STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP943-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

HAJJI Y. MCREYNOLDS,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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TABLE OF CONTENTS

ISSUES PRESENTED

Mr. McReynolds was convicted at a jury trial of two counts of delivery of less than one gram of cocaine. The deliveries were alleged to have occurred during controlled buys involving a confidential informant. During trial, an investigator testified that he believed the informant had been truthful. Also, at trial, the informant testified that Mr. McReynolds was affiliated with a street gang. At sentencing, the circuit court declined to state the reasons for its sentence in open court, instead choosing to file a written decision at a later date, in reliance on Wis. Stat. § 973.017(10m)b.[1]

1. This Court should grant review to consider whether Wis. Stat. § 973.017(10m)b. is unconstitutional as applied to Mr. McReynolds because use of the statutory procedure violated his right to be present at sentencing and right to a public trial.

The postconviction court[2] determined that the sentencing court had not erroneously exercised discretion by using the statute, but did not reach

[1] Section 973.017(10m)b. states:"[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 sentencing decision in writing and include the written statement in the record."

[2] A different judge presided over postconviction proceedings than at sentencing.

Mr. McReynolds' arguments about the statute's constitutionality. (R.305:4; App. 41).

The court of appeals held that Mr. McReynolds' right to be present was limited to the announcement of the "sentencing decision," not "the pronouncement of 'the reasons for its sentencing decision.'" *State v. Hajji Y. McReynolds*, No. 2021AP943-CR slip op., ¶60 (Wis. Ct. App. April 12, 2011) (recommended for publication). (App. 30-31). It held that Mr. McReynolds forfeited his public-trial claim by not objecting at the sentencing hearing. (*Id*., ¶¶46-51; App. 24-26).

2. This Court should grant review to resolve tension in the caselaw, and clarify whether there is an exception to the *Haseltine*[3] vouching rule for law enforcement officers testifying about their investigations.

The circuit court concluded that the investigator's testimony was not a vouching violation because it was introduced to explain the correctness of the investigative procedure. (R.305:10-12; App. 47-49).

The court of appeals held that the statements "were not offered to bolster the informant's credibility; instead, they were offered to explain the course of events during the interrogation." (*McReynolds*, slip op., ¶32; App. 19).

[3] *State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984) (no witness may give an opinion that another witness is telling the truth).

3. If the Court grants review it should hold that trial counsel's failure to object to the vouching testimony and testimony about alleged gang affiliation was prejudicial and grant Mr. McReynolds a *Machner*[4] hearing to complete his claim of ineffective assistance of counsel.

The circuit court did not permit trial counsel to testify, but determined that the alleged vouching was not objectionable. (R.305:10-12; App. 47-49). It ruled that the gang testimony was improper, but that defense counsel's failure to object was not deficient or prejudicial. (R.305:19-20; App. 56-57).

The court of appeals affirmed both rulings. (*McReynolds*, slip op., ¶¶32, 41; App. 19, 22).

CRITERIA FOR REVIEW

Mr. McReynolds' case is the first appellate case applying Wis. Stat. § 973.017(10m)b., and the decision is recommended for publication. This statute permits the court to place the reasons for its sentencing decision in writing, rather than in court at the time of the sentencing hearing. Whether this violates a defendant's constitutional rights is "an issue of first impression" in Wisconsin. (*McReynolds*, slip op., ¶56; App. 28). Mr. McReynolds argues that the statute, as

[4] A defendant must call trial counsel at a hearing to give them the opportunity to respond to ineffectiveness claims. *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905.

applied to him, violated his constitutional rights to be present at sentencing and to a public trial. This Court should grant review to consider these important questions of constitutional law, the resolution of which will have statewide impact. *See* Wis. Stat. §§ 809.62(1r)(a) and (c).

