals that these statements were not vouching. *See State v. Smith*, 170 Wis. 2d 701, 717, 490 N.W.2d 40 (Ct. App. 1992) (assessing the context and effect of the alleged vouching testimony). The context here confirms that these answers were related to the validity and the sanctity of the

investigation, which Investigator Ranallo was fully permitted to testify about. *See Snider*, 266 Wis. 2d 830, ¶ 27.

The record reveals that Investigator Ranallo did not testify to the confidential informant's credibility and did not invade the province of the jury to assess credibility. Therefore, McReynolds' trial counsel was not deficient for failing to object to admissible testimony. *See State v. Maday*, 2017 WI 28, ¶ 55, 374 Wis. 2d 164, 892 N.W.2d 611 ("Counsel's performance cannot be considered deficient for failing to object to admissible evidence.").

2. There was no improper character evidence, and even if there was, not objecting was a valid trial strategy.

McReynolds next argues that his trial counsel performed deficiently for failing to object to allegedly improper character evidence. Here, McReynolds isolates and challenges the confidential informant's answers that a man named KG was McReynolds' "Vice Lord friend" and "Vice Lord brother." (McReynolds' Br. 25.) But neither of these references amounted to improper character evidence.

Character evidence is inadmissible "for the purpose of proving that the person acted in conformity therewith on a particular occasion." Wis. Stat. § 904.04(1). Generally inadmissible character evidence is subject to three exceptions permitting its admissibility, none of which are relevant here. Wis. Stat. § 904.04(1)(a)–(c).

McReynolds' claim fails for the simple fact that the State was not attempting to prove conduct in conformity—*i.e.*, that he committed crimes in the past and therefore committed the crime charged in this case. While McReynolds cites the character evidence statute, he does not explain how the mere reference to a person's affiliation to a gang "implie[s] that Mr. McReynolds had a propensity for crime" or how the State elicited the testimony for that purpose. (McReynolds' Br. 26.)

Contrary to McReynolds' argument, there is no evidence in the record that shows that the State elicited the testimony from the confidential informant to demonstrate that McReynolds acted in conformity with any trait or had a propensity for any character trait. The record reveals that all the State asked was how the confidential informant knew KG. (R. 296:30; 297:18.) The questions regarding KG stopped there. The confidential informant's answers were not an attempt to undermine McReynolds' character.

Like in *Long*, the State did not belabor the point by asking follow-up questions about KG or the Vice Lords. *See State v. Long*, 2002 WI App 114, ¶ 23, 255 Wis. 2d 729, 647 N.W.2d 884. The confidential informant did not opine, like the expert in *Burton* opined, on the bias of any witnesses or the propensity of gang members to act in any particular manner. *See State v. Burton*, 2007 WI App. 237, ¶¶ 7–9, 306 Wis. 2d 403, 743 N.W.2d 152. Here, like in *Long*, "the evidence of gang affiliations [did not] so permeate[] the trial as to create a risk of unfair prejudice or confusion." *Long*, 255 Wis. 2d 729, ¶ 23. The references here were much fewer and far between than in *Long* and *Burton*—as the circuit court noted, the references were "minor." (R. 305:19.)

Even if the confidential informant's statement regarding how he knew KG did constitute character evidence, the record confirms that not objecting was reasonable trial strategy. "[T]rial counsel's decisions regarding trial strategy" are presumed reasonable. *State v. Breitzman*, 2017 WI 100, ¶ 75, 378 Wis. 2d 431, 904 N.W.2d 93. To prove that a trial strategy was deficient, a defendant must show "that counsel's decision not to object . . . was inconsistent with a reasonable trial strategy, that is, that it was irrational or based on caprice." *Id.* "[W]here a lower court determines that counsel had a reasonable trial strategy, the strategy 'is virtually unassailable in an ineffective assistance of counsel analysis.'" *Id.* (citation omitted).

Again, the references to any gang affiliation were minor. The circuit court determined that it was reasonable for trial counsel to not object and thereby inadvertently call more attention to the testimony. (R. 305:19–20.) It is not "irrational or based on caprice" to choose to not object to two minor and isolated references to gang affiliation. To the contrary, as the references were brief, seemingly inadvertent, and did not permeate the trial, "an objectively reasonable attorney might have judged that it would be a mistake to object in front of the jury, thereby calling attention to the issue." *State v. Diehl*, 2020 WI App 16, ¶ 35, 391 Wis. 2d 353, 941 N.W.2d 272.

