STATE OF WISCONSIN

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

DISTRICT III

Case No. 2022AP1695-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MATTHEW ROBERT MAYOTTE,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING A MOTION FOR PLEA WITHDRAWAL ENTERED IN THE TAYLOR COUNTY CIRCUIT COURT, THE HONORABLE ANTHONY J. STELLA, JR., PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

1. Should this Court overlook the guilty plea waiver rule, address Defendant-Appellant Matthew Robert Mayotte's waived *Arizona v. Youngblood* claim on the merits, and hold that Mayotte did not establish that the lost evidence at issue was apparently exculpatory?

Yes. It would best serve the interests of justice and finality for this Court to address this claim on the merits. A preserved appellate challenge to the circuit court's denial of Mayotte's motion to dismiss would have failed on the merits, so he is due no relief.

2. Did the circuit court properly deny Mayotte's postsentencing motion for plea withdrawal after finding that, even assuming counsel deficiently advised him about his ability to appeal a pretrial ruling after entering an *Alford* plea, Mayotte was not prejudiced?

Yes. This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case deals only with application of settled law to the facts, which is adequately addressed on briefs.

STATEMENT OF THE CASE

On October 16, 2019, the State charged Mayotte with Burglary of a Building, Felony Bail Jumping, Misdemeanor Theft, and two counts of Criminal Damage to Property after the following series of events. (R. 2:1–2.) On September 14, 2019, Mayotte's brother Jeremy[1] contacted the Taylor County Sheriff's Office to report that Mayotte stole a set of keys from

[1] To avoid confusion, the State will refer to Jeremy by his first name in this brief.

the District Attorney and used them to cause mischief in the courthouse. (R. 2:2.) Jeremy said that Mayotte had changed the time on the tower clock, took photos of himself on his cell phone while in the clock tower, and that Mayotte was currently at home drunk while on bond. (R. 2:2.) Medford police officer Matt Hoops followed up on this information and learned that an employee in the District Attorney's Office had lost her keys at the courthouse roughly a week earlier, that the courthouse clock tower had been tampered with and required repairs, and that the District Attorney's Office's case file on Mayotte's open felony case, no. 2019CF40, and a restitution case file for a man named Travis Spinler, were missing. (R. 2:2–3.)

Police further spoke with Sergeant Craig Amundson, who reviewed surveillance footage from the courthouse. (R. 2:2.) Amundson reported that a person wearing a green hooded sweatshirt with the hood up, and with nothing in his hands, could be seen entering the D.A.'s Office at 3:20 a.m. on September 6, 2019. (R. 2:2.) The same person exited at 3:35 a.m. carrying paperwork in his hand. (R. 2:2.) Taylor County Sheriff's Detective Aemus Balsis watched the courthouse complex surveillance video and learned the following: at 2:52 a.m., a person is seen entering the north entrance of the building, which required a key fob. (R. 2:4.) The person was using a flashlight but only appeared as a dark silhouette due to the darkness of the building, and he ascended a staircase. (R. 2:4.) The person was next visible outside a restroom on the third floor near the door leading to the clock tower at 3:19 a.m., and he was identifiable as a male wearing jeans and an olive drab green hooded sweatshirt with a circular design that resembled a skull and crossbones on the front, with the multicolored hood pulled over his head. (R. 2:4; 47:9–10.) He had nothing in his hands. (R. 2:4.) The subject walked toward the D.A.'s Office. (R. 2:4.) At 3:35 a.m. the same subject walked back toward the courtroom lobby from

the D.A.'s Office, this time carrying paperwork. (R. 2:4.) Balsis could see writing in the lower back area of the sweatshirt as he turned and walked toward the Clerk of Court's office and out of sight. (R. 2:4.)

Law enforcement executed a search warrant on Mayotte's home, found him highly intoxicated, and arrested him. (R. 2:3.) Mayotte's roommate, Robert Palms, told police that Mayotte found a set of keys labeled "DA" in the Taylor County Courthouse parking lot about a week ago, and that Mayotte had used them to steal his court case file along with another one his girlfriend, Jannie Armbrust, told him to take. (R. 2:3.) Palms said Mayotte burned the two case files in the burn pit outside their house. (R. 2:3.) Law enforcement confirmed this after locating the remnants of burnt court paperwork in the fire pit and speaking with Armbrust, who was in the Taylor County Jail at the time. (R. 2:3–4.) Armbrust said Mayotte admitted to using the keys to take his court files and Spinler's court files from the D.A.'s Office, which caused a fight between them that led to her arrest. (R. 2:3–4.) Balsis returned to Mayotte's residence two days later and asked Palms for permission to search for the sweatshirt the subject on the video was wearing. (R. 2:5.) Balsis located a shirt that, when turned inside out, had all the same colors and markings as the shirt the subject was wearing on the video. (R. 2:5.) Palms said the shirt was not his and it belonged either to Mayotte or his nephew, who had stayed at the residence before.[2] (R. 2:5)