A defendant has a constitutional right to be present at their sentencing hearing. *State v. Perez*, 170 Wis. 2d 130, 138, 487 N.W.2d 630 (Ct. App. 1992). The court of appeals concluded that, although there is a right to be present at sentencing, this does not include a right to be present during the explanation for the sentence. (*McReynolds*, slip op., ¶¶59-60; App. 30-31). Instead, the court of appeals held that a court's "sentencing decision" and the court's "reasons for its sentencing decision" are "distinct events" and the right to be present only applies to the former. (*McReynolds*, slip op., ¶60; App. 30-31). This Court should reject the purported distinction. The reasons for a sentence are intrinsic to the sentencing decision.

In addition, a defendant has a constitutional right to a public trial, which extends to the sentencing hearing. *See Presley v. Georgia*, 558 U.S. 209, 212 (2010). The court of appeals declined to address this claim, concluding it was forfeited because Mr. McReynolds did not object at his sentencing hearing. (*McReynolds*, slip op., ¶¶47-51; App. 30-31). This conclusion is erroneous. Mr. McReynolds properly preserved the claim by raising it in a postconviction motion. In addition, forfeiture is a rule of judicial administration, and it will serve the interests of

fairness, efficiency, and the orderly administration of justice for this Court to decide both claims about the constitutionality of the statute instead of leaving the door open to a future public-trial claim. *See State v. Coffee*, 2020 WI 1, ¶19, 389 Wis. 2d 627, 937 N.W.2d 579 (discussing the interests served by the forfeiture rule).

This Court should also grant review to resolve tension in the case law regarding whether a police officer may testify to their belief in a witness's truthfulness without violating the vouching rule, where the asserted purpose of the testimony is to explain the course of the investigation. The court of appeals approved of such testimony in *State v. Smith*[5] and *State v. Snider*,[6] but held it inadmissible in *State v. Patterson*.[7] In Mr. McReynolds' case, the court of appeals relied on *Smith* and *Snider*, and disregarded *Patterson*. (*McReynolds*, slip op., ¶¶28-35; App. 17-21) Clarification and harmonization is needed. *See* Wis. Stat. § 809.62(1r)(c)3 (a decision will help clarify and harmonize a question of law that is likely to recur unless resolved).

Finally, if the Court grants review it should hold that Mr. McReynolds was prejudiced by his attorney's failure to object to the vouching testimony and

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[5] *State v. Smith*, 170 Wis.2d 701, 490 N.W.2d 40 (Ct. App. 1992).

[6] *State v. Snider*, 2003 WI App 172, 266 Wis. 2d 830, 668 N.W.2d 784.

[7] *State v. Patterson*, 2009 WI App 161, 321 Wis. 2d 752, 776 N.W.2d 602.

improper testimony that Mr. McReynolds was allegedly affiliated with a gang, and should remand for a *Machner* hearing so that he may complete his claim of ineffective assistance of counsel.

STATEMENT OF FACTS

Mr. McReynolds was convicted at a jury trial of two counts of delivery of less than one gram of cocaine. The witnesses at trial included law enforcement officers and a confidential informant. Investigator Aaron Ranallo testified that the informant contacted him, claiming that Mr. McReynolds was selling cocaine, and volunteering to participate in a controlled buy. (R.295:14). Ultimately, two alleged buys took place, a week apart.

Investigator Ranallo testified that, before the alleged buys, police checked the informant's pockets and patted him down. (R.295:42, R.297:5). They gave him $150 in prerecorded cash and outfitted him with a body wire and video recording device. (R.295:17; R.296:47). Both times, the informant made a phone call and claimed it was to Mr. McReynolds, but police did not listen in on the calls. (R.295:19; R.296:24-25). After each of the alleged buys, the informant turned over cocaine, which he said he got from Mr. McReynolds. After each alleged buy, the informant was paid $100 for his services. (R.295:28). Police did not recover the prerecorded cash after either alleged buy. (R.295:26).

Investigator Ranallo testified that for the first buy, the informant was dropped off near a gas station. (R.295:18). Police saw him walk toward the gas station, but then lost sight of him. (R.295:19-20). A few minutes later they saw him and Mr. McReynolds walking together and parting ways. (R.295:22). The prosecutor played a clip of the alleged buy. (R.72. R.296:14). Nothing was visible because the informant had the camera in the palm of his hand. (R.296:19).

