STATE OF WISCONSIN

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

DISTRICT I

Case No. 2021AP1339-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TRACY LAVER HAILES,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JANET C. PROTASIEWICZ AND HONORABLE MICHAEL J. HANRAHAN, PRESIDING

# BRIEF OF PLAINTIFF-RESPONDENT

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## INTRODUCTION

Defendant-Appellant Tracy Laver Hailes was on probation for drug dealing when he promptly started dealing again. Following the execution of search warrants, officers found drug-crime evidence at two of Hailes's apartments. Hailes gave a thorough confession. The State charged him with seven drug crimes as a second and subsequent offense and as a repeater, and two gun crimes as a repeater.

After Hailes lost his suppression motion, he told the court that he'd love to plead guilty. He did to five charges, three of which carried both the repeater enhancer and the second and subsequent enhancer. He received a global sentence of 14 years' initial confinement and 9 years' extended supervision.

Hailes filed a postconviction motion seeking plea withdrawal, sentence modification, or resentencing. The basis for all these requests was his belief that both enhancers could not apply to him. The circuit court disagreed and denied relief. Hailes filed another postconviction motion for plea withdrawal making the same pitch, to no avail.

On appeal, Hailes argues that the circuit court erred in denying his motion to suppress. He also revives his arguments for plea withdrawal and sentencing relief.

Hailes is entitled to no relief. The search-warrant affidavits state probable cause to believe that drug-crime evidence would be found in Hailes's apartments. The repeater enhancer and the second and subsequent enhancer both properly applied to him. And even if they didn't, Hailes's claims for plea withdrawal, sentence modification, and resentencing still fail. He has not shown a manifest injustice or a "new factor." Nor has Hailes demonstrated that the sentencing court actually relied on inaccurate information, though he forfeited that claim anyway.

This Court should affirm.

## ISSUES PRESENTED

1. Did the circuit court err in denying Hailes's motion to suppress?

This Court should answer, "no."

2. Is Hailes entitled to plea withdrawal or sentencing relief?

This Court should answer, "no."

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

## STATEMENT OF THE CASE

*The State charged Hailes with nine offenses*

In August 2015, Milwaukee police officers investigated Hailes for drug dealing. (R. 61:5.) They executed three search warrants: one at 29th Street, and two at an apartment complex on 30th Street (apartments 102 and 208). (R. 61:5.) Officers found guns, drugs, and drug packaging materials. (R. 61:5–9.) When questioned, Hailes admitted to possessing the contraband, believing that he was "fucked" or "cooked." (R. 61:9–10.) The State charged him with seven drug crimes as a second and subsequent offense and as a repeater, as well as two gun charges as a repeater. (R. 61:1–9.)

*Hailes moved to suppress evidence from the searches*

Hailes moved to suppress the evidence derived from the searches of the 30th Street apartments. (R. 9:1.) He argued that the search-warrant affidavits did not state probable cause to believe that evidence of drug dealing would be found at the apartments. (R. 9:3.) Specifically, Hailes maintained,

"the arguable existence of probable cause to search the . . . 29th St. address should not give probable cause to search the . . . 30th St. apartments simply because the target of the investigation happens to be present or even living in that different location." (R. 9:3.) Hailes submitted that there were no facts tying his drug-dealing activities at 29th Street to the apartments on 30th Street. (R. 9:3; 41:4–6.)

The search-warrant affidavits for the apartments sought objects related to the possession, distribution, or delivery of drugs. (R. 106; 107.) They set forth the following allegations of fact based on the averments of Officer Joseph Esqueda. (R. 106:4; 107:4.)

In the summer of 2015, Hailes was on probation for drug dealing in Milwaukee County case number 2013CF5497.[1] (R. 106:8.) He had prior convictions for maintaining a drug trafficking place (Milwaukee County case number 2011CF3834) and possessing marijuana as a second offense (Milwaukee County case number 2012CF6047). (R. 106:10.) Hailes had been arrested for drug-related offenses in Milwaukee 11 times since 2004. (R. 106:10–11.) At least one of those arrests was at Hailes's residence, where he had nearly half a kilogram of cocaine base and four firearms. (R. 106:13.)

Due to his probation, Hailes was subject to "electronic monitoring with a curfew from 7PM until 8AM." (R. 106:8.) In July 2015, Hailes's probation agent believed that he was living at apartment 307 on 30th Street. (R. 106:8.) But when the agent made an unscheduled home visit on August 3, "he observed several electric extension cords and phone cords running from underneath" apartment 307's door, down the hallway, and "underneath the front door" of apartment 208.

[1] The search-warrant affidavits are nearly identical so the State will cite to one unless otherwise noted.

(R. 106:9.) This was indicative of Hailes cheating the electronic monitoring system. (R. 106:9–10.) Indeed, further investigation revealed that Hailes was the "WE Energies" "subscriber for Apartment # 208 since July 7, 2015." (R. 106:9.)

A few days later, on August 7, Hailes told his probation agent that he would be moving from apartment 307 to another apartment in the same complex—but not to apartment 208. (R. 106:8–9.) Rather, Hailes said that he was moving to apartment 102, and the agent visited the apartment and approved the move. (R. 106:8.) Yet, around the same time, a reliable confidential informant (CI) witnessed Hailes moving new furniture into apartment 208. (R. 106:6, 9.)

The probation agent told Officer Esqueda that between July and August 2015, he visited the apartment complex approximately six times. (R. 106:10.) Some were scheduled visits, and some weren't. (R. 106:10.) Each time, as the agent approached the building, someone would greet him and retrieve the apartment manager, who lived with Hailes. (R. 106:10.) The manager would then let the agent into the building through the locked lobby. (R. 106:10.)

The probation agent also reported that he conducted surveillance on the apartment complex on two separation occasions. (R. 106:10.) Each time, the agent "observed what appeared to be 'lookouts' for the apartment building." (R. 106:10.) The suspected lookouts "walked the perimeter of the apartment complex and up & down N. 30th Street, looking back and forth." (R. 106:10.) The agent had "seen these same individuals" either "walk into the apartment complex or sit near the front door to the complex." (R. 106:10.)

