STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

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Appeal No. 2022AP1929-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

REYNALDO ROSALEZ,
Defendant-Appellant.

ON APPEAL FROM THE MAY 24, 2019, JUDGMENT OF CONVICTION AS WELL AS THE NOVEMBER 7, 2022, ORDER DENYING ROSALEZ'S MOTION FOR POSTCONVICTION RELIEF, FILED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE GLENN H. YAMAHIRO, PRESIDING.
MILWAUKEE COUNTY CASE NO. 2018CF3441

DEFENDANT-APPELLANT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

Constitutional Provisions

STATEMENT OF THE ISSUE

Whether the postconviction court erred in denying Rosalez's request to withdraw his plea when his trial counsel did not inform him of the protections under *State v. McIntosh*, 137 Wis. 2d 339, 404 N.W.2d 557 (Ct. App. 1987), he was amnestic regarding the incident that gave rise to the charges, and he would not have entered a plea if he had been informed of the *McIntosh* procedure?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Rosalez would welcome oral argument if of interest to the panel. The parties argued several issues before the circuit court and the court obviously struggled with applying *State v. McIntosh* and Rosalez's entitlement to its dictates. Relatedly, publication is appropriate to advance the law regarding an amnestic defendant's due process rights.

STATEMENT OF THE CASE

Reynaldo Rosalez has no memory of the events that currently imprison him. (*See* R.18:4.) That is not to say that he does not know why he is imprisoned; he is fully aware that he pleaded no contest to sexual assault of child. (R.36:12; R.15.) But,

Rosalez does not remember anything about the time period during which the assault is said to have occurred. (*See* R.18:4.) In fact, he has absolutely no memory of then interacting with or sexually assaulting the victim, as she described. (*Id.*) That absence of memory is not a novel condition. (R.96:9; A-Ap 13.) Instead, it has persisted since the night on which the victim said the assault occurred. (*Id.*:44-45; A-Ap 48-49.)

Rosalez told his trial counsel during pretrial litigation that he had no memory of the event. (*See* R.36:3-4.) The matter of Rosalez's absent memory was discussed on the record at his plea hearing as the basis for the State allowing him to plead no contest. (*Id.*) He told the PSI writer that he had no memory of the event. (R.18:4.) And then, when he spoke at sentencing, he reiterated he "would never have consciously harmed" the victim and "first found out . . . about the details" of the allegations when he was being charged. (R.49:32-33.) He told the court that he simply had no "explanation as to what happened that night." (*Id.*:32.) According to trial counsel, Rosalez did not want to "attack[] the credibility" of the victim or her mother "from the beginning," and thus he did not "deny these events" occurred. (*Id.*:26.) He pleaded no contest not because he remembered and knew that he had harmed the victim, but rather because he accepted as true what the victim said. (*See id.*)

Relatedly, if Rosalez had gone to trial, he would have been little help to his defense. In the pretrial stages, he could not have guided his attorney to defensive facts—he doesn't remember anything about the incident. (R.18:4.) What Rosalez does remember about that night is that he took his Ambien, drank some alcohol, and was Skyping with his daughter when his memory goes blank. (*Id.*) The next thing he remembers is waking the next day in his own bed. (*See id.*) At trial, his testimony—if he had given it—would have by necessity consisted almost entirely of a single, repetitive answer: "I don't remember." (See R.119:55-56; A-Ap 59-60.) He could not testify to what he was thinking or doing during the alleged assaults. (*Id.*) He could not proffer any exculpatory explanation of his alleged interactions with the victim. (*Id.*) And, quite frankly, he could offer no meaningful answer to "Did you do it?" The best he could have offered in response is "I don't remember doing it," which is by no means exculpating. (*Id.*)

Despite Rosalez's amnesia and his trial counsel's apparent awareness of it, his trial counsel never discussed with him the possibility of filing a motion protesting

that his amnesia would deny his right to a fair trial. (R.96:16; Ap 20); *see also State v. McIntosh*, 137 Wis. 2d 339, 404 N.W.2d 557 (1987) (leading case on subject). Indeed, when Rosalez pleaded no contest, he did not know that Wisconsin recognizes that an amnestic defendant may, by virtue of that amnesia, be unable to be fairly tried. *Id.* at 349-50. (R.96:46-48; A-Ap 50-52.)