After receiving the discovery, which included screenshots of the surveillance video but not the video itself, Mayotte learned that the surveillance video had not been preserved. (R. 43:1–2.) He moved to dismiss the charges with prejudice pursuant to *State v. Greenwold*, 181 Wis. 2d 881,

[2] It is not clear from the complaint whether Palms was referring to his own nephew or a nephew of Mayotte. (R. 2:5.)

885, 512 N.W.2d 237 (Ct. App. 1994) (*Greenwold I*), claiming the video was "apparent[ly] exculpatory." (R. 43:3.)

The State opposed, admitting that the footage had not been preserved but noting that it was "blurry and grainy and Detective Balsis" had indicated at the preliminary hearing "that he would be unable to positively identify the suspect from the surveillance footage other than it appears to be a Caucasian male of roughly the same height and weight of the defendant." (R. 45:2–3.) It attached the screenshots to its motion. (R. 51; 52; 53.) The State additionally detailed the wealth of other evidence the State had pointing to Mayotte, including statements from his brother, his roommate, and his girlfriend implicating Mayotte, as well as the paperwork and matching sweatshirt found at his residence. (R. 45:2.) The State said that the video had no exculpatory value at all, but at best could be described as only potentially exculpatory and, since the defendant had not made any allegation that it was destroyed in bad faith, he could not meet his burden under the controlling case law. (R. 45:3–5.)

The circuit court held a hearing and denied Mayotte's motion. (R. 82.) The court found that the video was inconclusive as to who it captured, that it did not have any exculpatory value that would have been apparent to law enforcement at the time—law enforcement actually believed it was inculpatory—and that it was only negligently destroyed. (R. 82:31–33.) It informed Mayotte that it was leaving open the issue of whether the State could still refer to the video or use the screenshots, however, and would entertain any defense motions on that point. (R. 82:32–33.)

Mayotte subsequently moved to suppress the screenshots, prohibit the State from making any reference to the video or the pictures at trial, and for an adverse inference instruction informing the jury that the State had failed to preserve potentially probative evidence. (R. 57.) The circuit court denied the request to prohibit the screenshots, but

granted the defense motion for an adverse inference instruction.[3] (R. 81:35–36.) Shortly thereafter, though, Mayotte reached a plea agreement with the State. (R. 84:3–5.) The court accepted his *Alford*[4] plea to the burglary charge, and the rest of the charges were dismissed and read in. (R. 83:6–22.) The court accepted the parties' joint sentencing recommendation and placed him on probation for 30 months with costs and restitution due. (R. 83:27.)

Postsentencing, Mayotte moved to withdraw his plea, alleging that trial counsel was ineffective for "failing to inform Mayotte that an Alford plea would result in the waiver of his ability to challenge" the denial of his pretrial motion to dismiss the charges based on the State's failure to preserve the surveillance video. (R. 102:5–8.) The circuit court held a *Machner*[5] hearing, at which Mayotte and defense counsel testified.[6] (R. 126; 128.) Mayotte did not recall having any discussions with counsel during the plea process about his previous motion to dismiss. (R. 126:16–20.) Defense counsel could not remember whether he discussed appealing the court's denial of the pretrial motion to dismiss with Mayotte immediately after it was denied. (R. 128:10.) He explained, however, that he restyled the argument in his motion in limine as a motion to suppress any mention of or description of the video and the screenshots because he knew that

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[3] Defense counsel erroneously stated once at the subsequent *Machner* hearing that the court had denied the request for an instruction, but the record shows that the court granted that portion of the motion, which counsel corrected later. (R. 81:35–36; 128:8–9, 17.)

[4] *North Carolina v. Alford,* 400 U.S. 25, 39 (1970).

