STATE OF WISCONSIN

IN SUPREME COURT

No. 2021AP943-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

HAJJI Y. MCREYNOLDS,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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The State opposes Hajji Y. McReynolds' petition for review. In an opinion recommended for publication, the court of appeals applied the correct principles of law and standards of review when it affirmed the circuit court's decision and order denying McReynolds' postconviction motion. *State v. McReynolds*, No. 2021AP943-CR, slip op. (Wis. Ct. App. April 12, 2022). (Pet-App. 3–36.) McReynolds' petition does not present any special or compelling reason for this Court to disturb the court of appeals' decision in this case. The court of appeals dutifully applied both well-settled precedent and well-settled principles of statutory interpretation to McReynolds' various arguments. McReynolds merely disagrees with the court of appeals, but his disagreement alone does not warrant this Court's review.

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

This Court should deny McReynolds' petition for review. McReynolds was convicted of two counts of delivery of a controlled substance after a jury trial. He filed a postconviction motion[1] seeking a new trial and, in the alternative, resentencing. McReynolds alleged that he was entitled to a new trial because he received ineffective assistance of counsel when his trial attorney (1) did not object to alleged vouching testimony by Investigator Ranallo and (2) did not object to alleged character evidence by way of the confidential informant's reference to McReynolds being in the Vice Lords gang. McReynolds alleged he was entitled to resentencing because the circuit court violated his

[1] Should this Court accept review of this case, the State maintains that McReynolds' current postconviction motion and appeal is procedurally barred by both *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and *State v. Tillman*, 2005 WI App 71, 281 Wis. 2d 157, 696 N.W.2d 574.

constitutional right to be present at sentencing and his right to a public trial. The foundation for McReynolds' constitutional arguments was the circuit court's invocation of Wis. Stat. § 973.017(10m)(b), which provides: "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." After a non-testimonial hearing, the circuit court denied McReynolds' motion in its entirety.

A. The court of appeals properly interpreted Wis. Stat. § 973.017(10m)(b).

McReynolds' first argument falls flat for the simple reason that Wis. Stat. § 973.017(10m)(b) is clear, unambiguous, and had no effect on his constitutional rights to be present at sentencing and to a public trial.[2] *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶¶ 45–46, 271 Wis. 2d 633, 681 N.W.2d 110 ("[S]tatutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'"). McReynolds' entire argument is based on the flawed premise that a circuit court's invocation of paragraph (b) somehow does away with a circuit court's exercise of discretion at sentencing. But the court of appeals rejected that argument, and the plain language of paragraph (b) confirms the argument is wrong.

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[2] The court of appeals correctly decided that McReynolds' forfeited any challenge to his right to a public trial under *State v. Pinno*, 2014 WI 74, ¶ 61, 356 Wis. 2d 106, 850 N.W.2d 207 (explicitly applying forfeiture to the right to a public trial). However, even if this Court were to overlook McReynolds' obvious forfeiture on this issue, the court of appeals' overall reasoning and interpretation of the statute applies to the public trial issue with equal force.

At no point has the State disagreed with McReynolds' basic premise that "[t]he reasons for a sentence are intrinsic to the sentencing decision." (Pet. 7.) But McReynolds' argument goes too far and ignores that the statute "in no way dispenses with the requirement that the circuit court explain its reasons for its sentencing decision on the record."[3] *McReynolds*, slip op., ¶ 63; *see also* Wis. Stat. § 973.017(10m)(b) (". . . the court *shall* state the reasons for its sentencing decision in writing and include the written statement in the record."). When correctly interpreted, the statute has no effect on any of the rights afforded to defendants at sentencing nor does it meaningfully "close" the courtroom to be a violation of the right to a public trial. The statute is nothing more than a limited procedural mechanism for a circuit court to exercise its ordinary sentencing discretion in a manner the court feels would be more beneficial to an individual defendant. *McReynolds*, slip op., ¶ 63.