If Rosalez's trial counsel had hired an expert to develop facts relevant to a *McIntosh* claim, he would have learned that Rosalez shows no sign of malingering in his assertion that he cannot remember the night in question. (R.62:11.) On multiple instruments purposed on discerning whether a person is being untruthful in reporting mental health issues, Rosalez's score demonstrates that he is not faking his loss of memory. (*Id.*:8-10.)

Postconviction, Rosalez hired Dr. James Freiburger, a forensic psychologist with a doctorate in clinical psychology and over twenty-six years of experience in the field to assess his claim of amnesia. In his report, Dr. Freiburger explained,

> Malingering was not found in the instruments as described, and feigning, exaggerating, minimizing, and mis-representing symptoms were not indicated. Subject's presentation was consistent with an individual who is responding in an honest and a self disclosing manner. More specifically, subject was consistent in his responses regarding overall functioning and regarding functioning the night of the incidents in question.
>
> His responses and scores suggest that he is relatively honest and self disclosing with mental health professionals. He was found to be forthcoming both in the instruments and during clinical interviews. To a reasonable degree of psychological certainty, given the totality of the information, clinical malingering indicators or evidence that would call into question the veracity or consistency of his self report regarding amnesia the night of the incidents in question were not found.

(*Id.*:11.) With Dr. Freiburger's report in hand pretrial, Rosalez, could have filed a motion averring an inability to be fairly tried. *McIntosh*, 137 Wis. 2d at 349-50. As will be more fully discussed below, *McIntosh*'s procedure is to await the conclusion of trial before deciding whether the defendant was fairly tried. *Id.* at 349. If a fair trial proves impossible because of the defendant's amnesia a case may be dismissed. *Id.* at 350.

But Rosalez knew nothing of *McIntosh*'s rule because his attorney failed to advise him about it. (R.96:16; A-Ap 20.) However, if trial counsel had informed Rosalez that a pretrial motion concerning his right to a fair trial was possible, Rosalez would

not have pleaded no contest. (R.96:47-48; A-Ap 51-52.) Instead, he would have filed the *McIntosh* motion and taken his case to trial with the specific purpose of establishing that his amnesia meant he could not be fairly tried. (Id.)

Postconviction, Rosalez filed a motion to withdraw his plea. (R.61.) He argued that it was the result of his counsel's ineffectiveness, insofar as his counsel had not explained the *McIntosh* rule to him. (Id.:11-17.)

On June 9, 2022, the circuit court held a *Machner* hearing to address the issues raised in Rosalez's postconviction motion. (See R.96; A-Ap at 5.) Rosalez's trial attorney admitted during his testimony that he "never was exploring whether there was a defense based upon [Rosalez's] amnesia." (R.96:25; A-Ap 29.) Defense counsel further admitted that he never discussed *McIntosh* or its rule with Rosalez:

> Q Am I understanding you correctly that when Mr. Rosalez was entering his plea he did not -- at least from the conversations you had with him, he did not understand that he could make a pretrial motion raising his amnesia and then go to trial, and if he lost, raise that issue at that time?
> A I never had that discussion with him. It was not something that I talked discussed with him.

(R.96:16; A-Ap 20.)

In his own testimony, Rosalez confirmed that trial counsel never made him aware of *McIntosh* or the possibility of going to trial to ultimately avoid a conviction:

> Q Do you understand what the *McIntosh* case refers to?
> A I do somewhat, yes.
> Q When is the first time that you heard about that?
> A When I talked with [appellate counsel] about it.
> Q And did [trial counsel] ever bring that up to you?
> A No.
> Q When you entered your plea, Mr. Rosalez, did you know that you had the ability to go to trial and later contest its fairness based on your amnesia?
> A No, I did not.
> Q Do you understand that that may have been a possibility now?
> A I understand it now, yes.

(R.96:46-48; A-Ap 50-52.)

Rosalez also testified that he would not have taken a plea if he had known about *McIntosh*:

Q . . . Would you have entered your plea if you had known about the *McIntosh* rule?
A No, I would not.
Q Can you explain why not?
A Well, I would of taken it to trial. I only knew what [trial counsel] was telling me. I didn't know that I had -- that there were other options out there as far as with my case.
Q Mr. Rosalez, would you prefer not to be convicted of this charge?
A Yes, I would.
Q And if a successful *McIntosh* defense had been presented, do you understand that you possibly could avoid conviction for this case?
A Yes, I do now.
Q Would you have -- how would that have impacted your decision whether to go to trial or not?
A If I would of known?
Q Yes.
A I would of gone to trial, yeah.

(R.96:47-48; A-Ap 51-52.)

