STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2022AP001311-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

AMBER C. DEBREE,

Defendant-Appellant.

On Appeal from a Judgment of Conviction,
the Honorable Bruce E. Schroeder, Presiding,
and an Order Denying Postconviction Relief
and an Order Denying Reconsideration,
the Honorable Chad G. Kerkman, Presiding,
Entered in the Kenosha County Circuit Court

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The state should be estopped from arguing on appeal that Ms. Debree did not present a new factor.

The state has done a complete about-face to argue on appeal that Ms. Debree failed to present a new factor. The transcript of the postconviction hearing and the state's response to Ms. Debree's motion for reconsideration demonstrate that in the circuit court, the state conceded that Ms. Debree's motion presented a new factor under the law. Specifically, the prosecutor stated:

> I do agree with Attorney Force that in reviewing the record there was no indication that the defendant was a victim of domestic violence or any discussion of that past history. And I do agree with Ms. Force that that would be relevant at sentencing.
>
> Ultimately, in reviewing the record she has been thus far successful on probation. Normally disorderly conduct defendants only get a year of probation, though I understand 2 years is the maximum under the Statute.
>
> So given that she's done well on probation and shown that she can be a productive member of society, we ultimately have no objection to the motion.

(37:13-14). The prosecutor further stated, "I believe it was a factor not known at the time of sentencing insofar as -- [.]" (37:14). At that point the the

postconviction court interjected to ask why it was not known at the time of sentencing. The prosecutor responded, stating, "I also say insofar as it was not discussed at sentencing. Why? I don't know. I wasn't there." (37:14). However, the prosecutor later explained that, "from the State's perspective that wouldn't be information we have." (37:15).

In response to Ms. Debree's motion for reconsideration, which argued that the postconviction court applied the incorrect legal standard, the prosecutor clarified the state's position as follows:

> The State had no objection to the Defendant's Motion for Sentencing Modification at the Motion Hearing on June 7, 2022, for the reasons stated on the record. The State continues to have no objection to the motion, *believing that a new factor exists* and an amendment of the sentence to one year of probation is appropriate.

(41:1 (emphasis added)). Therefore, the state had already made its position clear—that the newly presented information was a new factor. As such, the state should be estopped from arguing on appeal that Ms. Debree failed to present a new factor.

The doctrine of judicial estoppel "is intended to protect against a litigant playing 'fast and loose with the courts' by asserting inconsistent positions." *State v. Petty*, 201 Wis. 2d 337, 347, 548 N.W.2d 817 (1996) (quoting *State v. Fleming*, 181 Wis. 2d 546, 557, 510 N.W.2d 837 (internal citations omitted)). Whether to apply the doctrine to a particular case is in the court's discretion; however, whether the requisite

elements that permit a court to invoke the doctrine have been met is a question of law. *Petty*, 201 Wis. 2d at 346-47.

The two elements of judicial estoppel are: (1) the party against judicial estoppel is sought to be invoked argued two "irreconcilably inconsistent positions;" and (2) that party "intentionally manipulated the judicial system." *Id.* at 354. As to the first element, the state has clearly argued two irreconcilably inconsistent positions. As to the second element, *Petty* differentiates between "cold manipulation," and "an unthinking or confused blunder." *Id.* The state's inconsistent position on appeal cannot be interpreted as "unthinking" or "a confused blunder." Therefore, the reasoning behind the state's conflicting position on appeal must be the result of an intentional decision to manipulate the system.

Therefore, this court should hold that the state is judicially estopped from arguing its inconsistent position on appeal.

II. Ms. Debree's postconviction motion for sentence modification presented a new factor.

Although Ms. Debree had knowledge of the information presented later in the postconviction motion at sentencing, this does not preclude it from being a new factor. As the state argues, Ms. Debree was aware that the victim in this case, her husband, had previously committed acts of domestic violence

against her. However, the state misrepresents the holding in the seminal case, *Rosado v. State*, 70 Wis. 2d 280, 234 N.W.2d 69. The state also relies on a factually dissimilar case, *State v. Crockett*, 2001 WI App 235, 248 Wis. 2d 120, 635 N.W.2d 673.

First, the state provides several extremely misleading quotes from *Rosado*. (*See* Response Brief at 12, 15-16). The state's selective quotes avoid key distinguishing information. That is, that the circuit court in *Rosado* made the defense aware of the significance of the information in question prior to the sentencing hearing. The full quotes and context from *Rosado* are as follows:

> In this case, defendant was available to give his explanation of the Puerto Rican affair at the December 17th meeting, and his counsel was fully aware at that time that the trial court considered this incident relevant to sentencing. This failure to testify at this time can only be interpreted as a conscious tactical choice. Simply because this knowing failure to testify deprived the trial court of defendant's story does not transform this side of the story into a 'new factor' at the post-conviction hearing four months later.