Contrary to McReynolds' position, which undermines the context, scheme, and plain language of the statute, the court of appeals applied well-settled principles of statutory interpretation to Wis. Stat. § 973.017(10m)(b). The court aptly assessed the plain meaning of the statute, the context of the statutory scheme and the definition of "sentencing decision" to conclude that "a circuit court's 'sentencing decision' and the pronouncement of 'the reasons for its sentencing decision' are

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[3] Under *State v. Gallion* 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, it is certainly possible that a circuit court *could* erroneously exercise its discretion when it places its sentencing reasons in writing under Wis. Stat. § 973.017(10m)(b) in the same way a circuit court could erroneously exercise its discretion when it provides the reasons for its sentencing decision in open court. However, McReynolds has not advanced any argument that that occurred here.

distinct events." *McReynolds*, slip op., ¶¶ 55–60.[4] And, while the interpretation of this statute is a matter of first impression, the plain language confirms that the court of appeals' interpretation is the only one that gives full effect to the words chosen by the legislature. *See Kalal*, 271 Wis. 2d 633, ¶ 46 ("Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.")

McReynolds' proffered interpretation, on the other hand, would read words into the statute that do not exist and would otherwise render paragraph (b) meaningless—both of which are contrary to this Court's long-standing principles of interpretation. *See Jefferson v. Dane Cnty.*, 2020 WI 90, ¶ 25, 394 Wis. 2d 602, 951 N.W.2d 556 (this Court "will not add words into a statute that the legislature did not see fit to employ"); *see also Salachna v. Edgebrook Radiology*, 2021 WI App 76, ¶ 19, 399 Wis. 2d 759, 966 N.W. 2d 923 ("[I]t is well-established that statutory interpretations that render provisions meaningless should be avoided.").

As a final point, while McReynolds argues that his petition presents a question of statewide impact, (Pet. 7), it has become clear throughout this litigation that Wis. Stat. § 973.017(10m)(b) is rarely used. The circuit court acknowledged that it was the first time it had ever invoked the statute, and the court of appeals noted that its use "is not a common practice." *McReynolds*, slip op., ¶¶ 11, 70 n.22. The court of appeals was careful to clarify that its decision "should not be read as endorsing the use of the procedure, especially

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[4] McReynolds' admonition of the court of appeals' use of other statutory and dictionary definitions to reach its result does not merit a response. This Court and the court of appeals have long looked to dictionary definitions to inform plain meaning statutory analyses. *See, e.g., State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶¶ 53–54, 271 Wis. 2d 633, 681 N.W.2d 110.

if a defendant affirmatively balks at the use of the procedure." *Id.* ¶ 70 n.22. This is a limited, narrow, and rarely used statute; accordingly, its "statewide impact" is of limited effect and does not warrant this Court's review. Wis. Stat. § (Rule) 809.62(1r)(c)2.

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When correctly interpreted, it is clear that Wis. Stat. § 973.017(10m)(b) had no effect on McReynolds' constitutional rights. McReynolds received the rights afforded to defendants at sentencing and received a public trial, and the circuit court's invocation of section 973.017(10m)(b) did not change that. In turn, there is no question of state or federal constitutional law that this Court needs to resolve. Wis. Stat. § (Rule) 809.62(1r)(a). Moreover, the court of appeals correctly rejected McReynolds' atextual interpretation of the statute. Because the court of appeals correctly interpreted the statute, there is no need for this Court to further "develop [or] clarify . . . the law." Wis. Stat. § (Rule) 809.62(1r)(c). Therefore, McReynolds' first issue falls short of meeting the criteria for this Court's review.

B. There is no conflict between *Snider*, *Smith*, and *Patterson* that would warrant this Court's review.

McReynolds next argues that this Court should accept review in order 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." (Pet. 8.) Contrary to McReynolds' argument, no such "tension" exists, and there is no need for this Court to clarify or harmonize the law.

State v. Haseltine precludes witnesses from "giv[ing] an opinion that another mentally and physically competent witness is telling the truth." 120 Wis. 2d 92, 96, 352 N.W.2d 673 (1984). *Haseltine*'s rule sought to prevent interference with the jury's role as "the lie detector in the courtroom." *Id.* (citation omitted). However, *State v. Smith*, 170 Wis. 2d 701, 718–19, 490 N.W.2d 40 (Ct. App. 1992), and *State v. Snider*, 2003 WI App 172, ¶¶ 25–27, 266 Wis. 2d 830, 668 N.W.2d 784, both stand for the proposition that testimony does not run afoul of the *Haseltine* rule if the purpose and effect of the testimony is to describe an officer's beliefs during an investigation and not to bolster another witnesses' credibility. *McReynolds*, slip op. ¶ 32.