Hailes was not just hanging around the apartment complex in the summer of 2015. Per the CI, he was dealing cocaine, heroin, and marijuana out of the 29th Street residence. (R. 106:6–8.) The CI reported that Hailes dealt

drugs during the day and then left for an apartment on 30th Street at night "during his monitoring hours." (R. 106:6.) The CI also observed Hailes in possession of guns at the 29th Street residence. (R. 106:8.) And on over fifty occasions, the CI saw Hailes armed with a gun while driving his black Infiniti M35 sedan. (R. 106:6.) During the subject investigation, police observed Hailes leave the 29th Street location in his sedan, which was later parked in front of the apartment complex at 30th Street. (R. 106:7.)

Beyond these specific allegations, the search-warrant affidavits contain general statements based on Officer Esqueda's ten years of training and experience. (R. 106:4–6, 9.) From his training and experience in the investigation of drug trafficking, he understands that drug traffickers "are not easily deterred by law enforcement actions, and commonly continue criminal activities for long periods of time." (R. 106:13.) Drug traffickers "commonly have in their possession, either in their residences and/or in other locations where they exercise control and domination . . . firearms . . . and other weapons." (R. 106:4.) Further, drug traffickers commonly keep documents regarding the sale and distribution of controlled substances where they "have access to them," including in their "residences" and other areas where they "maintain or exercise control." (R. 106:5.) The same goes for evidence of drug proceeds. (R. 106:5.)

Per Officer Esqueda, drug traffickers commonly use "look-outs . . . to provide an early detection system to the presence of law enforcement." (R. 106:12.) Moreover, probationers who continue to engage in illegal conduct will maintain "a second . . . or even third residence . . . to avoid detection by their probation agents and from law enforcement." (R. 106:9.)

Based on the allegations of fact in the search-warrant affidavits, the circuit court found that they stated probable cause to believe that evidence of a crime would be found at the

apartments in question. (R. 41:15–18.) It therefore denied Hailes's motion to suppress.

*Hailes took a plea deal*

At a status conference a few months after his suppression motion failed, Hailes told the circuit court that he was rejecting the State's current plea offer. (R. 38:3–4.) That offer was to plead guilty to counts 1, 2, 3, 6, and 8, with the remaining charges dismissed and read in. (R. 38:3.) The State would recommend a total of 18 years' initial confinement and 10 years' extended supervision. (R. 38:3–4, 7.) The State responded that the offer was "off the table." (R. 38:4.) In discussing the upcoming trial, the prosecutor noted that she intended to show the jury Hailes's "very complete" statement to police. (R. 38:5.) Hailes then indicated that he wanted to continue plea negotiations. (R. 38:4–8.) He told the court that he would "appreciate" resolving the matter before trial, and that he'd "love to take . . . a plea offer and plead guilty." (R. 38:8.) He explained, "I'm just not willing to accept the offer that the State is offering at this point." (R. 38:8.) Hailes then asked if he'd be "forced to go to trial" if he didn't accept the State's offer. (R. 38:8.)

Hailes ultimately pled guilty to counts 1, 2, 3, 6, and 8, with the remaining charges dismissed and read in. (R. 39:3, 12–13.) Counts 2, 3, and 8 carried both the habitual criminal enhancer and the second and subsequent offense enhancer. (R. 30.) Both parties were free to argue at sentencing. (R. 39:5.) At the plea hearing, Hailes told the court that the facts in the complaint were true, and he explained how he broke the law regarding each charge. (R. 39:16–20.) The court accepted Hailes's guilty pleas. (R. 39:20.)

The circuit court sentenced Hailes to a total of 14 years' initial confinement and 9 years' extended supervision.[2] (R. 40:78; 56:3; 57:3.)

*Hailes sought plea withdrawal, sentence modification, or resentencing*

Hailes filed a postconviction motion seeking plea withdrawal, arguing that his plea "was not knowingly, intelligently, and voluntarily entered because it was based on misinformation." (R. 56:7.) He argued that "at the time of his plea, he did *not* know that he could *only* have been charged and convicted of the repeater enhancer *or* with the second and subsequent enhancer on seven of the nine counts." (R. 56:9.) "Thus," Hailes reasoned, "he was prevented from making a reasoned decision whether to proceed to trial or plead." (R. 56:9.)

Hailes further argued that his trial counsel was ineffective for (1) failing to move to dismiss one of the two enhancers on seven of the nine charges, and (2) telling Hailes that he could be convicted of counts carrying both enhancers. (R. 56:11.) The prejudice, per Hailes, was that "he would not have pled to the counts with both enhancers" "had he known that there was a challenge to both enhancers." (R. 56:12.) Hailes sought plea withdrawal on this basis, too. (R. 56:12.)

Alternatively, Hailes sought "new factor" sentence modification or resentencing based on the purported misinformation about the sentencing enhancers. (R. 56:12–15.) If his resentencing claim based on inaccurate information was forfeited, Hailes claimed ineffective assistance of counsel. (R. 56:15.)

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[2] Hailes incorrectly states his total sentence as 16 years' initial confinement and 11 years' extended supervision. (Hailes's Br. 16.)

The circuit court denied Hailes's motion in a written decision and order, disagreeing that he was improperly charged with and convicted of crimes with both enhancers. (R. 57.)

*Hailes filed another postconviction motion*

Hailes later filed another postconviction motion seeking plea withdrawal based on the application of both enhancers. (R. 80.) This time, he argued that he pled to "a legal impossibility." (R. 80:2.) Hailes further maintained that his plea was "illusory." (R. 80:3.)

Again, the circuit court denied Hailes relief without an evidentiary hearing. (R. 95.)

Hailes appeals.

## ARGUMENT

### I. The circuit court correctly denied Hailes's motion to suppress.

#### A. Standard of review.

This Court reviews "a warrant-issuing magistrate's determination of whether the affidavit in support of the order was sufficient to show probable cause with 'great deference.'" *State v. Tate*, 2014 WI 89, ¶ 14, 357 Wis. 2d 172, 849 N.W.2d 798 (citation omitted).

#### B. A reviewing court upholds a decision to issue a warrant unless the facts in the search-warrant affidavit are clearly insufficient to support a finding of probable cause.

The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect people from unreasonable searches and establish the requirements for the issuance of a search warrant. *Tate*, 357 Wis. 2d 172, ¶ 27.