Investigator Ranallo wrote a statement provided to him by the informant. (R.296:25; R.73). The prosecutor asked the investigator to read the statement aloud to the jury. In the statement, the informant asserted that he called Mr. McReynolds to set up a meeting, then met with him on the sidewalk and did a drug exchange. The prosecutor asked Investigator Ranallo, "so do you believe this to be a truthful and accurate statement?" and he responded "Yes, I do." (R.296:42). The prosecutor 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 Investigator Ranallo responded, "[n]o." *Id.* Later during the examination, Investigator Ranallo testified that he was "not given any information to lead [him] to believe that he [informant] was not being truthful." (R.296:45).

The informant testified that his relationship with Mr. McReynolds was "fair," but also admitted that he owed Mr. McReynolds' friend money, and that he was in a physical altercation with Mr. McReynolds

about the debt sometime between the first alleged buy and the second. (R.295:48, R.296:29). The prosecutor asked who he was indebted to, and the informant said "KG." (R.296:30). The prosecutor asked "who is KG," and the informant responded that he was one of Mr. McReynolds' "Vice Lord friends." (R.296:30).

During the second alleged buy, Investigator Ranallo again lost sight of the informant "for some time" both before and after the meeting. (R.298:21). He testified that it was possible that the informant picked up drugs somewhere along the way. (R.298:21, 23). A clip was played for the jury. (R.298:14; R.72). It showed Mr. McReynolds reaching back from the front seat of a car to the back seat. (R.72: 28 mins, 39 sec.; R.298:19). No exchange is visible.

Investigator Ranallo again wrote a statement provided to him by the informant. (R.74). In the statement, the informant asserted that he called Mr. McReynolds, set up a meeting, and met him in the park. They got into a car and he gave Mr. McReynolds money in exchange for drugs. The prosecutor asked Investigator Ranallo to read the statement aloud. (R.298:17). The prosecutor then asked, "[d]o you have any reason to believe that [the informant] was in any way untruthful about his observations that day?" and Investigator Ranallo answered, "[n]o." (R.298:18).

The informant testified that his motivation for offering to do the second buy was that he was "mad" at Mr. McReynolds about the fight. (R.297:13). He also testified that the money he earned from the buys was

a "real incentive." (R.297:41). The informant testified that KG was present at the second alleged buy. The prosecutor asked, "who is KG" and the informant answered it was Mr. McReynolds' "Vice Lord brother." (R.297:18). The informant testified that he had previously been convicted of a crime ten times. (R.295:47). He was a drug user, but testified that he was recently in recovery. *Id.* Investigator Ranallo testified that the informant would not have received the $100 had he not provided statements. (R.298:22).

Mr. McReynolds was convicted, and on July 27, 2015, the court held a sentencing hearing. (R.300; App. 74-119). The court heard the arguments of the parties and gave Mr. McReynolds the opportunity for allocution. (R.300:10-36; App. 83-109). The court stated that its sentence was five years of initial confinement and five years of extended supervision on each count, concurrent. (R.300:42; App.115).

However, the circuit court did not state the reasons for the sentence in open court. Instead, it invoked Wis. Stat. § 973.017(10m)(b), and said it would state its reasons in writing at a later date.

> 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.113-14).

The circuit court noted that Mr. McReynolds had previously refused to come to court on two occasions, and had been disruptive in the courtroom on the morning of trial before the trial began. The court stated: "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." (R.300:41; App.114). A judgment of conviction was entered on July 27, 2015. (R.105). Three days later, the court filed a document titled "written reasons for sentencing decision." (R.108:1-11; App.63-73).