Dr. Freiburger also testified at the postconviction hearing. Consistent with his report, he explained that Rosalez shows no evidence of malingering in is assertion that he is amnestic. (R.96:30; A-Ap 34.) Dr. Freiburger further explained that there is no "single medical test that can be run on a person to determine whether they are, in fact, amnestic." (*Id.*:30; A-Ap 34.) However, Dr. Freiburger testified that the tests he ran on Rosalez are "recognized in [his] field as the sort of tests that would help to assess whether a person is or is not amnestic." (*Id.*:31; A-Ap 35.) According to Dr. Freiburger's assessment of those tests in Rosalez's case, as well as the other ancillary material he consulted, he said to a reasonable degree of psychological certainty that Rosalez is not falsely reporting his inability to remember the events in question. (R.62:11.)

In addition to Dr. Freiburger's report and testimony, Rosalez presented documentation from Ambien's manufacturer detailing that memory loss is a significantly occurring side effect of the medication. (R.107, R.108.) Ambien's manufacturer explains:

> Complex sleep behaviors, including sleep-walking, sleep-driving, and engaging in other activities while not fully awake, may occur following the first *or any subsequent use* of AMBIEN. Patients can be seriously injured or injure others during complex sleep behaviors. Such injuries may result in a fatal outcome. Other complex sleep behaviors (e.g., preparing and eating food, making phone calls, or having sex) have also been reported. *Patients usually do not remember these events.* Postmarketing reports have shown that *complex sleep behaviors may occur with AMBIEN alone at*

> *recommended doses, with or without the concomitant use of alcohol* or other central nervous system (CNS) depressants . . .

(R.107:4 section 5.1 (emphasis added).) In other words, Ambien's manufacturer warns its users that taking Ambien may cause them to forget having done any number of things from cooking to having sex. (*Id.*) And, the manufacturer warns that amnesia can occur regardless of whether the user drank alcohol when taking their prescribed Ambien. (*Id.*) Furthermore, such memory loss could occur the first time or it could occur upon "*any* subsequent use." (*Id.* (emphasis added).)

The State proffered no evidence that Rosalez has before remembered the events but was now feigning to have forgotten them. And, the State called no expert to contest Dr. Freiburger's conclusion, nor did it offer any evidence—expert testimony or otherwise—disputing the proposition that Ambien can cause memory loss. (See R.96; A-Ap 5-71.) To the contrary, the State stipulated at the hearing to the admission of the documentary evidence that R0salez had presented from Ambien's manufacturer.

In its decision, the circuit court stated "it is important to compare the facts in [Rosalez's] case with those of the leading case in this area with regard to amnesia, the *McIntosh* decision." (R.119:5; A-Ap 76.) In particular, the court focused on the fact that "the diagnosis [of amnesia] in the *McIntosh* case was not made by a psychologist. It was made by a psychiatrist." (*Id.*) The court went on to say that since Dr. Freiburger was not a "medical doctor" and did not affirmatively make a diagnosis of amnesia, "and also there have been numerous self-reports here that this was not a permanent condition of any sort, the Court believes it is necessary to look at the defendant, his testimony, his credibility, and any inconsistencies that have been made over the course of this case with regard to drug use, alcohol use, and the mixing thereof." (*Id.*:5-6; A-Ap 76-77.)

Ultimately the circuit court found that in "the absence of any diagnosis and—and I think, frankly, the statement that he did not dispute at sentencing where it was stated that he didn't know if he was unable to remember what happened or if that it was such a painful event he could not force himself to remember it seems to be a more likely scenario to the Court. I do not find any basis here to find that he suffers from amnesia." (*Id.*:8-9; A-Ap 79-70.) Based on not finding amnesia, the court denied the postconviction motion. (R.119:9; A-Ap 80.) It did not otherwise address the elements of Rosalez's ineffectiveness claim. (*See id.*) Rosalez appeals.

SUMMARY OF THE ARGUMENT

Rosalez seeks to withdraw his no contest plea. He claims entitlement to that relief because his trial counsel was ineffective for failing to inform him that, as a defendant amnestic of the charged incident, he could contest his ability to be fairly tried. Rosalez avers that his counsel's failure to so advise him was deficient because (1) Rosalez's amnesia was established by a clear preponderance of the evidence and (2) Rosalez was entitled to know about the *McIntosh* rule when deciding whether to plead or go to trial. Rosalez argues prejudice because he would not have pleaded no contest if trial counsel had rightly informed him about *McIntosh* and the impact of his amnesia on his right to a fair trial.