Rosado, 70 Wis. 2d at 288-89 (underlining added to identify the language cited in the state's brief at 12, 15). Therefore, the state's contention that *Rosado* holds that, "A defendant's 'failure to testify' when he is available 'can only be interpreted as a conscious tactical choice.'" is a misrepresentation. (*See* Resp. Br. at 12). What *Rosado* actually says is that "*This* failure to testify *at this time* can only be interpreted as a

conscious tactical choice." 70 Wis. 2d at 288 (emphasis added). The court concluded this because, "his counsel was fully aware at that time that the trial court considered this incident relevant to sentencing." *Id.* The state's choice to isolate particular language takes the quote out of the context of the specific facts in *Rosado*. There, the defendant and defense counsel were made aware of the significance of particular events prior to sentencing and made a conscious choice not to present the testimony in question. *See id.* at 288-89. And for that reason, the court concluded that the proffered information was not a new factor. *Id.*

The state also cites *Crockett*, a case in which the defendant was aware of discrepancies among various codefendants' stories—information which would have reduced his culpability—but failed to present these facts at sentencing. *Crockett,* 248 Wis. 2d 120, ¶14. While this court noted that the defendant did not claim he was unaware of the facts later raised in his sentence modification claim, Crockett does not seem to have offered any rationale to satisfy the requirement that the information have been "unknowingly overlooked." *Id.* As such, *Crockett* did not consider the issue in this case. *Crockett* therefore does not control.

Here, on the other hand, the significance of Ms. Debree's status as a domestic abuse survivor was not known until the circuit court began to make its sentencing rationale known—at the end of the sentencing hearing. After defense counsel's sentencing argument and Ms. Debree's allocution, the court discussed her record, which it believed was a "terrible,

really a terrible record." (21:10). The court explained further, that it had heard "all this about [her] new life and everything" but that it was thinking "oh, come on. What about this past background?" (21:10). This rhetorical question, posed at the end of the court's sentencing discussion, did not put Ms. Debree or her counsel on notice that the court placed a high level of significance on her past background, namely on what in her background had caused her to commit crimes.

In addition, unlike *Rosado*, where the defendant's testimony about the "Puerto Rican affair" was likely to produce a worse outcome for him at sentencing, there was no strategic reason for Ms. Debree to withhold the information regarding her husband's history of domestic abuse. A much more reasonable explanation is that Ms. Debree, like most survivors of domestic abuse, was not jumping at the opportunity to discuss the abuse she had suffered and for personal—not strategic—reasons, she was not likely to want to label herself a victim. In fact, the postconviction court's written decision denying Ms. Debree's motion for reconsideration is a prime example of why survivors do not want to talk about their abuse. (*See* 43:1-7). Survivors are often blamed, judged, and ridiculed when they share this information.

The information in Ms. Debree's postconviction motion is a new factor under the law. It was unknowingly overlooked by the parties because the state did not know about it. At the motion hearing, the prosecutor explained that "from the State's

perspective that wouldn't be information we have." (37:15). Ms. Debree and defense counsel could not have guessed that the sentencing court would find the underlying cause(s) of her past criminal behavior significant to the sentencing in this case. Therefore, it was not the type of situation present in *Rosado* or *Crockett*. In addition, it is apparent from the court's sentencing pronouncement that this the information was highly relevant. Therefore, this court should conclude that Ms. Debree presented a new factor for purposes of sentence modification as a matter of law.

III. The circuit court's denial of Ms. Debree's postconviction motion was not a valid exercise of discretion

The state argues that the postconviction court properly exercised its discretion in considering whether the new factor Ms. Debree established warranted sentence modification. (Resp. Br. at 18-19). However, the state does not cite to the record to demonstrate this supposed exercise of discretion by the postconviction court.

As Ms. Debree argued in her opening brief, the circuit court failed to exercise discretion to determine whether sentence modification is warranted. The court's comments were insufficient to constitute a valid exercise of discretion. Therefore, this court should remand for a valid exercise of discretion. *See State v. Harbor*, 2011 WI 28, ¶37, 333 Wis. 2d 53, 797 N.W.2d 828.

CONCLUSION

As Ms. Debree has demonstrated the existence of a new factor and the circuit court's comments do not evidence an exercise of discretion, Ms. Debree respectfully requests that this Court reverse the denial of her postconviction motion and remand with directions that the circuit court consider, in its discretion, whether to modify her sentence.

Dated this 1st day of December, 2022.

Respectfully submitted,

Electronically signed by
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 1,714 words.

Dated this 1st day of December, 2022.

Respectfully submitted,

Electronically signed by
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