As these two minor statements were not character evidence at all, and even if they were, not objecting was valid trial strategy, McReynolds' trial counsel was not deficient for failing to object.

3. The record conclusively demonstrates that McReynolds was not prejudiced.

a. The alleged vouching evidence was not prejudicial.

Even if this Court concludes that counsel's failure to object to the alleged vouching evidence or alleged character evidence was deficient performance, that deficient performance did not prejudice McReynolds. McReynolds' argument that he was prejudiced by the supposed vouching evidence is not supported by the record. He argues that the vouching evidence "significantly and unfairly bolstered the State's case." (McReynolds' Br. 24.) He claims that "the State had no real case if the informant was not believed." (McReynolds' Br. 24.)

Again, supposedly prejudicial performance is viewed in light of the totality of the evidence before the jury. *Johnson*, 153 Wis. 2d at 129–130. Contrary to McReynolds' assertions as to the weakness of the State's case, in reality there was ample evidence before the jury from which it could convict

McReynolds. The result of the trial would not have been different but for the supposedly deficient performance. *Strickland*, 466 U.S. at 694.

Counsel's failure to object to the alleged vouching evidence did not prejudice McReynolds because the jury had a plethora of other information to consider when it determined whether the confidential informant was credible. And to be clear, the alleged vouching statements concerned officers' impressions of the informant *during the investigation*. Not a single witness said that the confidential informant was telling the truth at trial.

The jury heard testimony from the confidential informant that was consistent with testimony regarding the events from Investigator Ranallo and his fellow officers. The confidential informant's testimony was further bolstered by the video and wire evidence that the jury saw and heard during trial. On the other side of the scale, the jury heard testimony regarding the confidential informant's criminal record, his past drug use, his motivations for approaching police regarding McReynolds, and the altercation that occurred between them. In short, the jury had plenty of information with which it could evaluate the informant's credibility—the alleged vouching evidence did not tip the scales in one way or another.

To support his prejudice argument, McReynolds points to several facts that he believes undermined the State's case. For example, he points to the fact that the informant had ill will toward McReynolds and that "his motivation for setting the meeting up was that he was 'mad' at Mr. McReynolds." (McReynolds' Br. 24.) He also notes that the prerecorded money was never recovered, the officers lost sight of the informant, and the bags of cocaine were small and could have been hidden on the informant. (McReynolds' Br. 23–24.)

McReynolds' argument ignores several other key facts. First, the confidential informant admitted that *part* of his motivation for the *second* controlled buy was because he was mad at McReynolds. (R. 297:23.) However, the confidential informant clarified that his initial motivation—to get McReynolds off the streets—remained true. (R. 297:23.) Further, Investigator Ranallo testified that the prerecorded money is almost never recovered because there is typically a gap in time between a controlled buy and an arrest, which is what occurred here. (R. 295:9–10, 27.) Next, despite losing sight of the informant, the officers had contemporaneous audio and video of the informant's movement. (R. 295:19–20.) Finally, three officers and the confidential informant testified that the officers searched the confidential informant before and after each controlled buy—they all testified that nothing was recovered during any of the searches. McReynolds' speculation that the informant may have come to the encounter with bags of drugs inside his body cavity is based nothing but that—speculation. Accordingly, even if counsel had objected to the alleged vouching testimony, the result would have been the same because of the overwhelming amount of other evidence that supported the State's case.

b. The alleged character evidence was not prejudicial.

McReynolds relies on the same proffered weaknesses in the State's case to demonstrate how he was prejudiced by counsel's failure to object to the alleged character evidence. He alleges that "[t]he State improperly bolstered its case by disparaging Mr. McReynolds' character." (McReynolds' Br. 26.) But as already discussed, McReynolds fails to grapple with the other evidence that the jury was presented with. Again, the two alleged statements of character evidence were relatively brief, minor, and inconsequential when compared to the rest of the evidence that the jury had before it. Simply put, counsel's failure to object did not have an adverse effect

on the defense. *See Strickland*, 466 U.S. at 693. McReynolds cannot show a reasonably probability of a different result but-for these two minor gratuitous references.