Rosalez offers the following in support.

ARGUMENT

I. Due to his amnesia surrounding the offense, Rosalez was entitled to an established procedure by which to ensure that he received a fair trial.

A. The law governing amnesia and the constitutional right to a fair trial.

The state and federal constitutions guarantee all defendants the right to due process. U.S. Const. Amend. XIV; Wis. Const. Art. I, § 8. A fundamental component of due process is the defendant's opportunity to defend himself through the assistance of his counsel and the opportunity to present evidence. *Jackson v. Virginia*, 443 U.S. 307, 314 (1979), *Chambers v. Mississippi*, 410 U.S. 284, 294-95 (1973), *State v. Hanson*, 2012 WI 4, ¶45, 338 Wis. 2d 243, 808 N.W.2d 390.

Wisconsin courts have before concluded that trying a criminal defendant who has amnesia can result in a violation of that defendant's right to due process. *State v. McIntosh*, 137 Wis. 2d 339, 348-49, 404 N.W.2d 557, 561-62 (1987). Our courts have explained that, when a defendant is suffering from amnesia, the ability to assist counsel or present evidence may be so undermined that trying the defendant would be a violation of due process. *Id.*

Whether an amnestic defendant can receive a fair trial is subject to a multifactor analysis first adopted in *McIntosh*, 137 Wis. 2d at 349. Our appellate court has identified the following factors as relevant when deciding whether a defendant's amnesia prevents a fair trial:

> (1) the extent to which the amnesia affected the defendant's ability to consult with and assist his lawyer;
> (2) the extent to which the amnesia affected the defendant's ability to testify in his own behalf;
> (3) the extent to which the evidence in suit could be extrinsically reconstructed in view of the defendant's amnesia;
> (4) the extent to which the State assisted the defendant and his counsel in that reconstruction;
> (5) the strength of the prosecution's case, including whether the State's case is such as to negate all reasonable hypotheses of innocence, and/or any substantial possibility that the accused could, but for his amnesia, establish a defense; it should be presumed that he would have been able to do so; and
> (6) any other facts and circumstances which would indicate whether or not the defendant had a fair trial.

McIntosh, 137 Wis. 2d at 349-50 (*citing Wilson v. United States*, 391 F.2d 460 (D.C. CiR.1968))

The impact of amnesia on a defendant's due process rights is a unique issue in the law where courts have considered pretrial objections *after* the trial concludes. *McIntosh*, 137 Wis. 2d at 349, *State v. King*, 187 Wis. 2d 548, 558, 523 N.W.2d 159 (Ct. App 1994). In the prior cases to have considered the issue, the defendant brought a pretrial motion protesting amnesia as an impediment to a fair trial. *McIntosh*, 137 Wis. 2d at 346, *King*, 187 Wis. 2d at 556. However, the circuit court in each case postponed a decision on the motion until after the trial. *McIntosh*, 137 Wis. 2d 346-47, *King*, 187 Wis. 2d at 557. And, in each case, the reviewing court noted that what occurred at trial was relevant deciding whether the defendant was fairly tried. *McIntosh*, 137 Wis. 2d at 351, *King*, 187 Wis. 2d at 558.

Importantly, the seminal Wisconsin case dealing with an amnestic defendant's right to receive a fair trial recognized that, "in many cases," assessing what occurred *at trial* is a key part of the analysis. *McIntosh*, 137 Wis. 2d at 349. Indeed, the *McIntosh* factors require consideration of things like "the strength of the prosecution's case" and "facts and circumstances which would indicate whether or not the defendant had a fair trial." *Id.* at 349-50. By their very nature, the weight of

those factors can be known only after a trial has been conducted. And thus, *McIntosh* noted that deciding whether an amnestic defendant's right to a fair trial can be respected often "will have to await the trial's end." *Id.* at 349. After trial, the court can look to the *McIntosh* factors "to determine whether, in light of the defendant's disability, he or she nonetheless received a fair trial." *Id.* at 351.

Proof that a defendant has amnesia is an obvious condition precedent to establishing an amnesia-based due process violation. *Id.* And thus, the threshold question in this case is whether Rosalez is amnestic. A defendant seeking to invoke *McIntosh*'s provisions must prove the presence of amnesia by a clear preponderance of the evidence. *Muench v. State*, 60 Wis. 2d 386, 392-93, 210 N.W.2d 716, 719-20 (Wis. 1973) (overruled on other grounds by *Schimmel v. State*, 84 Wis. 2d 287, 267 N.W.2d 271 (Wis. 1978)), *State v. Leach*, 124 Wis. 2d 648, 663, 370 N.W.2d 240, 254 (Wis. 1985). In other words, Rosalez need not prove his amnesia beyond a reasonable doubt. Instead, he must show only that it is more likely than not that he is amnestic.