One requirement is that "the person seeking a warrant demonstrate upon oath or affirmation sufficient facts to support probable cause to believe that 'the evidence sought will aid in a particular apprehension or conviction for a particular offense.'" *Tate*, 357 Wis. 2d 172, ¶ 30 (citation omitted). Further, there must be "probable cause to believe that evidence is located in a particular place." *State v. Ward*, 2000 WI 3, ¶ 26, 231 Wis. 2d 723, 604 N.W.2d 517.

"Probable cause is 'more than a possibility, but not a probability, that the conclusion is more likely than not.'" *State v. Sloan*, 2007 WI App 146, ¶ 23, 303 Wis. 2d 438, 736 N.W.2d 189 (citation omitted). Courts determine whether probable cause exists based on the totality of the circumstances. *Ward*, 231 Wis. 2d 723, ¶ 26. "[A] probable cause determination must be based upon what a reasonable magistrate can infer from the information presented by the police." *Id.* The key question is "whether objectively viewed, the record before the warrant-issuing judge provided 'sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that they will be found in the place to be searched.'" *Id.* ¶ 27 (citation omitted).

"Probable cause [for a search warrant] is not a technical, legalistic concept[,] but a flexible, common-sense measure of the plausibility of particular conclusions about human behavior." *State v. Petrone*, 161 Wis. 2d 530, 547–48, 468 N.W.2d 676 (1991), *overruled on other grounds*, *State v. Greve*, 2004 WI 69, 272 Wis. 2d 444, 681 N.W.2d 479. And a "reasonable inference support[ing] the probable cause determination" suffices—it does not matter that a competing inference of lawful conduct exists. *State v. Dunn*, 121 Wis. 2d 389, 398, 359 N.W.2d 151 (1984). "The test is not whether the inference drawn is the only reasonable inference. The test is whether the inference drawn is a reasonable one." *State v. Jones*, 2002 WI App 196, ¶ 10, 257 Wis. 2d 319, 651 N.W.2d 305 (citation omitted).

Moreover, probable cause is not an unvarying standard but changes depending on the particular stage of the proceedings and the nature of the interest at stake. The further along in the proceedings, the higher the standard for probable cause. *Cty. of Jefferson v. Renz*, 231 Wis. 2d 293, 308–09, 603 N.W.2d 541 (1999). For example, the quantum of evidence necessary to support a determination of probable cause for a search warrant is less than that required for bindover following a preliminary examination. *Sloan*, 303 Wis. 2d 438, ¶ 23.

The person challenging the warrant bears the burden of demonstrating that the evidence before the warrant-issuing judge was insufficient. *State v. DeSmidt*, 155 Wis. 2d 119, 132, 454 N.W.2d 780 (1990). "A warrant-issuing magistrate's determination of probable cause will be affirmed unless the facts asserted in support of the warrant are clearly insufficient to support probable cause." *Tate*, 357 Wis. 2d 172, ¶ 14.

### C. A reasonable inference to draw from the facts in the search-warrant affidavits is that there was drug-crime evidence in Hailes's apartments.

Under a lens of great deference, this Court should conclude that the search-warrant affidavits state probable cause to believe that drug-crime evidence would be found at Hailes's apartments.

Hailes concedes that the search-warrant affidavits state probable cause to believe that drug-crime evidence would be found at the 29th Street location. (Hailes's Br. 20.) He revives his argument that there are no facts tying his drug-dealing activities at 29th Street to the apartments at 30th Street. (Hailes's Br. 20–22.) He's wrong.

All that matters is that the search-warrant affidavits contain information "sufficient for a reasonable person to

logically infer that evidence would be found" at Hailes's apartments. *Ward*, 231 Wis. 2d 723, ¶ 27. If the search-warrant affidavits simply documented Hailes's extensive history as a drug dealer and his current dealing at the 29th Street location (R. 106:6–13), his motion to suppress may have been successful. *See Ward*, 231 Wis. 2d 723, ¶ 36 ("[W]e are not suggesting that when there is sufficient evidence to identify an individual as a drug dealer . . . that there is sufficient evidence to search the suspect's home."). But there's more than that.

A reasonable and obvious inference to draw from the facts in the search-warrant affidavits is that Hailes, who was on probation and subject to electronic monitoring, was hiding a domicile from his probation agent. The agent thought that Hailes was living in apartment 307, only to find numerous extension and phone cords running from apartment 307 to apartment 208 on an unscheduled visit. (R. 106:8–9.) This was indicative of Hailes cheating the electronic monitoring system. (R. 106:9–10.) Perhaps suspicion could have been dispelled when the agent learned that Hailes was moving from apartment 307 to another apartment in the complex. (R. 106:8–9.) But Hailes didn't report moving into apartment 208—he said he'd be living in apartment 102, and he walked the agent through that apartment. (R. 106:8.) Yet, he had subscribed to utilities at apartment 208, and a reliable CI saw him moving furniture into that apartment. (R. 106:6, 9.) On these facts, it's reasonable to infer that Hailes was hiding an apartment from his probation agent.

Another reasonable and obvious inference to draw from the facts in the search-warrant affidavits is that Hailes set up a surveillance or alarm system at the apartment complex. Every time the probation agent went to visit Hailes—scheduled or unscheduled—he was greeted by someone as he approached the building. (R. 106:10.) That person, in turn, wouldn't simply retrieve Hailes. Instead, they would get the

apartment manager, who just happened to live with Hailes. (R. 106:10.) Further, on two occasions, the probation agent saw what appeared to be "lookouts" for the apartment building. (R. 106:10.) These individuals would walk the perimeter of the complex, looking back and forth. (R. 106:10.) And they had some connection to the complex, as the agent had seen them either walk into the complex or sit near the front entrance. (R. 106:10.) From these facts, it's reasonable to infer that Hailes had set up a surveillance or alarm system at his place of residence.

Given the totality of the circumstances—an entrenched and active drug dealer who's hiding an apartment from his probation agent and employing a surveillance system outside his apartment complex—common sense says that drug-crime evidence likely would be found at the apartments. But the magistrate here had more than common sense to help him reach that conclusion, as the search-warrant affidavits contain information linking the above facts to criminal activity based on Officer Esqueda's training and experience in drug trafficking.