Mr. McReynolds filed a postconviction motion requesting a new trial and sentencing hearing. (R.227). Grounds for a new trial were: (1) the prosecutor elicited improper testimony from Investigator Ranallo that he believed the informant was truthful; and (2) the prosecutor elicited improper testimony from the informant that Mr. McReynolds was associated with the Vice Lord gang. (R.227:2-6). Mr. McReynolds alleged ineffective assistance of counsel for not objecting. (R.227:6). Mr. McReynolds also argued for resentencing based on the court's failure to explain his sentence in open court. He argued that Wis. Stat. § 973.017(10m)b. was unconstitutional as applied to him because it violated his rights to be present at sentencing and to a public trial. (R.227:9).

On May 14, 2021, the circuit court held a hearing on the motion. (R.305:1-25; App.38-62). At the outset, the court denied the State's request to deny the motion on the basis that Mr. McReynolds had filed a prior postconviction motion. (R.305:3-4; App.40-41). *See State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). The court proceeded to deny the motion on the merits. First, the court determined that the sentencing court met the statutory requirements for utilizing Wis. Stat. § 973.017(10m)b. and "laid out all of the reasons he decided to hear argument and then give a written decision on sentencing." (R.305:4; App. 41). The court did not address Mr. McReynolds' constitutional claims.

Next, the court considered Mr. McReynolds' claims for a new trial. The circuit court ruled that Investigator Ranallo's testimony was not vouching. Instead, the questions and answers involved the inquiry of "did you have any reason to suspect that the [investigative] procedure wasn't followed correctly," rather than, "is this informant a truthful person." (R.305:10-12; App. 47-49). Finally, the court agreed that the Vice Lord evidence was improper and stated that the prosecutor should have prepared her witness or taken corrective action once the first reference had been made. (R.305:19-20; App. 56-57). However, it did "not appear to be the case" that it "tip[ped] the scales to the extent that would necessitate a new trial." (R.305:20; App. 57). The court did not permit Mr. McReynolds to call trial counsel as a witness for his ineffectiveness claim. (R.305:12; App.49). The

court entered a written order affirming its oral ruling. (R.264; App. 37).

The court of appeals affirmed. First, it denied the State's claim that Mr. McReynolds' appeal was procedurally barred. ((*McReynolds*, slip op., ¶¶16-20; App. 30-31). Under the "unique facts of the case," and because the case was still on direct appeal, it was not subject to the *Escalona-Naranjo*, 185 Wis. 2d 168, bar on successive postconviction motions. (*Id.*, ¶18; App.12).

As to the new trial claims, the court of appeals first concluded that the investigator's testimony "did not constitute impermissible vouching testimony," but rather, the statements were "offered to explain the course of events during the interrogation." (*Id.*, ¶32; App. 19). Next, it assumed without deciding that trial counsel was deficient for not objecting to the gang testimony, but held that Mr. McReynolds was not prejudiced by the testimony. (*Id.*, ¶¶41-42; App.22-23).

As to the sentencing claims, the court of appeals held that Mr. McReynolds forfeited his claim that Wis. Stat. § 973.107(10m)b. violated his right to a public trial because he did not object at the sentencing hearing. (*Id.*, ¶¶46-51; App.24-25). Finally, it held that the statutory procedure did not violate Mr. McReynolds' right to be present at sentencing because he was present when the court announced the "sentencing decision," and he did not have a right to be present for "the pronouncement of 'the reasons for [the court's] sentencing decision.'" (*Id.*, ¶60; App.30-31).

ARGUMENT

I. This Court should grant review to determine whether Wis. Stat. § 973.017(10m), which permits a court to state the reasons for its sentence in writing instead of in open court, violated Mr. McReynolds right to be present at sentencing and right to a public trial.

A. Applicable statutes.

Under Wis. Stat. § 973.017(10m)a. 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."

Under Wis. Stat. § 973.017(10m)b., the court may deviate from that 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.

Wis. Stat. § 973.017(10m)a.

The court of appeals also relied on the definition of "sentencing decision" in the statute, which is:

> 'Sentencing decision' means 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).