B. Rosalez proved that he is amnestic.

To decide whether a person has proven that they are amnestic, *McIntosh* identified three elements of proof. In *McIntosh* the court had appointed a psychiatrist to evaluate the defendant who concluded that "(1) McIntosh's amnesia was consistent with his injuries; (2) there was 'no reason to doubt the permanence of a significant part of [his] memory loss'; and (3) while McIntosh was unable to recall the details of the accident, he was nonetheless" competent to stand trial, allowing the trial to proceed. *McIntosh*, 137 Wis.2d at 346. That reasoning suggests that there only three things need be proven to ensure fidelity to *McIntosh*: 1) that amnesia is consistent with the alleged cause; 2) that there is no indication the amnesia is feigned; and 3) that competency to proceed to trial is not at issue. Rosalez proved all three of those things in his case.

Regarding *McIntosh*'s first element of proof—consistency between amnesia and the triggering event—Rosalez showed that his amnesia was consistent with Ambien use, regardless of its combination with alcohol. The parties stipulated to the admission of documentation from Ambien's manufacturer detailing that memory loss is a significantly occurring side effect of the medication. (R.107-108.) Ambien's manufacturer acknowledges and warns that *any* use of Ambien at standard dosage can cause behaviors that patients do not remember, with or without use of alcohol.

(R.107:4 sec. 5.1.) Ambien's manufacturer even warns its users that taking Ambien may cause them to forget having done any number of things including sex. (*Id.*) And they make clear that memory loss can happen regardless of whether the user drank alcohol while taking Ambien. (*Id.*) Interestingly, the matter of Rosalez's amnesia did not become apparently contested until Rosalez decided to challenge his plea during postconviction proceedings. (*See* R.36:2, R.49:23-25.) As Rosalez has before explained, the State agreed to allow him to plead no contest—rather than guilty—because of his professed amnesia. (R.36:2.) And the sentencing court spoke of admitted awareness of instances in which people on Ambien had become amnestic, as is Rosalez's claim here. (R.49:23-25.)

Regarding *McIntosh*'s second criteria—the absence of reason to doubt amnestic permanency—Dr. Freiburger, a forensic psychologist, testified that tests commonly utilized in his field to assess the veracity of a person's self-report of amnesia showed that Rosalez is not malingering in that claim. Rosalez underwent a psychological evaluation purposed on a assessing his claim that he has no memory of the assault. Dr. Freiburger tested Rosalez with several psychological instruments to gauge whether he might be malingering in his amnesia. (R.62:7-10.) Relevant psychological research has before noted that formal testing of the sort utilized by Dr. Freiburger in this case can successfully ferret out false claims of amnesia. *See* Bernice A. Marcolpulos, Laysa Hedjar, & Beth C. Arredondo, *Dissociative Amnesia or Malingered Amnesia? A Case Report*, 16 J. Forensic Psych. Practice 106 (MaR.30, 2016). But in Rosalez's case, not one of the instruments with which he was tested showed him to be falsely reporting his lack of memory. (R.62:10.) Dr. Freiburger ultimately concluded that "[m]alingering was not found" by the tests that were performed on Rosalez. (*Id.*) Likewise, Rosalez demonstrated no "feigning, exaggerating, minimizing, [or] mis-representing [of his] symptoms." (*Id.*:11) Dr. Freiburger concluded, "[t]o a reasonable degree of scientific certainty," that none of the "clinical malingering indicators or evidence that would call into question the veracity or consistency of [Rosalez's] self report regarding amnesia" were found. (*Id.*) Rosalez's performance on those instruments is thus proof that he is truthfully reporting his amnesia.

Consistently, Rosalez's trial attorney admitted that Rosalez maintained throughout the representation that he had no memory of what occurred. (R.96:9; A-Ap 13.) Even at the evidentiary hearing in this case, Rosalez continued to profess a

complete lack of memory regarding the offense with which he is charged. (*Id.*:44-45; A-Ap 48-49.) And, as noted above, even the State and the sentencing court had no trouble accepting Rosalez's asserted lack of memory *before* Rosalez sought to withdraw his plea. It seems that the parties and the court were all on the same page that Rosalez could not remember the incident *until* he sought to invoke his rights under *McIntosh*. Rosalez can thus prove beyond a preponderance of the evidence that he is amnestic.