For example, drug traffickers like Hailes "are not easily deterred by law enforcement actions, and commonly continue criminal activities for long periods of time." (R. 106:13.) Those on probation, like Hailes, will maintain "a second . . . or even third residence . . . to avoid detection by their probation agents and from law enforcement" as they continue their criminal enterprise. (R. 106:9.) And drug traffickers like Hailes commonly use "look-outs . . . to provide an early detection system to the presence of law enforcement." (R. 106:12.) Not to mention, drug traffickers like Hailes commonly keep drug-crime evidence in their residences or

other places where they "maintain or exercise control."[3] (R. 106:4–5.)

In short, the search-warrant affidavits here don't "[m]erely describe[e] the stereotypical behaviors of drug dealers" without "establish[ing] why such generic observations 'probably' apply to the facts of this case." (Hailes's Br. 22.) It's quite strikingly the opposite.

Hailes makes the above representation by ignoring the totality of the circumstances. He submits that it's perfectly normal that he was "moving in and out of" apartments and "had subscribed to utilities at one of these addresses." (Hailes's Br. 20.) But he doesn't mention that he was subject to electronic monitoring and never told his probation agent about his connection to apartment 208, despite putting the utilities in his name. (Hailes's Br. 20–22.) Further, Hailes thinks nothing of the probation agent's observation of lookouts at the apartment complex, suggesting that a person needs training and experience to identify a lookout. (Hailes's Br. 21.) Even if that's true (it's not), what of the other surveillance techniques Hailes employed at the apartment complex? Was it normal to have two people serving as gatekeepers to his apartment? Doesn't that odd setup for visitors make the agent's "lookout" conclusion all the more reasonable? Hailes doesn't weigh in, though the burden is his. *DeSmidt*, 155 Wis. 2d at 132.

Instead, Hailes relies on *Sloan*, a case that's inapposite. (Hailes's Br. 19–22.) There, unlike here, the search-warrant affidavit for Sloan's residence gave "the reader no reason to

[3] On this point, it's noteworthy that the CI saw Hailes possess a firearm at the 29th Street location and while driving his Infiniti on over 50 occasions. (R. 106:6–8.) Police observed the Infiniti parked in front of the 30th Street apartment complex. (R. 106:7.)

conclude Sloan [was] a drug trafficker."[4] *Sloan*, 303 Wis. 2d 438, ¶ 38. So, the officer's description of the stereotypical behavior of drug traffickers carried no weight, whereas it does here. *Id.* Further, the search-warrant affidavit in *Sloan* didn't identify any "suspicious activity" connected to Sloan's residence. *Id.* ¶ 35. All it showed was that Sloan attempted to mail marijuana at a UPS store in Elm Grove and listed his West Allis residence as the "return address" on the package. *Id.* ¶¶ 2, 29. That's very different from the search-warrant affidavits here, which show that an entrenched and active drug dealer was hiding an apartment from his probation agent and employing a surveillance or alarm system outside his place of residence.

This case is about the totality of the circumstances and the reasonable inferences to draw therefrom. Given the great deference afforded to the magistrate's probable cause determination, *see Tate*, 357 Wis. 2d 172, ¶ 14, this isn't a close call. This Court should affirm.[5]

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[4] Hailes omits this critical distinction when he claims that under *Sloan*, Officer Esqueda's observations based on his training and experience are entitled to no weight in the probable cause analysis. (Hailes's Br. 22.) The *Sloan* opinion repeatedly notes that nothing in the search-warrant affidavit suggested that Sloan was a drug dealer: "[N]or is there evidence of Sloan's prior actual or suspected involvement with marijuana or other controlled substances. [The search-warrant affidavit] does not claim that Sloan fits any relevant profile of someone involved in [drug dealing]." *State v. Sloan*, 2007 WI App 146, ¶ 32, 303 Wis. 2d 438, 736 N.W.2d 189.

[5] The State requested an opportunity to argue the good-faith exception to the exclusionary rule at the suppression hearing, if the circuit court found the search-warrant affidavits lacking. (R. 41:14–15.) The court's ruling obviated the need to develop a record on good faith. Therefore, if this Court disagrees that the search-warrant affidavits state probable cause, a remand is appropriate. *See, e.g.*, *State v. Anker*, 2014 WI App 107, ¶¶ 25–27, 357 Wis. 2d

## II. Hailes isn't entitled to plea withdrawal or sentencing relief.

Believing that he was improperly charged with and convicted of counts with both the repeater enhancer and the second and subsequent enhancer, Hailes seeks plea withdrawal, sentence modification, or resentencing. (Hailes's Br. 34–45.) He's not entitled to any of these things because the enhancers properly applied. Even if they didn't, Hailes's claims would still fail.

### A. Standards of review.

Hailes's remaining arguments implicate principles of statutory interpretation, plea withdrawal, ineffective assistance, "new factor" sentence modification, resentencing based on inaccurate information, forfeiture, and harmless error.

Statutory interpretation presents a question of law that this Court decides de novo. *State v. Shoeder*, 2019 WI App 60, ¶ 6, 389 Wis. 2d 244, 936 N.W.2d 172.

Whether a defendant's plea was entered knowingly, intelligently, and voluntarily is a question of constitutional fact. *State v. Dillard*, 2014 WI 123, ¶ 38, 358 Wis. 2d 543, 859 N.W.2d 44. The circuit court's findings of historical fact must be upheld unless clearly erroneous. *Id.* An appellate court determines independently whether those facts demonstrate that the plea was knowing, intelligent, and voluntary, benefitting from the circuit court's analysis. *Id.*

Whether trial counsel rendered ineffective assistance is also a question of constitutional fact. *State v. Carter*, 2010 WI 40, ¶ 19, 324 Wis. 2d 640, 782 N.W.2d 695. This Court upholds "the circuit court's findings of fact unless they are clearly

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565, 855 N.W.2d 483 (remanding for an evidentiary hearing on whether an exception to the exclusionary rule applied).

erroneous." *Id.* The ultimate determination of whether counsel was ineffective is a question of law that this Court reviews de novo. *Id.*

Whether a "new factor" exists for purposes of sentence modification is a legal question this Court reviews de novo. *State v. Harbor*, 2011 WI 28, ¶¶ 36–37, 333 Wis. 2d 53, 797 N.W.2d 828.