B. Standard of review.

There are two 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. In an as-applied challenge, the challenging party succeeds if they show that their rights were violated under the facts of their case. *State v. Wood*, 2010 WI 17, ¶13, 323 Wis. 2d 321, 780 N.W.2d 63. The 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.*

C. Wisconsin Statute § 973.017(10m)b. is unconstitutional as applied to Mr. McReynolds.

1. The circuit court's use of the statutory procedure violated Mr. McReynolds' right to be present at sentencing.

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 *Perez*, the court of appeals identified these due process rights with regard to sentencing: the right to be present at the sentencing and to be afforded the right of allocution; the right to be represented by counsel; and the right to be sentenced on the basis of true and correct information. *Id*. at 138 (citing *Bruneau v. State*, 77 Wis. 2d 166, 174-75, 252 N.W.2d 347 (1977)). Under Wis. Stat. § 971.04(g), a defendant also has a statutory right to be present at sentencing.

Given that a defendant has a right to be present at sentencing, Mr. McReynolds asserts that Wis. Stat. § 973.017(10m)b. may only be used where the defendant waives their right to be present. A 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). Mr. McReynolds did not waive his right to be present.[8]

The court of appeals did not find that Mr. McReynolds waived his right to be present. Instead, it found that Mr. McReynolds did not have a right to be present for the court's statement of reasons for his sentence. It held that, "the sentencing decision,

[8] A person might also forfeit their right to be present. *Illinois v. Allen*, 397 U.S. 337, 343 (1970) (defendant can forfeit the right to be present through disruptive conduct but only so long as long as the court forewarns them and provides them the chance to reclaim the right).

which includes the imposition of sentence, and the pronouncement of the reasons for the sentencing decision are distinct events under the statute." (*McReynolds*, slip op., ¶60; App. 30-31). It reasoned:

> As the State notes, "sentencing" is not defined under § 973.017. Rather, WIS. STAT. RULE 809.30(1)(f) defines "sentencing" as "the imposition of a sentence, a fine, or probation in a criminal case." See also Sentencing, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The judicial determination of the penalty for a crime."). In accordance with those definitions, a "sentencing decision" under § 973.017(10m) is properly defined as "a decision as to whether to *impose* a bifurcated sentence … or place a person on probation and a decision as to the length of a bifurcated sentence," which includes the length of the initial incarceration and extended supervision, the amount of a fine, and the length of probation. Sec. 973.017(1) (emphasis added). Neither definition of sentencing includes a court's statement of the reasons for the imposition of a sentence.

(*Id*., ¶60; App. 30-31).

This Court should reject a distinction between the sentencing decision and the reasons for the sentencing decision. The reasons are intrinsic to the sentencing decision. Imposing a sentence means more than uttering numbers and conditions—it means the exercise of sentencing discretion. *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).

The sources relied upon by the court of appeals are not informative. It is not helpful to look to Wis. Stat. § 809.30(1)(f) for a definition of "sentencing." This subsection is a rule of appellate procedure; its purpose is to set a triggering deadline for the filing of a notice of intent to pursue postconviction relief. Its definition of "sentencing" also includes a "entry of an order under s.980.06." This Court has held that a Chapter 980 detention is not a sentence. *State ex rel. Thorson v. Schwarz*, 2004 WI 96, 274 Wis. 2d 1, 681 N.W.2d 914. Nor should the court rely on Black's Law Dictionary. A generic definition of the term "sentencing" does not inform on its meaning in all contexts.

Instead, the court should consider the meaning of "sentencing" within the framework of the right to be present, and the values underlying that right. As this Court explained in *State v. Soto*, 2012 WI 93, ¶23, 343 Wis. 2d 43, 817 N.W.2d 848. "[a] defendant's right to be present during sentencing is 'particularly important to the actual or perceived fairness of the criminal proceedings.'" It "is guided also by the belief that a courtroom is a setting epitomizing and guaranteeing "calmness and solemnity," . . . so that a defendant may recognize that he has had access to the

judicial process in a criminal proceeding. *Id.*, ¶40.[9] To ensure that sentencing is fair and receives solemnity it deserves, a defendant has a right to be in the presence of the court when the court states its reasons for its sentence.