Lastly, *McIntosh*'s third criteria—competency—is not at issue in this case; no one has ever challenged Rosalez's competency.

And thus, as detailed above, Rosalez proved all three of the elements required by *McIntosh* to establish himself as an amnestic.

B. The postconviction court erred in concluding that Rosalez did not prove himself amnestic.

However, when deciding that Rosalez had not proven his amnesia, the postconviction court added an element to the *McIntosh* test that is unsupported by that decision. Namely, the court focused on the fact that "the diagnosis [of amnesia] in the *McIntosh* case was not made by a psychologist. It was made by a psychiatrist." (R.119:5; A-Ap 76.) And, the postconviction court relied on the fact that Rosalez's expert was not a psychiatrist to conclude that Rosalez had not satisfied the *McIntosh* proof. But *McIntosh* does not stand for the proposition that a psychiatrist is needed or required to determine amnesia is present, nor is it expressly clear in *McIntosh* that a psychiatrist made such a diagnosis.

Instead, as explained above, all that a defendant needs to prove is that (1) amnesia is consistent with the triggering event, (2) there's been no reason offered to doubt amnestic permanence, and (3) that the defendant is not making a competency challenge. *McIntosh*, 137 Wis.2d at 346. In fact, *McIntosh* does not suggest that a psychiatrist need be the sole basis for opining or finding that amnesia is present. *McIntosh*, 137 Wis.2d at 348. There is nothing in *McIntosh* holding that a particular sort of expert is necessary to prove that a person is amnestic.

Importantly, what is present in the record in Rosalez's case was more than enough to meet the criteria outlined in the *McIntosh* decision, even though his expert offered only psychological and not psychiatric testimony. And thus, the

postconviction court erred in adding a factor to the *McIntosh* test that the decision does not require.

In addition to erroneously adopting a legal standard not recognized by *McIntosh*, the circuit court additionally made an error of fact. That is to say, the postconviction court additionally reasoned that "there have been numerous self-reports here that this was not a permanent condition of any sort." (R.119:6; A-Ap 77.) But the record will not support that statement. To the contrary, Rosalez has never self-reported that his amnesia about the underlying incident was temporary. Indeed, all of the testimony at the hearing supported the opposite conclusion that Rosalez has never waivered in his inability to recall what occurred. As such, the postconviction court's reliance on "numerous self-reports" concerning non-permanent amnesia was clearly erroneous. The record simply does not support that factual finding, which the postconviction court relied upon when denying Rosalez's motion. As such, the circuit court's decision is based on a clearly erroneous factual finding.

The postconviction court's conclusion is infirm for another reason: it's ultimate finding defies logic. At the end of its oral decision, the postconviction court made the following statement:

> [In] the absence of any diagnosis and -- and I think, frankly, the statement that he did not dispute at sentencing where it was stated that he didn't know if he was unable to remember what happened or if that it was such a painful event he could not force himself to remember it seems to be a more likely scenario to the Court. I do not find any basis here to find that he suffers from amnesia.

(R.119:8-9; A-Ap 79-80.) That logic is confounding.

The postconviction court is suggesting that one of two scenario's is present: either Rosalez is unable to remember, or Rosalez cannot force himself to remember. From that premise, the postconviction court concludes that there is no basis to find amnesia. But, in either situation, Rosalez cannot remember. And amnesia is precisely, by definition, the loss of memory, *viz.* the inability to remember. Again, the stated basis for the postconviction court's decision is clearly erroneous: saying that someone cannot remember but is not amnestic. That's not a thing.

In sum, there is simply no evidence in the record contradicting Rosalez's claim of amnesia or Dr. Freiburger's conclusion that he is not malingering. The State had no evidence that Rosalez has before remembered the events but is only now feigning to

have forgotten them. Furthermore, the State called no expert to contest Dr. Freiburger's conclusion, nor did it offer any evidence—expert testimony or otherwise—disputing the proposition that Ambien can cause memory loss.

On the clear preponderance of the evidence that was presented to the circuit court, Rosalez showed that his amnesia is consistent with the medication he was on and that he is not feigning, the two salient criteria established by the expert and acknowledged by the court in the *McIntosh* case. Given that the postconviction court's contrary ruling is (1) inconsistent with *McIntosh*'s test, (2) based on an clear factual error, and (3) internally illogical, it constitutes an erroneous exercise of discretion.