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The record conclusively demonstrates that McReynolds' trial counsel did not perform deficiently and even if counsel did perform deficiently there was no prejudice. Accordingly, McReynolds has failed to overcome *Strickland*'s high bar, and this Court should affirm.

III. McReynolds' constitutional claim fails because Wisconsin Stat. § 973.017(10m)(b) is not unconstitutional as applied to McReynolds.

Wisconsin Stat. § 973.017(10m)(b) permits a sentencing court to place its reasons for imposing a particular sentence on the record in writing rather than announce them orally. McReynolds claims that this statute is unconstitutional as applied to the facts of his case because it violated his right to be present at sentencing and his right to a public trial. But McReynolds conflates two distinct events: actual imposition of the sentence and the explanation for the sentence. As explained below, he has a right to be physically present for the former but not the latter. In turn, the circuit court's use of § 973.017(10m)(b) had no impact on McReynolds' constitutional rights.

A. McReynolds forfeited his constitutional claims.

McReynolds did not object to the circuit court's use of Wis. Stat. § 973.017(10m)(b). He argues that the circuit court's use of the statute violated his right to be present at sentencing and his right to a public trial. However, by failing to object on either ground, he has forfeited his arguments. *State v. Huebner*, 2000 WI 59, ¶ 11, 235 Wis. 2d 486, 611 N.W.2d 727.

First, the supreme court has made very clear that the right to a public trial is subject to forfeiture, not waiver. *State v. Pinno*, 2014 WI 74, ¶ 57, 356 Wis. 2d 106, 850 N.W.2d 207. Accordingly, such an argument can be forfeited for failing to raise it in the circuit court. *Id.* McReynolds attempts to circumvent *Pinno* by shoehorning his case into the policy of the lead[8] opinion in *State v. Coffee*, 2020 WI 1, ¶ 26, 389 Wis. 2d 627, 937 N.W.2d 579 (lead op.). (McReynolds' Br. 34–35.) He asserts that counsel could not have realistically objected because of the late juncture of the circuit court's decision to utilize Wis. Stat. § 973.017(10m)(b). (McReynolds' Br. 34–35.) McReynolds does not, however, explain *why* it was unrealistic for his counsel to object.

The situation that occurred here is hardly the same as *Coffee*. There, the State presented previously unknown, inaccurate information regarding Coffee's prior record during sentencing. *Coffee*, 389 Wis. 2d 627, ¶ 25. Defense counsel did not have time to evaluate the accuracy of the information, and the information ultimately proved to be inaccurate. *Id.* ¶ 25. It was that flaw that caused the lead opinion to hold that "the forfeiture rule does not preclude the ability to later challenge the State's spontaneous presentation at sentencing of previously unknown, inaccurate information." *Id.* ¶ 26.

However, as the concurrence in *Coffee* recognized, "defense attorneys are intimately familiar with rocks and hard places." *Coffee*, 389 Wis. 2d 627, ¶ 56 (Kelly, J., concurring). Trial attorneys must make split second decisions, often based on information they are hearing for the first time. *See id.* McReynolds' counsel could have done so here. Here,

[8] Sections IV.A. and B. (paragraphs 18–36) of *State v. Coffee* did not garner a majority of the court. *State v. Coffee*, 2020 WI 1, ¶ 70 n.1, 389 Wis. 2d 627, 937 N.W.2d 579 (A.W. Bradley, J., dissenting). Accordingly, those sections do not represent a holding of the court. *See id.* (citing *State v. Griep*, 2015 WI 40, ¶ 37 n.16, 361 Wis. 2d 657, 863 N.W.2d 567).

unlike *Coffee*, the circuit court informed the parties of its plan to utilize Wis. Stat. § 973.017(10m)(b) and explained its decision. (R. 300:39–41.) There was no inaccurate information for counsel to evaluate that was previously unknown or largely unavailable that would trigger the policy underlying the lead opinion in *Coffee*. *See Coffee*, 389 Wis. 2d 627, ¶ 29. Rather, counsel could have easily objected in the time the court took to explain itself—doing so would have preserved the issue for appeal. But, because there was no objection, McReynolds forfeited his public trial argument. *See Pinno*, 356 Wis. 2d 106, ¶ 56.