2. The circuit court's use of the statutory procedure violated Mr. McReynolds' right to a public trial.

The circuit court's use of Wis. Stat. § 973.017(10m)b. also violated Mr. McReynolds' constitutional right to a public trial. 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). This right extends beyond the literal trial. *E.g., id.* at 212 (voir dire); *Waller v. Georgia*, 467 U.S. 39 (1984) (suppression hearing); *see also, United States v. Thompson*, 713 F.3d 388, 392 (8th Cir. 2013) (sentencing hearing). On review, this Court applies a two-step analysis. First, it determines whether the closure at issue implicated the right to a public trial. Then, it determines whether the closure

[9] *Soto* was a claim about the statutory right to be present. Perhaps because of his citation to *Soto*, the court of appeals stated that Mr. McReynolds "provided no legal support for his argument that his constitutional due process right to be present at sentencing extends to the court's explanation of its sentencing rationale." (*McReynolds*, slip op., ¶64; App. 32-33). The point Mr. McReynolds makes is that there is no meaningful difference between a sentencing decision and the reasons for the sentencing decision.

was justified under the circumstances. *Id.*, ¶46. A violation of a defendant's right to a public trial is not subject to the harmless error doctrine. *Id.*, ¶43.

In *State v. Ndina*, 2009 WI 21, ¶42, 315 Wis. 2d 653, 761 N.W.2d 612, this Court emphasized the importance of the public trial requirement to ensure the fairness of the criminal justice system. A "contemporaneous review in the forum of public opinion is an effective restraint on the possible abuse of judicial power,'" and the right is premised on "[t]he principle that justice cannot survive behind walls of silence. . .". *Id.* (citations omitted). 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. *Id.,* ¶¶41, 56 (citing *Waller*, 467 U.S. 39).

The purpose of the public trial right is to provide transparency. The court of appeals stated that the Wis. Stat. § 973.017(10m)b. "procedure allows for public and appellate review at least equivalent to that available through an oral pronouncement." (*McReynolds*, slip op., ¶63; App. 32.). Mr. McReynolds disagrees. If the public wanted to know why Mr. McReynolds received a ten-year prison sentence, they would need to surmount several logistical obstacles: they would need to know that they had a

right to access the court file; to know when the court filed its written memorandum (here it was three days after the entry of the judgment of conviction); to travel to the courthouse; and to locate the clerk's office to request the court file. These steps are more onerous than attending a sentencing hearing, the date and time for which are publicly available on the Wisconsin Circuit Court Access website.

The court of appeals found that Mr. McReynolds forfeited a public-trial claim because his attorney did not object at the sentencing hearing. Yet, a defendant is not required to make an on-the-spot objection to an erroneous exercise of sentencing discretion. *E.g. State v. Grady*, 2007 WI 81, ¶14 n4, 302 Wis. 2d 80, 734 N.W.2d 364 (rejecting State's argument that a contemporaneous objection to the court's failure to consider a sentencing guideline was required). Instead, the filing of a postconviction motion is a proper avenue to challenge the error. *Id. See also, State v. Counihan*, 2020 WI 12, ¶31, 390 Wis. 2d 172, 938 N.W.2d 530 (postconviction motion is proper means of challenging the court's reliance on inaccurate information at sentencing).

The court of appeals distinguished *Grady* saying that Mr. McReynolds did not "argue that the court erroneously exercised its discretion in imposing the sentences or explaining its rationale for them." (*McReynolds*, slip op., ¶50; App. 25). In fact, he *did* argue the court erred in the manner in which it explained its rationale. And the court of appeals does not explain why the purported distinction matters.

The court of appeals stated that, "[a] fundamental appellate precept is that we 'will not … blindside[circuit] courts with reversals based on theories which did not originate in their forum.'" (*Id.*, ¶51; App. 26) (quoting *Schonscheck v. Paccar, Inc.*, 2003 WI App 79, ¶11, 261 Wis. 2d 769, 661 N.W.2d 476). Mr. McReynolds *did* raise the issue in the circuit court "forum" in a postconviction motion.