Whereas Rosalez can prove himself amnestic, the question then becomes whether his plea resulted from ineffective assistance of counsel, given that his attorney did not address the *McIntosh* rule with him.

II. When he pleaded no contest, Rosalez did not know he could challenge his right to a fair trial under *McIntosh* because his trial counsel never told him. If he had known differently, he would not have pleaded no contest. Rosalez should thus be allowed to withdraw his plea because of his counsel's ineffectiveness.

The right to effective assistance of counsel is constitutionally guaranteed. U.S. Const. Amend. VI, *Wis. Const. Art. I, § 7*, *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984), *State v. Thiel*, 2003 WI 111, ¶11, 264 Wis. 2d 595, 665 N.W.2d 305. A plea that results from the ineffective assistance of counsel can be withdrawn. *Hill v. Lockhart*, 474 U.S. 52, 56-57 (1985) , *State v. Bentley*, 201 Wis. 2d 303, 311-12, 548 N.W.2d 50 (1996).

A defendant seeking to prove ineffective assistance must show both deficient performance by counsel and resulting prejudice. *Strickland*, 466 U.S. at 687. In the plea withdrawal setting, as with any other, deficient performance occurs whenever counsel's representation falls below the range of competence demanded of attorneys in criminal cases. *Hill*, 474 U.S. at 56-57. The prejudice component "focuses on whether counsel's constitutionally ineffective performance affected the outcome *of the plea process*," *id.* at 59 (emphasis added), to such a degree that it rendered it unreliable, *Strickland*, 466 U.S. at 693-94. If a defendant can prove a "'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and

would have insisted on going to trial,'" he can establish prejudice. *Bentley*, 201 Wis. 2d at 312, 548 N.W.2d at 54 (quoting *Hill*, 474 U.S. at 59). When the defendant proves prejudice derivative of his counsel's deficient performance—that is, a plea that otherwise would not have been entered—the court must grant relief and allow the plea to be withdrawn. *See Williams v. Taylor*, 529 U.S. 362, 394-95 (2000). No supplemental, abstract inquiry into the "fairness" or "reliability" of the proceedings is permissible. *Id.*

In Rosalez's case, based on not finding a basis for amnesia, the circuit court never made a determination on the issue of ineffective assistance of counsel. (See R.119:9; A-Ap 80.) Regardless, the standard here should de novo. On appeal, "the ultimate determination of whether counsel's performance was deficient and prejudicial to the defense are questions of law which [appellate court's] review[] independently." *Thiel*, 2003 WI 111, ¶23 (quotation, textual alteration, and authority omitted). The postconviction court's factual findings, however, are reviewed for clear error. *State v. Jenkins*, 2014 WI 59, ¶38, 355 Wis. 2d 180, 848 N.W.2d 786.

A. Rosalez's attorney was deficient in failing to advise him of the *McIntosh* rule and its applicability to his case.

As discussed above, Rosalez's trial attorney admitted during postconviction testimony that he "never was exploring whether there was a defense based upon [Rosalez's] amnesia." (R.96:25; A-Ap 29.) And defense counsel further admitted that he never discussed *McIntosh* or its rule with Rosalez. (R.96:16; A-Ap 20.)

For his part, Rosalez confirmed that trial counsel never made him aware of *McIntosh* or the possibility of going to trial to ultimately avoid a conviction. (R.96:46-48; A-Ap 50-52.)

The testimony at the postconviction hearing thus clearly established that Rosalez did not know of *McIntosh* or its rule when he chose to plead no contest. The deficiency question must then ask whether it was unreasonable for Rosalez's trial counsel not to discuss *McIntosh* with him before counseling him to take a plea. The answer to that question must be yes.

Relevantly, trial counsel explained that he did not discuss *McIntosh* with Rosalez because Rosalez "never had an intent to go to trial because he did not want to put the [victim] through testimony." (*Id.*:15; A-Ap 19.) Rosalez disagreed with that

assertion, testifying that it was "untrue" that he had "said [he] wanted to resolve this because [he] didn't want to put the [victim] through a trial." (*Id.*:53; A-Ap 57.) But even if we accept trial counsel's version—that Rosalez was intent on not having a trial—his failure to advise Rosalez of *McIntosh* remains objectively unreasonable. And trial counsel's own admitted pretrial behavior belies the unreasonableness of his purported justification for not talking to Rosalez about *McIntosh*.