[5] *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

[6] This hearing was held over two separate days, part in June 2022 and part in September 2022, due to defense counsel's unavailability at the scheduled June hearing. (R. 126; 128.)

appellate review of suppression issues would survive a plea pursuant to Wis. Stat. § 971.31(10). (R. 128:10.) He said he believed the argument was thus "preserved but with a different procedural posture on appeal." (R. 128:11.) He said that would not have been something he would have discussed with Mayotte. (R. 128:11.) He did not recall discussing with Mayotte how the entry of a plea would affect his right to appeal pre-plea rulings. (R. 128:12.)

On cross-examination, he said he believed it was in Mayotte's best interest to take the probation plea offered, though he would have recommended taking the case to trial if the State were only offering a plea with a recommendation of prison. (R. 128:13.) He further stated that Mayotte had some reluctance about going to trial, given that the charges in the complaint carried a possibly lengthy prison sentence, whereas the plea was an offer for a recommendation of probation, which was consistent with the goal to avoid prison time. (R. 128:13–16.) Counsel reemphasized that if the State had only agreed to recommend prison, they would have proceeded to trial. (R. 128:17.)

The circuit court decided the motion on the prejudice prong and denied it, finding no prejudice to Mayotte even if trial counsel should have advised him about the nuances of how to directly appeal the circuit court's denial of his pretrial motion. (R. 128:24–27.) Mayotte appeals.

ARGUMENT

I. In the interest of finality and judicial economy, this Court should overlook the guilty plea waiver rule and address Mayotte's *Youngblood* claim on the merits.

A. Remanding for plea withdrawal simply so Mayotte could go to trial to properly preserve for a subsequent appeal the issue of whether the charges should have been dismissed pretrial would waste this Court's, the trial court's, and the parties' scarce resources.

"The general rule is that a guilty, no contest, or *Alford* plea 'waives all nonjurisdictional defects, including constitutional claims.'" *State v. Kelty*, 2006 WI 101, ¶ 18, 294 Wis. 2d 62, 716 N.W.2d 886 (citations omitted). "Courts refer to this as the guilty-plea-waiver rule." *Id.* The rule exists because a plea is "a break in the chain of events which has proceeded [the plea] in the criminal process," and when the defendant agrees to resolve his case with a plea, "the State acquires a legitimate expectation of finality in the conviction thereby obtained." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973); *see also Lefkowitz v. Newsome*, 420 U.S. 283, 289 (1975). But waiver rules are also meant to "efficiently guard[ ] [the courts'] scarce judicial resources." *State v. Klessig*, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997). Accordingly, "[l]ike the general rule of waiver, the guilty-plea-waiver rule is a rule of administration and does not involve the court's power to address the issues raised." *Kelty*, 294 Wis. 2d 62, ¶ 18. This Court has thus exercised its discretion and declined to apply the rule, when appropriate. *State v. Tarrant*, 2009 WI App 121, ¶ 6, 321 Wis. 2d 69, 772 N.W.2d 750.

Overlooking the rule is appropriate here. There are no factual issues yet to be resolved regarding the character of the lost surveillance tape. *Tarrant*, 321 Wis. 2d 69, ¶ 6. And,

assuming Mayotte could prevail on his plea withdrawal claim,[7] returning this case to the trial court for a full trial simply so Mayotte can properly preserve for appeal the issue of whether no trial ever should have happened to begin with serves neither the State's interest in finality nor the judicial system's interest in preserving its scarce resources. Resolution of the *Youngblood* issue now would thus best "serve the interests of justice" in this case. *Id.* ¶ 6.

B. The circuit court was correct that the lost surveillance tape did not have any readily apparent exculpatory value, and Mayotte has never alleged bad faith.

When the State fails to preserve evidence, that failure violates a defendant's due process rights when the State either: "(1) fails to preserve evidence that is apparently exculpatory or (2) acts in bad faith by failing to preserve evidence that is potentially exculpatory." *State v. Luedtke*, 2015 WI 42, ¶ 53, 362 Wis. 2d 1, 863 N.W.2d 592; *see also Arizona v. Youngblood*, 488 U.S. 51, 57–58 (1988). If either of those prongs are satisfied, the trial court has discretion to sanction the State for its violation, including dismissal of the case when appropriate. *See, e.g.*, *State v. Huggett*, 2010 WI App 69, ¶¶ 27–28, 324 Wis. 2d 786, 783 N.W.2d 675. Whether the trial court properly applied the constitutional standard to the facts when it denied Mayotte's motion is a question of constitutional fact this Court reviews de novo. *State v. Greenwold*, 189 Wis. 2d 59, 66, 525 N.W.2d 294 (Ct. App. 1994) *(Greenwold II)*.