The purpose of the forfeiture rule is to allow the court to avoid or correct error with minimal disruption of the process and maximum efficiency; to give the parties fair notice of the issue; to encourage attorneys to diligently prepare for trials; and to prevent sandbagging. *See Ndina*, 315 Wis. 2d 653, ¶¶29-30. Ultimately, once the sentencing court revealed it was using the statutory procedure, it was too late to avoid disruption of the process. The court was apparently not prepared to give an oral sentencing. The remedy for an on-the-spot objection would have been a new sentencing hearing, which is the same remedy that Mr. McReynolds asked for in his postconviction motion. Furthermore, applying the forfeiture rule here, where it was sua sponte, would not encourage an attorney to be better prepared.

Forfeiture is a rule of judicial administration. It is meant to promote the fair, efficient, and orderly administration of justice. *See Coffee*, 389 Wis. 2d, ¶19. In this case, it would be more efficient and would further the orderly administration of justice to consider the constitutionality of Wis. Stat.

§ 973.017(10m)b. on all grounds instead of holding the door open to a future public-trial claim.

II. This Court should grant review to resolve tension in the caselaw, and clarify whether there is an exception to the *Haseltine* vouching rule for police officers testifying about their investigations.

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 *Haseltine* rule extends to vouching for out-of-court statements. *Id.*

The court of appeals concluded that there was no vouching violation in this case because the investigator's statements were "not offered to bolster the informant's credibility; instead, they were offered to explain the course of events during the interrogation." (*McReynolds*, slip op., ¶32; App. 19). His "opinions about the truthfulness of the informant's statements were relevant to explain both the reason law enforcement relied upon the informant's information—given their inability to observe the exchanges—and why they chose not to pursue any further investigation." (*Id.*, ¶33; App. 19).

The parties and lower courts discussed three court of appeals cases concerning law enforcement officers testifying about their belief in the truthfulness of witness statements: *Smith*, *Snider*, and *Patterson*. These cases are in tension, if not inconsistent. And the court of appeals did not explain why it relied on *Smith* and *Snider* and disregarded *Patterson*.

In *Smith*, 170 Wis. 2d 701, the defendant was arrested and charged with arson and reckless endangerment. A critical witness against him was an accomplice, who was granted use immunity in return for his trial testimony. *Id.* at 705. A detective testified at trial about his interrogation of the accomplice. At first, he denied involvement, but he later changed his story to what the detective "felt was the truth." *Id.* at 706. The court of appeals held that the testimony "was not an attempt to bolster [the accomplice's] credibility, but was simply an explanation of the course of events during the interrogation." *Id.* at 718.

In *Snider*, 266 Wis. 2d 830, the defendant was charged with child sexual assault. Both the victim and defendant gave statements. At trial, and in response to defense counsel's questioning, the investigating detective testified that he believed the victim's statement and did not believe the defendant's version. *Id.*, ¶25. The court of appeals found that the *Haseltine* rule was not violated. *Id.*, ¶27. The court drew a comparison to *Smith* and stated: "[h]ere, the detective similarly testified to what he believed at the time he was conducting the investigation, not whether Snider or the victim was telling the truth at trial." *Id.*, ¶27.

In *Patterson*, 321 Wis. 2d 752, the defendant was charged with various crimes after delivering Oxycodone. At trial, two witnesses' recollections were inconsistent. The prosecutor asked an 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." The court of appeals held that, "[i]t does not appear that this exchange was offered for any purpose other than bolstering the credibility of the other witness." *Id*., ¶36. The *Patterson* court "assume[d] that the exchange ran afoul of *Haseltine*." *Id*. The court distinguished *Smith* and *Snider* based on the fact that the testimony in those cases was about what the officer believed at the time of the investigation, as opposed to what they believed at the time of trial. *Id.*

Mr. McReynolds' case is like *Patterson*. The prosecutor asked, "so do you *believe* this to be a truthful and accurate statement," and Investigator Ranallo answered "Yes, I do." R.296:42 (emphasis added). This was nearly identical to the erroneous statement in *Patterson*. Investigator Ranallo's other statements were arguably more focused on external indicators of untruthfulness. However, they served to bolster the investigator's first statement, which was clear vouching. While the vouching in *Patterson* was nonprejudicial because it was a single isolated instance (321 Wis. 2d 752, ¶37), here it was repetitive.