This Court reviews de novo the constitutional issue of whether a defendant has been denied his due process right to be sentenced upon accurate information. *State v. Tiepelman*, 2006 WI 66, ¶ 9, 291 Wis. 2d 179, 717 N.W.2d 1.

This Court independently decides whether forfeiture applies or whether an error is harmless. *State v. Coffee*, 2020 WI 1, ¶ 17, 389 Wis. 2d 627, 937 N.W.2d 579.

### B. This Court has already held that both enhancers may apply to a defendant, assuming different prior convictions support them.

In Hailes's view, "*either* the second and subsequent drug offense enhancer or the habitual criminal statute may be applied [to a defendant], but not both." (Hailes's Br. 31.)

That's exactly what the defendant argued in *Maxey*: "Maxey's contention is that he cannot be subjected to multiple sentence enhancement as a repeat drug offender under WIS. STAT. § 961.48(2) *and* as a habitual criminal under WIS. STAT. § 939.62(1)(b)." *State v. Maxey*, 2003 WI App 94, ¶ 16, 264 Wis. 2d 878, 663 N.W.2d 811. This Court rejected that argument, "hold[ing] that the repeat drug offender provisions of WIS. STAT. § 961.48(2) and the habitual criminal repeater provisions of WIS. STAT. § 939.62(1)(b) may be applied against Maxey," as different prior convictions supported the enhancers. *Id.* ¶¶ 21, 23.

It's important to understand how this Court reached the above conclusion. As Hailes acknowledges, the language of both enhancer statutes controlled the outcome. (Hailes's Br. 33.) Following *State v. Delaney*, 2003 WI 9, 259 Wis. 2d 77, 658 N.W.2d 416, this Court asked whether either enhancer statute contained the exception that Maxey sought. *Maxey*, 264 Wis. 2d 878, ¶¶ 16–18. The answer was no. This Court explained, "[N]othing in the language of § 939.62 states or suggests that the State's invocation of the habitual criminal provisions of the statute serves to bar application of other statutory penalty enhancement schemes." *Id.* ¶¶ 17–18. It continued, "[N]othing in the language of § 961.48 states or suggests that the State's invocation of the repeat drug offender provisions of the statute serves to bar application of other statutory penalty enhancement schemes." *Id.* Finding "no conflict between [the] penalty enhancer schemes set out in the Uniform Controlled Substances Act and § 939.62," this Court gave "effect to both" enhancer statutes. *Id.* ¶ 22.

### C. *Maxey* is still good law and controls the outcome here.

Even though *Maxey* answers the question presented here—whether both the repeater enhancer and the second and subsequent enhancer may be applied to a defendant—Hailes treats this Court's decision as an afterthought in his brief-in-chief. (Hailes's Br. 33–34.) He "acknowledges *Maxey*," but contends that "the precedential value of that opinion is in doubt because it was superseded by a more specific legislative enactment governing how and when enhancers may be applied in a specific case." (Hailes's Br. 34.) That is, he believes that the Legislature altered the common law when it enacted Wis. Stat. § 973.01(2)(c)2., which tells a sentencing court how to rank enhancers when "*more than one*" applies. (Hailes's Br. 33–34.)

Hailes doesn't acknowledge that a "statute will be construed to alter the common law only when that disposition is clear," and "[r]epeals by implication are . . . 'very much disfavored.'" *Estate of Miller v. Storey*, 2017 WI 99, ¶ 51, 378 Wis. 2d 358, 903 N.W.2d 759 (citation omitted). Thus, proving that the Legislature abrogated *Maxey*'s holding when it enacted section 973.01(2)(c) is a tall order. And it's the starting point for this Court's analysis here—not an afterthought. (Hailes's Br. 33–34.)

Hailes has not shown that the Legislature clearly abrogated *Maxey*'s holding by implication. Again, *Maxey* holds that both the repeater enhancer and the second and subsequent enhancer may apply to a defendant because neither enhancer statute says otherwise. *Maxey*, 264 Wis. 2d 878, ¶¶ 16–18, 22. This Court relied on *Delaney* for that analysis. *Id.* The Legislature is presumed to know the rule of *Delaney* and *Maxey*, namely that a court looks to the language of an enhancer statute to determine if an exception applies. *See Czapinski v. St. Francis Hosp., Inc.*, 2000 WI 80, ¶ 22, 236 Wis. 2d 316, 613 N.W.2d 120 ("[T]he legislature is presumed to act with knowledge of the existing case law." (citation omitted)). If the Legislature wanted to change the rule that both the repeater enhancer and the second and subsequent enhancer may apply to a defendant, the clearest way to do that would be to add language to the enhancer statutes saying as much.

It certainly wouldn't be to create a statute that tells a sentencing court how to rank enhancers when *more than one* applies. The whole premise of section 973.01(2)(c)2. is that "more than one" of the enumerated enhancement statutes—including the repeater enhancer and the second and subsequent enhancer—"appl[ies] to a crime." Thus, Hailes is wrong to argue that section 973.01(2)(c)2. governs when enhancers apply. (Hailes's Br. 33–34.) The enhancer statutes govern when enhancers apply, and only after finding "more

than one" applicable does the court even consider section 973.01(2)(c)2. If the Legislature wanted to change the rule that both the repeater enhancer and the second and subsequent enhancer may apply to a defendant, why would it do so in a statute covering situations where *more than one* enhancer applies to a crime? Is a court really supposed to look to the enhancer statutes, decide that more than one applies, and then look to the sentencing statute, and decide that more than one *doesn't* apply? That doesn't make sense, particularly when considering that the law at the time of this supposed abrogation instructed courts to look at the enhancement statutes to determine if an exception applies.

There's additional language in section 973.01(2)(c) that prevents Hailes from showing that the Legislature clearly abrogated *Maxey*'s holding by implication. Contrary to Hailes's claim that the statute purports to limit the application of multiple enhancers here, the statute says that the maximum term of confinement "may be increased by *any applicable penalty enhancement statute*." Wis. Stat. § 973.01(2)(c).[6] And when "more than one" of certain enhancers (including the repeater enhancer and the second and subsequent enhancer) applies, the statute instructs courts to "apply *them*" in a certain order. Wis. Stat. § 973.01(2)(c)2. Again, if the Legislature wanted to prevent courts from applying both the repeater enhancer and the second and subsequent enhancer, it's head-scratching why it would attempt to do so in a statute with language like this.