[7] The State does not concede that Mayotte should prevail on his ineffective assistance of counsel claim to withdraw his plea and addresses that claim in Issue II. The State does believe, however, that addressing the underlying *Youngblood* claim now is the most efficient way to resolve this case.

Mayotte relied on the first prong of this test—that the the video was apparently exculpatory—and disavowed any argument that the State acted in bad faith to destroy the video. (R. 43:2–3.) To satisfy this standard, the evidence must "possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *California v. Trombetta*, 467 U.S. 479, 489 (1984). Evidence does not have apparent exculpatory value if it would have provided "simply an avenue of investigation that might have led in any number of directions." *Hubanks v. Frank*, 392 F.3d 926, 931 (7th Cir. 2004) (quoting *Youngblood*, 488 U.S. at 57 n.*). Nor does the State have "an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." *Youngblood*, 488 U.S. at 58. Thus, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Greenwold I*, 181 Wis. 2d at 885 (quoting *Youngblood*, 488 U.S. at 58).

Here, the circuit court correctly determined that the lost surveillance video did not have any readily apparent exculpatory value and was merely potentially useful to Mayotte, thus Mayotte did not meet his burden to establish a due process violation occurred when the courthouse maintenance office failed to preserve it. (R. 82:7–8, 19, 32.) This was not a situation where the character of the evidence was completely unknown—some screenshots from the video remained, which the State provided with its response to Mayotte's motion. (R. 51; 52; 53.) They show that the video was as the State described it: "a grainy video recorded in poor lighting showing an individual with a hooded sweatshirt with the hood pulled up," mostly obscuring the individual's face. (R. 45:5.) The designs on the individual's clothing were

distinctive in the video, but his face was not, because the bulk of the area was dark and the video quality was poor. (R. 47:8–9.) And as Detective Balsis, who had watched the whole video before the courthouse maintenance office inadvertently overwrote it, expressed at both the preliminary hearing and the motion hearing that due to the dark and grainy quality it was not possible from the video to make a positive identification of who was in the courthouse. (R. 47:8–11; 82:8–9.) Law enforcement identified Mayotte as the likely suspect not due to the video, but due to the wealth of other evidence implicating him and the fact that there was nothing in the video that would eliminate him as the perpetrator. (R. 47:5–6, 10–16; 82:8–10.)

In other words, there was nothing in the video that would cause law enforcement to believe the video was at all exculpatory. (R. 82:19–20.) Mayotte was not excluded by the video—the person captured was a Caucasian male whose build wasn't obviously different than Mayotte's. (R. 82:20–21.) And considering that: (1) Mayotte could not be excluded as the person on the video; (2) Mayotte's own brother turned him in for the burglary; (3) his girlfriend and roommate both confirmed that Mayotte was the perpetrator; and (4) police found the remnants of the stolen court files and a sweatshirt matching the one identifiable on the video at his residence; the circuit court appropriately found that law enforcement would have no reason to believe the video was anything but inculpatory. (R. 82:19–20.) Stated differently, the video did not have an exculpatory value that would have been apparent to law enforcement before it was lost.

True, the remaining still shots show that the person on the video could not be definitively identified. (R. 51; 52; 53.) Mayotte himself acknowledged this. (R. 82:13–14.) But the video did not show, or really even suggest, that the person on the video actually *was not* Mayotte, which is what would be necessary for the video to have an exculpatory value that was

apparent before the evidence was lost. (R. 82:20–21); *see Youngblood,* 488 U.S. at 58 (confining law enforcement's obligation to preserve evidence pursuant to the Due Process Clause "to that class of cases . . . in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant"). Here, the police did not try to destroy or conceal the video—the State itself was relying on the contents of the video as part of its own case in chief, and sought to introduce the screenshots that remained after it became clear that the video was no longer available. (R. 2:2, 4; 81:18–23, 33–36.) It would make no sense for the State to want to introduce this evidence if it were apparent that it would exonerate Mayotte. The video was not apparently exculpatory because no one could say one way or the other who the individual in the video was; both sides believed it helped their case.