McReynolds also forfeited his claim that the circuit court's use of Wis. Stat. § 973.017(10m)(b) violated his right to be present at sentencing. True, the supreme court has held that the right to be present at the imposition of a sentence must be waived, not forfeited. *State v. Soto*, 2012 WI 93, ¶ 40, 343 Wis. 2d 43, 817 N.W.2d 848 (deciding waiver applies to the procedures in Wis. Stat. § 971.04(1)(g)); *see also* Wis. Stat. § 971.04(1)(g) (defendant to be present at pronouncement of judgment and imposition of sentence). However, McReynolds was present for the imposition of his sentence, so *Soto*'s waiver rule is inapposite. *See* Section III.B.1.–2., *infra*.

Because McReynolds did not lose his right to be present at sentencing, he forfeited any argument that Wis. Stat. § 973.017(10m)(b) was applied in violation of his constitutional right by failing to object. *See Huebner*, 235 Wis. 2d 486, ¶ 24 (holding that because Huebner's trial proceeded under a statute that authorized a six-member jury, Huebner's failure to object to that statute's application to the constitutional right to a twelve-member jury constituted

forfeiture of the argument). Accordingly, this Court need not address McReynolds' forfeited constitutional claims.[9]

B. Regardless, the statute is constitutional as applied to McReynolds.

"Under [an as applied] challenge, the challenger must show that his or her constitutional rights were actually violated." *State v. Wood*, 2010 WI 17, ¶ 13, 323 Wis. 2d 321, 780 N.W.2d 63. Courts assess as-applied challenges "considering the facts of the particular case in front of [them], 'not hypothetical facts in other situations.'" *Id.* (quoting *State v. Hamdan*, 2003 WI 113, ¶ 43, 264 Wis. 2d 433, 665 N.W.2d 785). Courts presume that statutes are constitutional, and "the party raising the constitutional claim . . . must prove that the challenged statute is unconstitutional beyond a reasonable doubt." *Id.* ¶ 15.

Here, the circuit court exercised its clear statutory authority to state the reasons for its sentencing decision in writing because the court determined that doing so in person would not be in McReynolds' interest. McReynolds claims that Wis. Stat. § 973.017(10m)(b) is unconstitutional as applied to him because the circuit court allegedly violated his right to be present at sentencing and his right to a public trial. As the challenger, McReynolds must show that the statute, applied to the specific facts of his case, is unconstitutional beyond a reasonable doubt; he has failed to do so.

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[9] "The absence of any objection warrants that we follow 'the normal procedure in criminal cases,' which 'is to address waiver within the rubric of the ineffective assistance of counsel.'" *Carprue*, 274 Wis. 2d 656, ¶ 47. Under that rubric, McReynolds' trial counsel could not have been ineffective because, as McReynolds' points out, no court has interpreted Wis. Stat. § 973.017(10m)(b), making any interpretation a novel legal argument. (McReynolds' Br. 27.) "[C]ounsel's failure to raise [a] novel argument does not render his performance constitutionally ineffective." *State v. Lemberger*, 2017 WI 39, ¶ 18, 374 Wis. 2d 617, 893 N.W.2d 232 (citation omitted).

1. The plain language of Wis. Stat. § 973.017(10m) and surrounding statutes confirm that a circuit court's announcement of its reasons for a sentence is distinct from the imposition of the sentence.

McReynolds' constitutional arguments are premised on a fundamental misreading of what the statute allows and requires. When correctly interpreted, it is clear that a circuit court's sentencing reasons and sentencing decision are plainly distinct events. That they often occur together is irrelevant. The proper interpretation reveals that Wis. Stat. § 973.017(10m)(b) had no effect on McReynolds' right to be present at sentencing.

To begin, defendants in Wisconsin have three due process rights at sentencing: "(1) [t]o be present at the hearing and to be afforded the right of allocution, (2) to be represented by counsel, and (3) to be sentenced on the basis of true and correct information." *Bruneau v. State*, 77 Wis. 2d 166, 174–75, 252 N.W.2d 347 (1977). However, while a defendant has a right to be present at sentencing, it does not necessarily follow that he or she must be present when the court provides its reasons for its sentencing decision. A proper interpretation of Wis. Stat. § 973.017(10m) and its context confirm this conclusion.

"Statutory interpretation begins with the language of the statute." *State v. Mercado*, 2021 WI 2, ¶ 43, 395 Wis. 2d 296, 953 N.W.2d 337 (citing *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110). "If the meaning of the statute is plain," the inquiry stops. *Kalal*, 271 Wis. 2d 633, ¶ 45. "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.* Further, "statutory 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 results." *Id.* ¶ 46. Here, the language is plain, and it belies McReynolds' proffered conclusions.