The court of appeals acknowledged Mr. McReynolds' reliance on *Patterson*, but did not distinguish the case. (*McReynolds*, slip op., ¶28; App. 17). The apparent difference between *Smith* and *Snider* on the one hand, and *Patterson* on the other appears to be the use of present versus past tense. It may be logical to apply a different rule when a witness testifies about past versus current beliefs. However, this Court might determine that there is no meaningful difference. The Court might alternatively determine that there is no exception to the vouching rule for law enforcement testifying about their opinion of a witness's truthfulness—or that if there is one, that it should be narrowly construed.

III. If the Court grants review it should also consider whether trial counsel rendered ineffective assistance of counsel by not objecting to improper vouching testimony and prohibited character evidence.

Ineffective assistance of counsel is a question of constitutional fact. *State v. Dillard*, 2014 WI 123, ¶86, 358 Wis. 2d 543, 859 N.W.2d 44. The circuit court's findings of facts are upheld unless clearly erroneous. Whether those facts meet the ineffective assistance of counsel standard is reviewed de novo. *Id.* To establish ineffective assistance, a defendant must show that trial counsel's performance was deficient, and that the deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

As discussed *supra*, Argument II, Investigator Ranallo vouched for the informant's credibility. This was erroneous and trial counsel should have objected and taken corrective action.

In addition, trial counsel performed deficiently by not objecting when the prosecutor elicited testimony that Mr. McReynolds was a Vice Lord affiliate. The prosecutor elicited testimony that a person named KG, who came up at trial in a tangential manner, was Mr. McReynolds' "Vice Lord friend" and "Vice Lord brother." R.295:30, R.297:18. There was no foundation laid for these accusations. *See* Wis. Stat. § 901.04(2). Furthermore, this was character evidence, which 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. (R.305:19-20; App. 56-57). The court of appeals assumed without deciding that trial counsel was deficient for not objecting. (*McReynolds*, slip op., ¶41; App. 22).

This Court should conclude that Mr. McReynolds was prejudiced. The Vice Lord gang is known 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. Prejudice is even clearer when considered along with the vouching. *See State v. Thiel*, 2003 WI 111, ¶63, 264 Wis. 2d 571, 665 N.W.2d 305 (all instances of deficient performance are considered in the aggregate to determine prejudice.). The court of appeals

acknowledged "that this case was largely based on witness credibility;" however, "the jury heard consistent testimony from the confidential informant, Ranallo, and other officers, and that testimony was also consistent with the video and audio evidence presented." (*McReynolds*, slip op., ¶42; App. 22). Mr. McReynolds acknowledges that there was other circumstantial evidence suggesting criminal activity, but the State had no viable case if the informant was not believed. 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. (R.295:19-20). The bags were very small and could easily be hidden on a person. (R.295:25). Police did not recover the pre-recorded buy money. (R.295:26). The informant had bad will toward Mr. McReynolds. His motivation for setting up the second meeting was that he was "mad" at him. (R.297:13). He was paid $100 each time, which was a "real incentive." (R.295:28; R.298:41).

Counsel's deficient performance undermines confidence in the outcome of Mr. McReynolds' trial. This Court should reverse and remand for a *Machner* hearing, so that he may complete his claim of ineffective assistance of counsel.

CONCLUSION

For the reasons stated above, Mr. McReynolds respectfully asks the Court to grant his petition for review.

Dated this 11th day of May, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 6,338 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, including the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 11th day of May, 2022.

Signed:

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COLLEEN MARION
Assistant State Public Defender