Mayotte's argument to the contrary was flawed. First, it relied upon the wrong legal standard. Mayotte claimed that evidence is apparently exculpatory anytime it "might be expected to play a significant role in the suspect's defense." (R. 43:3 (citing *Trombetta*, 467 U.S. at 488).) However, the Supreme Court subsequently significantly narrowed that statement and clarified in *Youngblood* that missing evidence is not apparently exculpatory when all that can be said about it that it might have exonerated the defendant if it had showed what the defendant hoped. *Youngblood*, 488 U.S. at 57–58. Second, that was all that Mayotte argued in support of his request for dismissal—that the video's exculpatory value was apparent because defense counsel could think of ways it *could have been* exculpatory *if* the video would have supported them (such as the perpetrator having a particular gait), and since the video was no longer available, no one could say whether those were present or not. (R. 82:27–29.) But that is the exact type of unknowable and disputed facts about lost evidence that the Supreme Court itself characterized as

making the evidence merely "potentially useful" and not "apparently exculpatory." *Youngblood*, 488 U.S. at 57–58. As the circuit court correctly parsed, all Mayotte established was that the video was not incriminating. (R. 82:31.) That, however, does not make it exculpatory—it simply puts the value of the evidence in equipoise between exculpatory and incriminating. At best, then, the video was merely "potentially useful" to Mayotte, which required him to show that law enforcement destroyed it in bad faith to establish a Due Process violation. *Id.* at 58. And Mayotte has always disavowed that the video was destroyed in bad faith. (R. 43:3; 82:13.)

Accordingly, the circuit court appropriately denied Mayotte's pretrial motion to dismiss the charges. It would thus work no manifest injustice to refuse to allow Mayotte to withdraw his plea in order to go to trial just to properly preserve and pursue this claim, because it would fail on its merits.

II. Mayotte cannot show that counsel was either deficient or prejudicial in failing to advise him that entering an *Alford* plea would waive direct appellate review of his pretrial motion to dismiss the charges.

A. *Riekkoff* is not the proper framework for this case.

Mayotte contended below that his counsel was ineffective for failing to inform him that he would waive his ability to appeal the circuit court's ruling on his *Youngblood* motion if he entered a plea, and had he known that, he would have proceeded to trial. (R. 101; 102.) Now, he primarily argues simply that his plea was not knowingly, intelligently, and voluntarily entered because he misunderstood the guilty plea waiver rule, and he seeks reversal based on *State v.*

Riekkoff, 112 Wis. 2d 119, 332 N.W.2d 744 (1983). (Mayotte's Br. 16–21.) This argument is misplaced.

Wisconsin law has long recognized that a defendant's failure to comprehend the collateral consequences of his plea that is based on his own misunderstanding, and not on any affirmative misadvice from the court, the state, or defense counsel—like Mayotte's here—does not render a plea unknowing, unintelligent, or involuntary. *See State v. Brown*, 2004 WI App 179, ¶ 12, 276 Wis. 2d 559, 687 N.W.2d 543 (holding that a defendant's misunderstanding of the collateral consequences of a plea that result only from the defendant's own inaccurate interpretation of what would happen do not render a plea unknowing or involuntary); *see also State v. Rodriguez*, 221 Wis. 2d 487, 498, 585 N.W.2d 701 (Ct. App. 1998) (citing *Birts v. State*, 68 Wis. 2d 389, 396, 228 N.W.2d 351 (1975)) (same). As explained below, *Riekkoff*, which involved both affirmative misadvice and a legally impossible plea, is readily distinguishable from this case. Mayotte's claim should thus properly proceed as an ineffective assistance of counsel claim pursuant to *State v. Bentley*, 201 Wis. 2d 303, 313–14, 548 N.W.2d 50 (1996) and *Hill v. Lockhart*, 474 U.S. 52, 58 (1985).

In *Riekkoff*, the defendant's plea was expressly conditioned on a reservation of the right to appellate review of a pretrial order denying the admission of the defendant's proffered evidence. *Riekkoff*, 112 Wis. 2d at 120–21. "[T]he prosecutor agreed to the conditional plea and the reservation" of the defendant's right to appeal the ruling, "and the trial judge acquiesced in the arrangement." *Id.* at 121. In other words, the right to appellate review of the evidentiary issue was a critical component of the plea agreement itself, and at that time, it remained an open question whether Wisconsin law permitted such conditional guilty pleas. *Id.* at 121–22. The Wisconsin Supreme Court held that, as a matter of public policy, the parties and the trial court could not impose upon

the appellate courts an obligation to review an otherwise waived issue by agreeing to explicitly condition the plea upon appellate review. *Id.* at 124–25, 130. The Court thus held that the defendant in *Riekkoff* must be allowed to withdraw his plea if he wished, because he clearly "pleaded guilty believing that he was entitled to an appellate review of the reserved issue" after being told by both counsel and the court that it would be addressed, and being able to do so was "a primary inducement for Riekkoff's guilty plea." *Id.* at 128–29.