Hailes offers the Legislature's use of the word "or" in section 973.01(2)(c)2.c. to prove that the Legislature clearly abrogated *Maxey* by implication—a result that's "very much

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[6] Hailes does not attempt to reconcile this language with his argument that "the plain language of Wis. Stat. § 973.01(2)(c) shows that the legislature chose to permit some, but not all, possible combinations of penalty enhancers." (Hailes's Br. 28.)

disfavored."[7] *Miller*, 378 Wis. 2d 358, ¶ 51 (citation omitted); (Hailes's Br. 26–31.) That simply cannot be enough given the context in which that single word is used: in a statute that tells sentencing courts that "any applicable penalty enhancement statute" is on the table, and when "more than one" applies, courts "shall apply *them*" in a certain order. Wis. Stat. § 973.01(2)(c)2.c. At best for Hailes, the Legislature's use of the disjunctive "or" in section 973.01(2)(c)2.c. creates confusion.[8] But he's tasked with much more than showing confusion. *See Miller*, 378 Wis. 2d 358, ¶ 51.

For this reason, Hailes's legislative history analysis misses the mark. He argues, "there is nothing in legislative history suggesting that the legislature intended that both §§ 939.62(1) and 961.48 apply to a single conviction." (Hailes's Br. 32–33.) But that's not the question. At the time the Legislature created section 973.01(2)(c), the law provided that both the repeater enhancer and the second and subsequent enhancer may apply to a defendant. *See Maxey*, 264 Wis. 2d 878, ¶¶ 16–18, 22. So, Hailes needs to show through legislative history (or otherwise) that the Legislature clearly abrogated *Maxey*'s holding through the enactment of section 973.01(2)(c).

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[7] Hailes also notes the Legislature's use of the word "or" in the attempt statute (Hailes's Br. 29), but that statute seems to simply parrot the language from section 973.01(2)(c)2.c.

[8] Notably, in two supreme court cases decided after the creation of section 973.01(2)(c), where both enhancers applied to the defendant, whether it was proper to do so was not even raised as an issue. *See State v. Delebreau*, 2015 WI 55, ¶ 2 & n.2, 362 Wis. 2d 542, 864 N.W.2d 852 (the defendant "was convicted of one count of delivering heroin (less than three grams), second or subsequent offense, as a repeater and as party to a crime."); *State v. Sanders*, 2008 WI 85, ¶ 1, 311 Wis. 2d 257, 752 N.W.2d 713 ("The defendant was convicted of possession of cocaine with intent to deliver as a second offense and as a habitual offender contrary to Wis. Stat. §§ 961.41(1m)(cm)1r., 961.48, and 939.62 (2005–06)").

He hasn't. *Maxey* controls. This Court should affirm.[9]

### D. Hailes is not entitled to relief even if both enhancers should not have applied.

Even if Hailes convinces this Court that the Legislature clearly abrogated *Maxey* by implication and both enhancers shouldn't have applied, he's still not entitled to plea withdrawal, sentence modification, or resentencing.[10] The State addresses Hailes's various requests for relief in turn.

#### 1. Plea withdrawal is not warranted.

"A defendant who seeks to withdraw a plea after sentencing has the burden to show by 'by clear and convincing evidence' that a 'manifest injustice' would result if the withdrawal were not permitted." *State v. Dawson*, 2004 WI App 173, ¶ 6, 276 Wis. 2d 418, 688 N.W.2d 12 (citation omitted). "To meet this standard, a defendant must show 'serious questions affecting the fundamental integrity of the plea.'" *Id.* (citation omitted).

Hailes contends that if both enhancers shouldn't have applied, his pleas were not knowingly, intelligently, and voluntarily entered. He claims, "Numerous cases have held that affirmative misinformation about the law given to the defendant requires plea withdrawal because the plea is uninformed and its voluntariness compromised." (Hailes's Br. 35.) Hailes reads those cases far too broadly and they're all distinguishable.

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[9] Hailes does not dispute that if *Maxey* applies, he was properly charged with and convicted of counts with both enhancers. (Hailes's Br. 33–34.)

[10] This Court may affirm on these alternative bases. *State v. Holt*, 128 Wis. 2d 110, 124–25, 382 N.W.2d 679 (Ct. App. 1985), *superseded on other grounds by statute*.

For starters, "Not every misunderstanding of the law by a defendant negates the knowing and voluntary nature of a plea." *State v. Brown*, 2004 WI App 179, ¶ 11, 276 Wis. 2d 559, 687 N.W.2d 543. While Hailes claims that "misinformation about the law . . . *requires*" plea withdrawal (Hailes's Br. 35 (emphasis added)), that's not what our supreme court has said. Rather, "affirmative misinformation about the law . . . *can* support a holding that" plea withdrawal is warranted. *Dillard*, 358 Wis. 2d 543, ¶ 39 (emphasis added). And in each of the cases that Hailes offers for the proposition that misinformation "requires" plea withdrawal (Hailes's Br. 35), the record clearly shows that the misinformation was an inducement for the plea, at least in part.

For example, Hailes claims that under *Woods*, pleading to a "legal impossibility" makes a plea "categorically invalid." (Hailes's Br. 36.) In *Woods*, it mattered "that Woods, at least in part, made the decision to plead guilty based on inaccurate information provided to him by the lawyers and judge." *State v. Woods*, 173 Wis. 2d 129, 140, 496 N.W.2d 144 (Ct. App. 1992). Indeed, *Woods* cited to *Riekkoff* to support its decision to permit plea withdrawal. *See id.* And *Riekkoff* is another case (that Hailes relies upon) where misinformation plainly induced the defendant's plea. *See State v. Riekkoff*, 112 Wis. 2d 119, 120–21, 128, 332 N.W.2d 744 (1983) ("a condition of the plea bargain was the defendant's reservation of the right to challenge" a waived issue on appeal).