At the outset, "sentencing" is not statutorily defined in Wis. Stat. § 973.017. However, it is defined elsewhere in the statutes. The rules of appellate procedure define "sentencing" as "the *imposition* of a sentence, a fine, or probation in a criminal case." Wis. Stat. § (Rule) 809.30(1)(f). That definition is in accord with the common and ordinary understanding of "sentencing." *See, e.g.,* "Sentencing", *Black's Law Dictionary* (11th ed. 2019) (defining "sentencing" as "the judicial determination of the penalty for a crime"); *see also* "Sentence", *Merriam-Webster's Collegiate Dictionary* 1067 (10th ed., 1995) ("[O]ne formally pronounced by a court or judge in a criminal proceeding and specifying the punishment to be inflicted upon the convict; the punishment so *imposed*") (emphasis added).

Further, as used in Wis. Stat. § 973.017, a "sentencing decision" is

> a decision as to whether to impose a bifurcated sentence under s. 973.01 or place a person on probation and a decision as to the length of a bifurcated sentence, including the length of each component of the bifurcated sentence, the amount of a fine, and the length of a term of probation.

Wis. Stat. § 973.017(1). So, in line with the above definitions, a sentencing decision includes (1) whether the court will impose a bifurcated sentence or probation; (2) the amount of any fines; and (3) the duration of any imposed bifurcated sentence or probation.

The common thread among all of these definitions is that sentencing includes everything through the imposition of a sentence. Notably absent from any of the above definitions is any mention of a court's *reasoning* for imposing a sentence. It follows that, although they ordinarily occur

contemporaneously, announcing a sentencing decision and announcing the reasons for a sentencing decision are distinct events.

Moving next to the statute at issue, Wis. Stat. § 973.017(10m), titled "Statements of reasons for sentencing decision," provides that "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." Wis. Stat. § 973.017(10m)(a). However,

> *[i]f 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 decision in writing and include the written statement in the record.

Wis. Sat. § 973.017(10m)(b). That language alone reveals that it is within the circuit court's discretion to determine whether paragraph (a) or paragraph (b) applies.

Based on the above definitions, it makes sense that a court's imposition of its sentence and the announcement of "the reasons for its sentencing decision" are distinct events. Because a "sentencing decision" includes the imposition of a sentence, a defendant must be present when a circuit court issues its sentencing decision. *See Bruneau*, 77 Wis. 2d at 174–75. But, as the language of Wis. Stat. § 973.017(10m) illustrates, providing the "reasons for its sentencing decision" is a distinct concept from imposing the sentence. Accordingly, interpreting "the reasons for its sentencing decision" to mean the same as the "sentencing decision" itself renders all of § 973.017(10m) meaningless.

If McReynolds' interpretation were true, there would be no need for Wis. Stat. § 973.017(10m) at all because, as part of a sentencing decision, the reasons would *always* have to be stated in person. This is an unreasonable reading of the statute. Rather, this Court should interpret the statute in a manner that gives meaningful effect to all of the words that

the legislature included and avoids rendering the entire statute surplusage. *See Kalal*, 271 Wis. 2d 633, ¶ 46.

In attempting to justify his interpretation, McReynolds injects two requirements not seen anywhere in the statute.

First, McReynolds argues that "Wis. Stat. § 973.017(10m)(b). may only be used where the defendant waives their right to be present." (McReynolds' Br. 30.) This argument is couched in a citation to *Soto*, which McReynolds contends holds that the right to be present at sentencing cannot be forfeited—it must be waived. (McReynolds' Br. 30.) McReynolds is half right. *Soto* held that "a defendant's right to be present in the same courtroom as the presiding judge at the proceedings listed in Wis. Stat. § 971.04(1)(g) is particularly important to the actual or perceived fairness of the criminal proceedings. Therefore, if this right is to be relinquished, it must be done by waiver." *Soto*, 343 Wis. 2d 43, ¶ 40.