So *Riekkoff* does not stand for the proposition that a defendant may automatically withdraw his or her plea any time the defendant is unaware of or misunderstands the guilty plea waiver rule. It stands for the proposition that a defendant whose plea is entered upon affirmative misadvice about the plea's effect that was endorsed by the court and both parties does not knowingly, intelligently, and voluntarily enter that plea, and thus they may withdraw it. *See id.* at 128; *see also Brown*, 276 Wis. 2d 559, ¶¶ 10–12.

That is not what happened here. The record shows that no one—not the court, the prosecutor, or defense counsel—ever suggested at any point that the plea rested in any degree upon Mayotte's post-judgment ability to appeal the circuit court's pretrial *Youngblood* ruling. (R. 69; 72:2–4; 83:6–23, 27–29; 84:3–5.) There was no discussion among the parties or advice from the court or counsel stating that Mayotte's claim would survive entry of his plea. The ability to appeal the *Youngblood* ruling was never mentioned at all until postconviction proceedings. (R. 69; 72:2–4; 83:6–23, 27–29; 84:3–5.) The court went through the plea colloquy with Mayotte, and he said he understood the plea, its direct consequences, and was satisfied with his attorney's advice about entering it. (R. 83:6–23.) Mayotte's true complaint, and the one he actually pursued below, is that his trial counsel allegedly performed deficiently in failing to ensure that he fully understood the guilty plea waiver rule before he pleaded,

and had he known that he could not raise the issue after pleading he would have proceeded to trial. (R. 101:2–3.) That puts this case squarely under *Bentley*, not *Riekkoff*.

B. The record conclusively demonstrates that trial counsel did not perform deficiently and that Mayotte cannot establish prejudice.

Mayotte cannot, and has not, established deficient performance even if he is correct that he did not understand counsel's explanation of the guilty plea waiver rule. In his brief, Mayotte does not discuss counsel's testimony at the *Machner* hearing nor any of the circuit court's factual findings, and provides not one single fact about what counsel said to him about the guilty plea waiver rule, why counsel's advice was unreasonable, or how it fell below reasonable professional norms. (Mayotte's Br. 21–23.) To the extent Mayotte mentioned counsel's testimony at all, he merely provides three sentences worth of vague, conclusory allegations stating that counsel "had conversations with Mayotte" about appealing the ruling. (Mayotte's Br. 20.) Otherwise, he merely observes that the plea questionnaire doesn't mention the guilty plea waiver rule and that the court did not discuss it during the plea colloquy. (Mayotte's Br. 23.) That says literally nothing about counsel's performance. By failing to provide any explanation of what advice counsel even gave Mayotte about the guilty plea waiver rule and no argument explaining why it was constitutionally unreasonable, Mayotte has failed to meet his burden.

Mayotte could not meet his burden even if he'd tried, for two reasons: (1) trial counsel has no constitutional obligation to explain the collateral consequences of a plea to a defendant; and (2) counsel's testimony at the *Machner* hearing shows that he took reasonable steps to preserve the issue and explained the proceedings to Mayotte to the extent that reasonable counsel would do so.

It is well settled that failure to inform a defendant about a collateral consequence of a plea does not constitute deficient performance. *State v. LeMere*, 2016 WI 41, ¶ 30, 368 Wis. 2d 624, 879 N.W.2d 580. Though no published opinion affirmatively holds that the guilty plea waiver rule is a collateral consequence of a plea, application of the usual rules for determining whether something is a direct consequence of a plea shows that the guilty plea waiver rule is collateral. The direct consequences of a plea about which a defendant must be informed "are those that have a 'definite, immediate, and largely automatic effect on the range of a defendant's punishment.'" *Id.* ¶ 31 (citation omitted). By contrast, collateral consequences are indirect, and rather than flowing from the conviction, "'may be contingent on a future proceeding in which a defendant's subsequent behavior affects the determination' or may 'rest[] not with the sentencing court, but instead with a different tribunal or government agency.'" *Id* (alteration in original) (citation omitted). The guilty plea waiver rule: (1) has no effect on the range of a defendant's punishment; (2) does not come into effect unless a defendant seeks to appeal a waived issue; and (3) comes into effect only if this Court decides to apply the rule. It is therefore a collateral consequence of a plea about which defense counsel has no obligation to adequately inform the defendant.