The same goes for the remaining cases that Hailes offers. In *Dawson*, the defendant "established that his plea was not knowing and voluntary because it was induced by the promise of a possible future benefit that could never be conferred." *Dawson*, 276 Wis. 2d 418, ¶ 25. In *Brown*, "the misinformation went to the heart of the plea agreement." *Brown*, 276 Wis. 2d 559, ¶ 3. That is, the "plea agreement was purposefully crafted to only include pleas to charges that would not require [Brown] to register as a sex offender or be

subject to" a Chapter 980 commitment, but it turned out that Brown's pleas subjected him to those collateral consequences. *Id.* ¶ 13. Finally, in *Dillard*, "[t]he defendant presented a persuasive account . . . of why, absent the misinformation he received about [facing a life sentence], he would not have entered a no-contest plea, why he would have gone to trial, and why the no-contest plea was not knowing, intelligent, and voluntary." *Dillard*, 358 Wis. 2d 543, ¶ 52. Dillard's attorney testified that "the dropped persistent repeater enhancer [was] 'the most significant factor' contributing to the defendant's decision to" plead. *Id.* ¶ 54.

In stark contrast, here, Hailes didn't even allege that the supposed misinformation induced his pleas (partially or primarily), let alone does the record clearly demonstrate that. Hailes's postconviction motion states that "he did *not* know that he could *only* have been charged and convicted of the repeater enhancer *or* with the second and subsequent enhancer," so "he was prevented from making a reasoned decision whether to proceed to trial or plead." (R. 56:9.) That's not the same as saying that the supposed misinformation induced his pleas. Given that all the cases he cites in his postconviction motion include this defining feature, he's offered no law supporting his claim that plea withdrawal is necessary to correct a manifest injustice. He's therefore insufficiently pled his claim. *See State v. Howell*, 2007 WI 75, ¶ 75, 301 Wis. 2d 350, 734 N.W.2d 48 (requiring a defendant seeking plea withdrawal to allege sufficient facts that, if true, show that the defendant is entitled to relief).

Anyway, the record conclusively disproves any claim that the supposed misinformation about the enhancers induced Hailes's pleas. As soon as he lost his suppression motion, he requested a plea hearing date. (R. 41:18.) At a status conference shortly thereafter, he told the circuit court that he was rejecting the State's plea offer. (R. 38:3–4.) After the prosecutor talked about her plan to show the jury Hailes's

"very complete" confession, Hailes indicated that he wanted to continue plea negotiations. (R. 38:4–8.) He said that he'd "appreciate" resolving the matter before trial and that he'd "love" to take a plea deal. (R. 38:8.) Hailes explained that he simply didn't like the State's current offer, yet he would up accepting a worse offer (where the State was free to argue) instead of going to trial. (R. 39:5.) That result is fully consistent with Hailes's apprehension about rolling the dice at trial, which became clear when Hailes asked the court whether he'd be "forced to go to trial" if he didn't accept the State's offer. (R. 38:8.)

In short, a failed suppression motion, a very complete confession, and dismissed charges induced Hailes's decision to plead, not any supposed misinformation about the enhancers. Hailes is correct that "case law does not require that the decision to plead be based *exclusively* on the misinformation the defendant received" (Hailes's Br. 35 (emphasis added).) But that same case law demonstrates that to be successful, the defendant must show that the misinformation at least partially induced the plea. Hailes can't show that.

Hailes also argues that he's entitled to plea withdrawal because his attorney was ineffective for not moving to dismiss one of the two enhancers and telling Hailes that both enhancers applied. (Hailes's Br. 38–39.) He's not entitled to a *Machner* hearing on his claim because he's insufficiently pled deficient performance and prejudice.

In his postconviction motion, Hailes acknowledged *Maxey*'s holding that both enhancers may apply to a defendant. (R. 56:7.) He contended that *Maxey* didn't apply for the same reason he does on appeal, but he recognized that no case law supported his interpretation of section 973.01(2)(c). (R. 56:7.) While he claimed that "is not surprising given the plain and clear language" of the statute, his request for

publication undermines his apparent position that he's not raising a novel legal issue. (R. 56:7; Hailes's Br. 10.)

An attorney isn't ineffective for failing to raise a novel legal issue. *See State v. Lemberger*, 2017 WI 39, ¶ 18, 374 Wis. 2d 617, 893 N.W.2d 232. As our supreme court has explained, "We think ineffective assistance of counsel cases should be limited to situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue." *Id.* ¶ 33 (quoting *State v. McMahon*, 186 Wis. 2d 68, 85, 519 N.W.2d 621 (Ct. App. 1994)). Here, when the alleged deficiency occurred, a published opinion said that both enhancers may apply to a defendant. No case had overruled or limited *Maxey* in light of section 973.01(2)(c), nor was there a case interpreting that statute the way that Hailes wants it interpreted. On these facts, Hailes has failed to sufficiently plead deficient performance.

The same goes for prejudice. The question is whether there is a reasonable probability that, but for any deficient performance, he would not have pleaded guilty and *would have gone to trial*. *State v. Bentley*, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996). Hailes's postconviction motion doesn't even include a bare-bones allegation saying as much. (R. 56:11–12.) Instead, he claims that if he'd known that both enhancers didn't apply, "he would not have *pled to the counts with both enhancers*." (R. 56:12 (emphasis added).) That's not the standard. Hailes's has insufficiently pled prejudice. *See Bentley*, 201 Wis. 2d at 312, 316–18.

For the above reasons, Hailes is not entitled to plea withdrawal, even if both enhancers shouldn't have applied.

**2. Sentence modification is not warranted.**

Wisconsin circuit courts have inherent authority to modify sentences, within certain constraints. *Harbor*, 333 Wis. 2d 53, ¶ 35. While a court cannot modify a sentence

based on reflection or second thoughts alone, it may modify a sentence based on a new factor. *Id*.

To prevail on a motion for sentence modification, the defendant must show "both the existence of a new factor and that the new factor justifies modification of the sentence." *Harbor*, 333 Wis. 2d 53, ¶ 38. A "new factor" is a fact or set of facts "highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). The defendant must show the existence of a new factor by clear and convincing evidence. *Harbor*, 333 Wis. 2d 53, ¶ 36.