Wisconsin Stat. § 971.04(1)(g) requires the defendant's presence "at the pronouncement of [the] judgement and the *imposition of sentence*." So, McReynolds is correct to the extent that a defendant cannot forfeit his or her *statutory* right to be present at the imposition of his or her sentence; that right must be waived. However, assuming *Soto* applies equally to the constitutional right to presence at sentencing, *Soto*'s waiver rule extends only as far as the imposition of a sentence. And that is because, as explained above, "sentencing" and "sentencing decisions" are events that are distinct from a circuit court's announcement of the "reasons for its sentencing decision." All this is to say that the statute's plain language does not require a circuit court to obtain a defendant's waiver prior to utilizing Wis. Stat. § 973.017(10m)(b), and there is no such implicit requirement.

Further, McReynolds faults the circuit court for utilizing Wis. Stat. § 973.017(10m)(b) *sua sponte* and without

entering into a colloquy with McReynolds to ascertain whether he was "agreeable" to the procedure. (McReynolds' Br. 28, 31.) However, the statute plainly permits a circuit court to invoke the statute on its own, and the plain language does not require such a colloquy. Further, because a defendant does not waive any right by virtue of this statute, there is no reason for a colloquy.[10]

Because this Court does not add words into the statute that the legislature did not see fit to include, this Court should reject McReynolds' interpretation. *Mercado*, 395 Wis. 2d 296, ¶ 50 (citing *Cnty. of Dane v. LIRC*, 2009 WI 9, ¶ 33, 315 Wis. 2d 293, 759 N.W.2d 571). Contrary to McReynolds' extratextual interpretation, the plain language reveals that the statute creates a discretionary decision for the circuit court. The circuit court determines whether it is in the interest of the defendant to announce the reasons in open court, and the statute does not require a circuit court to ask if the defendant is amenable to the procedure.[11]

The circuit court properly exercised that discretion here. The court explained that it did not want McReynolds to feel demeaned or insulted by the court "go[ing] through the long and ponderous explanation that [it was] going to [be] mak[ing]. . . in writing." (R. 300:40–41.) The court explained that it did not want McReynolds to feel insulted or lectured to. (R. 300:41.) The court's decision was based, in part, on McReynolds' behavior throughout his case. (R. 300:41.) The court noted the several times that McReynolds refused to come to court and the disruptive behavior that he displayed

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[10] A circuit court certainly *could* enter into a colloquy with a defendant to assess his or her agreeability to the procedure, but nothing within the statute requires such an occurrence.

[11] As a discretionary decision, a circuit court's decision to utilize Wis. Stat. § 973.017(10m)(b) would be subject to review for erroneous exercise of discretion. *State v. Davis*, 2001 WI 136, ¶ 28, 248 Wis. 2d 986, 637 N.W.2d 62.

when he was in court. (R. 300:41.) The court concluded that it was in McReynolds' interest for the sentencing explanation to be in writing rather than in open court—it was well within the circuit court's discretion to conclude as such. (R. 300:41.)

A circuit court must of course give its reasoning for imposing a given sentence. That is what Wis. Stat. § 973.017(10m) requires and that is what occurred here. That the imposition of a sentence and an explanation of its reasons *ordinarily* occur contemporaneously is immaterial and does not mean that they *always* have to. McReynolds, in arguing that they must always occur together, conflates giving sentencing reasons in writing with not giving reasons at all. (McReynolds' Br. 31–32.) True, "[t]he sentencing rationale is intrinsic to the pronouncement of a sentence." (McReynolds' Br. 31–32.) But McReynolds does not explain how that intrinsic step is lost when a circuit court gives its sentencing rationale in writing rather than in person. Perhaps that is because that essential step in sentencing is not lost at all—it is merely presented in a different, but legally acceptable, manner.

Simply stated, McReynolds' interpretation is unduly complicated and requires this Court to read words into the statute that don't exist. The plain language of Wis. Stat. § 973.017(1) and Wis. Stat. § 973.017(10m) confirm that "sentencing decisions" and "reasons for a sentencing decision" are distinct. While due process requires that the former be announced to the defendant in person, it is within the circuit court's discretion to assess the defendant and the situation before it and announce the latter in person or in writing. Accordingly, a circuit court's use of Wis. Stat. § 973.017(10m)(b) satisfies the requirement of providing reasons for the court's sentencing decision and does not have any effect on a defendant's right to be present at sentencing.

2. The procedure here comported with due process and with the permissible use of Wis. Stat. § 973.017(10m)(b).

The circuit court did not violate McReynolds' right to be present at sentencing. As discussed above, the right to be present at sentencing contemplates a defendant's presence only through imposition of a sentence, and McReynolds was present through the point that the circuit court imposed the sentence.