In *State v. Patterson*, the court of appeals *assumed* that there was a *Haseltine* violation when the prosecutor "asked a police investigator: 'Do you believe [a witness the investigator interviewed] was being truthful when she gave [certain] information to you . . . ?" 2009 WI App 161, ¶ 36, 321 Wis. 2d 752, 776 N.W.2d 602 (alterations in original). McReynolds contends that his "case is like *Patterson*," and that *Patterson* conflicts with *Smith* and *Snider* such that this Court's review is necessary. (Pet. 27–28.) McReynolds' argument fails (1) because *Patterson* assumed there was a *Haseltine* violation, it did not hold as such and (2) because whether testimony violates *Haseltine* is fact-dependent based on the purpose and effect of the testimony in any individual case.

The *Patterson* "holding" that McReynolds attaches to is not a holding at all. Rather, while reviewing a denial of a mistrial, the court of appeals *assumed* that there was a *Haseltine* violation and held that that single assumed violation did not infect the trial with unfairness. *Patterson*, 321 Wis. 2d 752, ¶¶ 36–37. The court of appeals did not definitively hold that a *Haseltine* violation had occurred. This makes sense because "even if a *Haseltine* violation occurred, it is only reversible error where the testimony 'creates too

great a possibility that the jury abdicated its fact-finding role' in relation to the witness or failed independently to find the defendant's guilt." *McReynolds*, slip op., ¶ 24 (citation omitted).

So, like a court assuming without deciding that there was deficient performance in order to reject an ineffective assistance claim on the prejudice prong, *see id.* ¶ 41 (assuming without deciding that McReynolds' counsel performed deficiently for failing to object to the character evidence but rejecting the ineffective assistance claim on prejudice), the court of appeals in *Patterson* assumed a *Haseltine* violation to reject the argument on different grounds. *Patterson*, 321 Wis. 2d 752 ¶ 36; *see also State v. Kramer*, 2009 WI 14, ¶¶ 3, 10, 315 Wis. 2d 414, 759 N.W.2d 598 (not resolving the first issue and assuming without deciding there was a seizure not justified by reasonable suspicion or probable cause but deciding the case on the other two prongs of the community caretaker test). Because the court of appeals did not ultimately resolve the issue of whether a *Haseltine* violation occurred, but rather assumed one to move to the ultimate inquiry of unfairness, there is no rule from *Patterson* that could conflict with *Smith* or *Snider*. In turn, McReynolds' reliance on *Patterson* is misplaced, and there is no need for this Court to clarify or harmonize the law. Rather, as discussed below, the law is clear, and the cases can live in harmony with each other.

As the court of appeals correctly noted in this case, "[t]o determine whether a witness's testimony violates *Haseltine*, we examine the testimony's purpose and effect." *McReynolds*, slip op., ¶ 24. This is a fact-dependent inquiry that will necessarily turn on the context of the testimony in an individual case. To that end, the court of appeals held that the facts of this case were more like *Smith* and *Snider* where the purpose and effect of the testimony was to describe the development and continuation of the investigation and less

like *Patterson* where the court of appeals reasoned that "[i]t does not appear that this exchange was offered for any purpose other than bolstering the credibility of the other witness." *Patterson*, 321 Wis. 2d 752, ¶ 36. The different facts of the different cases simply counseled different results—that is bound to happen, and that occurrence does not create tension or a conflict that would warrant this Court's review.

Finally, even if this Court were to accept McReynolds' argument, he would not be entitled to relief. McReynolds' *Haseltine* argument arises in the context of ineffective assistance of counsel. Under that rubric, counsel cannot perform deficiently for failing to raise an argument in an area where the law is unsettled. *State v. Breitzman*, 2017 WI 100, ¶ 49, 378 Wis. 2d 431, 904 N.W.2d 93. Accepting McReynolds' argument that there is a "tension" or a "conflict" between *Haseltine*'s progeny means acknowledging that the law is unsettled. *See id.* ¶ 56 ("This body of case law does not promulgate a clear standard . . . ."). Because the law is unsettled under McReynolds' framework, McReynolds' trial counsel could not have performed deficiently, and this Court would simply be affirming the court of appeals on different grounds. *See id.* (deciding the case on the narrower issue of whether the law is settled). Because no relief is due to McReynolds even under his own framework, this case does not present an issue for this Court's review.