And even if an ineffective assistance of counsel claim could be based on Mayotte's incomprehension of the guilty plea waiver rule, defense counsel's *Machner* hearing testimony shows that he made a reasonable strategic decision to instead attempt to preserve the issue by reformulating it as a suppression motion. Defense counsel testified that he could not remember specific conversations with Mayotte about appealing the circuit court's denial of the *Youngblood* motion, apart from telling Mayotte he disagreed with the circuit court. (R. 127:10.) He knew that entering a plea would

affect the right to appeal certain issues, but he also knew that review of motions to suppress evidence "are not waived" by a plea pursuant to Wis. Stat. § 971.31(10). (R. 127:10–11.) So, counsel testified, he made a strategic decision to reformulate the issue by seeking to suppress the photographs on the grounds of spoliation of evidence, which would preserve the issue "but with a different procedural posture on appeal." (R. 127:11.)

There was nothing unreasonable about that strategic decision to secure the benefit of the plea agreement while still preserving the ability to appeal the issue in another context; the maneuver was in fact perfectly skillful. Defense counsel was clearly in plea negotiations with the State while the case was proceeding toward the trial date, and made a calculated decision to preserve Mayotte's *Youngblood* claim in a different manner. Counsel admitted that Mayotte was reluctant to go to trial and that their ultimate goal was to avoid prison time for him. (R. 127:13–15.) He therefore opted to pursue what he believed would be the best outcome for Mayotte—accepting the *Alford* plea with a recommendation of probation—while preserving the spoliation of evidence argument the best way he could manage without requiring Mayotte to go to trial and risk going to prison. (R. 127:14–17.) That is exactly what is expected of defense counsel. The fact that he did not explain precisely how the guilty plea waiver rule operates or the finer points of motion procedure to Mayotte does not mean he performed deficiently; Mayotte points to no case suggesting that defense counsel is expected to tutor the defendant in esoteric legal procedure to the degree he's now claiming in order for counsel to fulfill his constitutional duties.

Mayotte also has not, and cannot, show prejudice. He claims that he would have opted for trial if he had known that he had to do so to preserve his right to appeal the denial of his pretrial motion. (Mayotte's Br. 24.) But he failed to explain below and again fails to explain now why a desire to appeal

that motion would have overridden his admitted apprehension about going to trial and his ultimate desire to avoid a prison sentence. (R. 101; 102; Mayotte's Br. 24.) He therefore has offered nothing more than conclusory allegations of prejudice, and those are never sufficient to establish an entitlement to relief. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992); *Bentley*, 201 Wis. 2d at 313–14.

Moreover, to establish prejudice in the plea context, a defendant must show "that a decision to reject the plea bargain [to avoid an indirect consequence] would have been rational under the circumstances." *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010). Mayotte cannot make this showing. If convicted of all of the charges at trial, Mayotte was facing a potential maximum sentence of more than 20 years of imprisonment. (R. 2:1–2.) The *Alford* plea allowed him to plead to a single charge in the five-count information with the remaining charges dismissed and read in, to maintain his innocence, and to receive a joint recommendation of probation with no prison time at all (which the court accepted). Trial counsel testified that Mayotte was apprehensive about going to trial and that they discussed risking "what would likely be a substantial prison sentence versus a probation offer," and trial counsel believed the probation offer was in Mayotte's best interest. (R. 127:13–14.) Rejecting a probation offer and risking a 20 year sentence at trial simply to preserve the ability to appeal a pretrial ruling would not have been a rational choice in this case, especially given the wealth of evidence the State had pointing to Mayotte as the perpetrator.

In sum, Mayotte established neither prong of ineffective assistance of counsel. The circuit court properly denied his motion.

CONCLUSION

This Court should affirm the decision of the circuit court.

Dated this 9th day of May 2023.

Respectfully submitted,

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FORM AND LENGTH 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 5552 words.

Dated this 9th day of May 2023.

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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 9th day of May 2023.

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