The circuit court held a sentencing hearing on July 25, 2015. At the sentencing hearing, the court heard argument from the State and McReynolds' counsel. McReynolds exercised his right to allocution. This satisfies the right to counsel and the right to allocution. There is no argument that the circuit court sentenced McReynolds based on inaccurate information, and the circuit court went on to impose McReynolds' sentence while he was present. Accordingly, the facts of this case comported with the three due process rights afforded to defendants at sentencing. *See Bruneau*, 77 Wis. 2d at 174–75.

The only "normal" procedure that the circuit court deviated from was giving the reasons for sentencing in open court. But, as discussed above, the circuit court properly exercised its discretion in making that decision to put the reasons for its sentencing decision in writing.

There was simply no impact on McReynolds' constitutional right to be present at sentencing. He was present through the imposition of his sentence, and that is all that the law requires. Accordingly, McReynolds has not met his burden to show that Wis. Stat. § 973.017(10m)(b) was unconstitutional beyond a reasonable doubt as applied to the facts of his case.

3. The circuit court did not violate McReynolds' right to a public trial.

a. A defendant has the right to a public trial, but the right is violated only when a purported closure implicates the values protected by the Sixth Amendment.

"Although the public trial right is very important, the absence of the public for part or even all of a criminal trial does not necessarily mean that the trial was unfair." *Pinno*, 356 Wis. 2d 106, ¶ 59. The Sixth Amendment guarantees criminal defendants the right to a public trial. U.S. Const. amend. VI; *State v. Ndina*, 2009 WI 21, ¶ 40, 315 Wis. 2d 653, 761 N.W.2d 612.[12] This right includes voir dire and suppression hearings. *See Pinno*, 356 Wis. 2d 106, ¶ 43 (citing *Waller v. Georgia*, 467 U.S. 39 (1984) and *Presley v. Georgia*, 558 U.S. 209 (2010)). Further, some jurisdictions have extended the right to sentencing. *See, e.g., United States v. Thompson*, 713 F.3d 388, 392 (8th Cir. 2013). However, Wisconsin does not appear to have extended the Sixth Amendment right to a public trial to sentencing.[13]

[12] The right to a public trial was incorporated to protect against state action via the Fourteenth Amendment. *See State v. Ndina*, 2009 WI 21, ¶ 41, n. 11, 315 Wis. 2d 653, 761 N.W.2d 612 (citing *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968)).

[13] Wisconsin Stat. § 757.14 does provide that "[t]he sittings of every court shall be public and every citizen may freely attend the same, except if otherwise expressly provided by law on the examination of persons charged with [a] crime." On appeal McReynolds argues only that his constitutional right to a public trial was violated; he does not base his argument in the statutes. *See Ndina*, 315 Wis. 2d 653, ¶ 41 n.11 ("This case is a Sixth Amendment case, not a statutory case.").

McReynolds cites no Wisconsin cases holding as such, and the State has found none.[14]

Assuming for the sake of argument that the right to a public trial does include sentencing, there is still a two-step analysis to undergo. "The appellate court first determines whether the closure at issue implicates the Sixth Amendment right to a public trial." *Ndina*, 315 Wis. 2d 653, ¶ 46. "If the closure does not implicate the Sixth Amendment right to a public trial, the appellate court need not reach the second step of the analysis." *Id.* On the first step, not all unjustified closures will implicate the Sixth Amendment.

"[E]ven an unjustified closure may, in some circumstances, be so trivial as not to implicate the right to a public trial." *Id.* ¶ 48 (citation omitted). To determine whether a closure is trivial, and therefore does not implicate the Sixth Amendment, courts consider whether the closure implicates "the values served by the Sixth Amendment." *Id.* ¶ 49. The right to a public trial "ensure[s] a fair trial . . . remind[s] the prosecutor and the judge of their responsibility to the accused and the importance of their functions . . . encourage[s] witnesses to come forward; and . . . discourage[s] perjury." *Id.* "In short, the triviality inquiry goes principally to the length of the closure and what parts of the trial were closed." *State v. Vanness*, 2007 WI App 195, ¶ 12, 304 Wis. 2d 692, 738 N.W.2d 154.