Here, Hailes claims, "The fact that Mr. Hailes was charged with, and later convicted of, multiple counts that erroneously carried both the repeater enhancer and the second and subsequent enhancer is highly relevant to the imposition of the sentence." (Hailes's Br. 41.) He offers zero citations to the sentencing transcript to prove as much, even though he has the burden to establish a new factor by clear and convincing evidence. (Hailes's Br. 41–42.) His argument is undeveloped and should be rejected for this reason alone. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

Regardless, the record shows that the supposed misinformation about the enhancers was not highly relevant to the imposition of sentence. The court's sentencing remarks reflect that its primary concern was the need to protect the public from Hailes's "very high-end dealing." (R. 40:73.) It said, "People are dying in this community on a continual basis because of these drugs. I could not justify to the community not giving you a substantial prison term . . . . I wouldn't be able to justify it, based on your prior record." (R. 40:74–75.) The court noted that Hailes was "pollut[ing] the community."

(R. 40:65.) And to the extent that the seriousness of the offense was on equal footing with public protection, the court's assessment focused on Hailes's reengagement in drug dealing in "a major way"—he wasn't just "doing some street-level selling." (R. 40:75.) The court didn't consider the offenses serious just because multiple enhancers applied, as Hailes might be suggesting. (Hailes's Br. 42.)

In short, Hailes hasn't shown that the supposed misinformation about the enhancers was highly relevant to the imposition of sentence. He's not entitled to sentence modification.

### 3. Resentencing is not warranted.

Criminal defendants are entitled to be sentenced based upon accurate information. The Fourteenth Amendment to the United States Constitution prohibits any state from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. The United States Supreme Court has held that it is "inconsistent with due process of law" for a defendant to be "sentenced on the basis of assumptions . . . which [are] materially untrue." *Townsend v. Burke*, 334 U.S. 736, 741 (1948). Thus, "a defendant has a constitutionally protected due process right to be sentenced upon accurate information." *State v. Travis*, 2013 WI 38, ¶ 17, 347 Wis. 2d 142, 832 N.W.2d 491.

When a defendant claims that he was sentenced based on inaccurate information, he bears the initial burden of proof. "The defendant must show by clear and convincing evidence that: (1) some information at the original sentencing was inaccurate; and (2) the circuit court actually relied on the inaccurate information at sentencing." *Coffee*, 389 Wis. 2d 627, ¶ 38.

Actual reliance requires more than mere references to an inaccuracy. A court "actually relie[s]" on information when

it gives "explicit attention" to the information and the information "form[s] part of the basis for the sentence." *State v. Alexander*, 2015 WI 6, ¶¶ 25, 29, 360 Wis. 2d 292, 858 N.W.2d 662. In determining whether a court "actually relied" on inaccurate information at sentencing, a reviewing court will examine "the entire sentencing transcript." *Id.*

If the defendant shows that the court actually relied upon inaccurate information at sentencing, the burden shifts to the State to prove that the error was harmless. *Travis*, 347 Wis. 2d 142, ¶ 23. "The State can meet its burden to prove harmless error by demonstrating that the sentencing court would have imposed the same sentence absent the error." *Id.* ¶ 73. "The most important piece of evidence for a reviewing court is the sentencing transcript itself, not 'the [postconviction] court's assertions' or 'speculation about what a circuit court would do in the future upon resentencing.'" *Coffee*, 389 Wis. 2d 627, ¶ 38 (citing *Travis*, 347 Wis. 2d 142, ¶ 73).

Here, Hailes argues that "the circuit court had before it, and considered, inaccurate information at the time of sentencing." (Hailes's Br. 43.) Again, he provides no citations to the sentencing transcript, even though he has the burden to show actual reliance by clear and convincing evidence, and reviewing courts are supposed to consider "the entire sentencing transcript" in resolving the claim. (Hailes's Br. 43); *Alexander*, 360 Wis. 2d 292, ¶ 25. Given that Hailes must prove that the supposed inaccurate information formed "part of the basis for the sentence," *Alexander*, 360 Wis. 2d 292, ¶ 29 (citation omitted), his claim is undeveloped.

It's also forfeited, as Hailes anticipates. (Hailes's Br. 44.) He didn't object to the alleged inaccuracy at sentencing. (R. 40.) Hailes should have objected. This wasn't a "spontaneous presentation" of allegedly inaccurate information, nor was the information "previously unknown." *Compare Coffee*, 389 Wis. 2d 627, ¶ 26; *State v. Counihan*,

2020 WI 12, ¶ 4, 390 Wis. 2d 172, 938 N.W.2d 530. In those situations, a defendant doesn't forfeit an inaccurate information by failing to timely object.

Hailes isn't entitled to a *Machner* hearing on his lawyer's failure to object, because as explained above, he's insufficiently pled deficient performance. He's also insufficiently pled prejudice because that requires a showing that the circuit court actually relied on the supposed inaccuracy. *See Alexander*, 360 Wis. 2d 292, ¶ 2. Again, actual reliance means that the information formed "part of the basis for the sentence," *id.* ¶ 29 (citation omitted), and Hailes's postconviction motion says nothing about that, (R. 56:14–15).

Finally, Hailes's resentencing claim fails on the merits. Whether the court gave explicit attention to the enhancers is debatable. It never mentioned them but at one point stated that Hailes's extensive drug dealing subjected him to "decades and decades of prison time." (R. 40:75.) Even if that constitutes explicit attention, the information certainly didn't form part of the basis for the sentence. The court didn't say anything about the enhancers when it landed on its global sentence. (R. 40:64–78.)

Further, any error would be harmless. It's clear that the court would have imposed the same sentence absent the error. It was concerned about Hailes's "very high-end dealing." (R. 40:73.) It was concerned about his "pollut[ing] the community." (R. 40:65.) It was concerned about his history of reoffending. (R. 40:64–78.) Those facts still would have existed if only one of two enhancers applied to his convictions.

For the above reasons, Hailes isn't entitled to resentencing.

* * * * *

To summarize, the search-warrant affidavits state probable cause, so the circuit court didn't err in denying Hailes's motion to suppress. If this Court disagrees, a remand

is necessary to develop a record on the good faith exception to the exclusionary rule.

Hailes isn't entitled to plea withdrawal or sentencing relief. Both enhancers applied to him. Even if they didn't, Hailes hasn't shown a manifest injustice, a "new factor," or that the sentencing court actually relied on inaccurate information.

## CONCLUSION

This Court should affirm Hailes's convictions and the circuit court's orders denying postconviction relief.

Dated this 7th day of February 2022.

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 8,602 words.

Dated this 7th day of February 2022.

Electronically signed by:

Kara L. Janson
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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 7th day of February 2022.

Electronically signed by:

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