C. McReynolds' other claim of ineffective assistance of counsel does not warrant this Court's review.

Finally, McReynolds asks this Court to determine that he is entitled to a *Machner*[5] hearing on his ineffective assistance claims. The premise for his ineffective assistance claim (not related to the alleged vouching evidence) is that counsel performed deficiently for failing to object to alleged character evidence. On that issue, the court of appeals correctly applied *Strickland*[6] to hold that McReynolds suffered no prejudice based on counsel's alleged deficiency. *McReynolds*, slip op., ¶¶40–43. The court first noted that McReynolds' prejudice argument was undeveloped, "spanning only one short paragraph." *Id.* ¶ 42. The court, looking at the totality of the evidence at trial, "disagree[d with McReynolds] that the State's case could be categorized as weak." *Id.* As the court of appeals correctly noted, "[t]he 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." *Id.* Accordingly, there was not a reasonable probability of a different result but-for counsel's deficient performance, and McReynolds' ineffective assistance claim failed. *Id.* ¶ 43.[7]

McReynolds does not identify any misapplication of ineffective assistance case law by the court of appeals. Rather, he relies on the same "weaknesses" in the State's case that the court of appeals already rejected, and he simply disagrees

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

[6] *Strickland v. Washington*, 466 U.S. 688 (1984).

[7] Even if this Court were to assume that McReynolds' counsel performed deficiently based on the alleged vouching evidence, that claim of ineffective assistance would fail on prejudice for these same reasons.

with the court of appeals assessment of prejudice. (Pet. 29–30.)

His petition on this issue seeks nothing more than error correction. But error correcting is not a special or compelling reason for this Court to accept review of this case. *State v. Minued*, 141 Wis. 2d 325, 328, 415 N.W.2d 515 (1987) (per curiam) ("[i]t is not [the supreme court's] institutional role to perform this error correcting function"); *State ex rel. Swan v. Elections Bd.*, 133 Wis. 2d 87, 93, 394 N.W.2d 732 (1986) (the supreme court is not an error-correcting court but a court "intended to make final determinations affecting state law, to supervise the development of the common law, and to assure uniformity of precedent throughout the state."). This Court "is primarily concerned with the institutional functions of our judicial system, while the court of appeals is charged primarily with error correcting in the individual case[s]." *Id.* at 93–94.

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In sum, McReynolds' petition fails to demonstrate a special or compelling reason for this Court to grant review. McReynolds' constitutional argument relies on a misunderstanding of the plain language of Wis. Stat. § 973.017(10m)(b) and would render the statute meaningless. His *Haseltine* argument relies on a non-existent conflict between three cases that can all reasonably live in harmony under *Haseltine*. Finally, his ineffective assistance claims seek only error correction. Because the court of appeals correctly applied the applicable precedent to McReynolds' various arguments and properly applied principles of statutory interpretation to its interpretation of section 973.017(10m)(b), this Court should deny McReynolds' petition for review.

CONCLUSION

This Court should deny McReynolds' petition for review.

Dated this 23rd day of May 2022.

Respectfully submitted,

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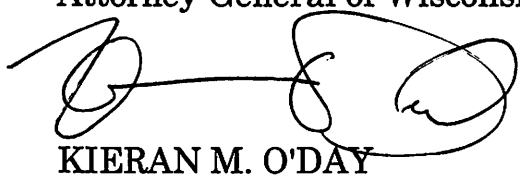

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FORM AND LENGTH CERTIFICATION

I hereby certify that this petition or response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition or response produced with a proportional serif font. The length of this petition or response is 2974 words.

Dated this 23rd day of May 2022.

KIERAN M. O'DAY
Assistant Attorney General

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

I hereby certify that:

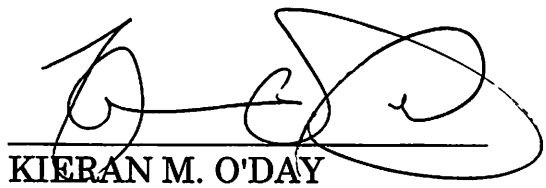
I have submitted an electronic copy of this petition or response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.19(12) and 809.62(4)(b) (2019-20).

I further certify that:

This electronic petition or response is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 23rd day of May 2022.



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