"If a closure implicates the Sixth Amendment right to a public trial, the appellate court then must determine whether the closure was justified under the circumstances." *Ndina*, 315 Wis. 2d 653, ¶ 46. A justifiable closure must meet four conditions. *Id.* ¶ 56. First, "the party who wishes to close the

[14] This Court has extended the Sixth Amendment right to a *speedy* trial to sentencing. *See State v. Allen*, 179 Wis. 2d 67, 803, 505 N.W.2d 801 (Ct. App. 1993) (discussing only the right to a speedy trial). However, it does not appear that the same can be said for the right to a *public* trial.

proceedings must show an overriding interest which is likely to be prejudiced by a public trial." Second, "the closure must be narrowly tailored to meet that interest." Third, "alternatives to closure must be considered by the trial court." Fourth, and finally, "the court must make findings sufficient to support the closure." *Id.* (citation omitted).

Here, again assuming that the right to a public trial extends to sentencing, the circuit court's use of Wis. Stat. § 973.017(10m)(b) was not a closure that implicated any of the values served by the Sixth Amendment's guarantee to a public trial.

b. The circuit court's use of Wis. Stat. § 973.017(10m)(b) did not "close" the courtroom in a way that implicated the values served by the Sixth Amendment.

For the myriad of reasons explained above, if the right to a public trial extends to sentencing, that right extends through only the imposition of a sentence. Again, "sentencing" ends at the imposition of a sentence. Although a sentencing hearing *ordinarily* includes an explanation of a circuit court's reasoning in open court, it does not necessarily *always* have to be that way—that is exactly what Wis. Stat. § 973.017(10m)(b) contemplates. Moreover, the situation here is wholly unlike cases where a court has found a court closure.

For example, unlike this case, in *Ndina*, "[t]he circuit court issued an order 'ban[ning] all family members from [the] court based on what [the court] believe[d] to be improper activities." 315 Wis. 2d 653, ¶ 15. In *Vanness*, "the courthouse doors were locked at 4:30 p.m. . . . [and] during the presentation of Vanness's entire defense and the State's rebuttal." *Vanness*, 304 Wis. 2d 692, ¶ 2. In each of these cases, the reviewing court concluded that the closures were

not trivial and implicated the Sixth Amendment. *Ndina*, 315 Wis. 2d 653, ¶¶ 52–54; *Vanness*, 304 Wis. 2d 692, ¶¶ 15–18.

McReynolds does not explain how the circuit court putting the reasons for its sentencing decision in writing is a closure at all, much less one of the same magnitude as the above cases. In fact, he skips the first step of the analysis entirely and appears to simply assume this was a closure that implicated the Sixth Amendment. (*See* McReynolds' Br. 32–35.) Analyzing the first step, however, is critical and reveals that any "closure" that occurred here was certainly trivial and did not implicate the Sixth Amendment.

By the time the circuit court filed the written reasons for its sentencing decision, the jury had been selected, the trial had ensued, the verdict had been announced, and the sentence had been imposed. The substantive and evidentiary portions of the trial had come and gone. *See Vanness*, 304 Wis. 2d 692, ¶ 12. Any closure that occurred via the circuit court's use of Wis. Stat. § 973.017(10m)(b) was incredibly brief as it merely "closed" the very end of the sentencing hearing while the court wrote the reasons for its sentencing decision. *See id.* At this point, the values that the public trial right seeks to protect were no longer implicated—there was no testimony where perjury would be a concern, the judge and prosecutor had upheld their responsibilities to the defendant, there were no witnesses to come forward. This is simply not the same as closing the court during voir dire, an entire defense and rebuttal, or witness testimony. *See Pinno*, 356 Wis. 2d 106, ¶¶ 23, 27; *see also Vanness*, 304 Wis. 2d 692, ¶ 2; *Ndina*, 315 Wis. 2d 653, ¶ 15.

McReynolds was present in person at sentencing and had a public trial. The circuit court giving the reasons for its sentencing decision in writing did not change that. Accordingly, McReynolds has not met his burden to show that the circuit court's use of Wis. Stat. § 973.017(10m)(b) was unconstitutional beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, this Court should affirm the circuit court's judgment of conviction and order denying postconviction relief.

Dated this 8th day of October 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,903 words.

Dated this 8th day of October 2021.

Electronically signed by:

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 8th day of October 2021.

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