Namely, trial counsel testified at length that he had contacted an expert about the possibility of proffering an involuntary intoxication defense. (R.96:9-10, 17, 23-25; A-Ap 13-14, 21, 27-9.) He abandoned that avenue of inquiry only when the expert told him that the mixing of two substances—alcohol and Ambien—would render an involuntary intoxication defense impossible. (*Id.*:23; A-Ap 27.) So, we know that for at least some time during pretrial proceedings defense counsel was admittedly investigating a possible trial defense to these allegations. If it was the case that Rosalez was always against a trial and always set on a plea, then why was trial counsel investigating defenses? There are two options.

First, it is possible that trial counsel is misremembering that Rosalez was dead set on a plea. After all, the fact that Rosalez may have at some point been noncommittal towards a plea surely explains trial counsel's having undertaken the investigation of an involuntary intoxication defense.

Second, it is possible that—even though Rosalez may have professed to want a plea—trial counsel was acting in accordance with his obligations as a defense attorney and nonetheless investigating possible avenues for challenging his client's case. Even if Rosalez told trial counsel at the outset that he wanted to take a plea, trial counsel should nonetheless have undertaken an investigation of the facts and law so that he could adequately advise Rosalez whether to admit responsibility. The ABA's Criminal Justice Standards) clearly reflect that principle:

> In every criminal matter, defense counsel should consider the individual circumstances of the case and of the client, and should not recommend to a client acceptance of a disposition offer unless and until appropriate investigation and study of the matter has been completed. Such study should include discussion with the client and an analysis of relevant law, the prosecution's evidence, and potential dispositions and relevant collateral consequences.

ABA, *Criminal Justice Standards: Defense Function* § 4-6.1(b) (4th ed. 2017) (available at https://bit.ly/2nEGBdJ) (last accessed Sept. 16, 2022); *see also Strickland*, 466 U.S. at 688-89) (ABA standards "are guides to determining what is reasonable"). And trial counsel's own actions in Rosalez's case are partially in line with those standards. Namely, trial counsel's investigation of the involuntary intoxication defense shows a willingness to investigate alternate outcomes even if Rosalez was always in plea posture.

Through that lens, the matter of failing to discuss *McIntosh* proves objectively unreasonable. Even if Rosalez told his attorney that he did not want to put the victim through trial, trial counsel should *still* have advised Rosalez about *McIntosh*. We know based on trial counsel's testimony that (1) he is familiar with *McIntosh* (R.96:19; A-Ap 23) and (2) he knew that Rosalez said he could not remember the crime (*Id.*:9; A-Ap 13). Under those circumstances, telling Rosalez about *McIntosh* would have been part of the "discussion with the client and an analysis of relevant law" that the ABA Standards contemplate defense counsel will undertake before counseling a client to plead guilty. ABA, *Crim. Justice Stds.: Def. Function* § 4-6.1(b).

Rosalez absolutely needed to know about *McIntosh* so that he could meaningfully assess whether to enter a plea. As Rosalez explained postconviction, given what he now knows about *McIntosh*, he would not have entered a plea. (R.96:48; A-Ap 52.) He would instead have undertaken a trial with the aim of having his conviction thrown out as the result of an inability to be fairly tried. (*Id.*) Rosalez's pretrial choice to take a plea—even if bottomed on a want to spare the victim a trial—was wholly uninformed by the existence of *McIntosh* and the possibility that, even if he is found guilty at trial, he could still garner dismissal of the charges against him. That gaping hole in Rosalez's knowledge is the result of his trial counsel's failure to tell him that, even though he had no defense, he may still have avoided criminal liability altogether pursuant to *McIntosh*.

There is simply no way that trial counsel's failure to even discuss *McIntosh* with Rosalez can be deemed objectively reasonable under the facts of this case.

B. Rosalez would not have pleaded no contest and instead gone to trial if he had known about the *McIntosh* rule.

We cannot now assess how Rosalez's *McIntosh* claim would come out because he has not had a trial, leaving key elements of the *McIntosh* test unknown. *See McIntosh*,

137 Wis. 2d at 349. But the inability to decide whether Rosalez could be fairly tried is not dispositive. What matters for prejudice in these circumstances is not how Rosalez's *McIntosh* claim would be decided, but rather what impact the ability to make that claim would have had on Rosalez's decision whether to plead no contest.

The Supreme Court has explained that the prejudice inquiry "do[es] not ask whether, had [the defendant] gone to trial, the result of that trial 'would have been different' than the result of the plea bargain." *Lee v. United States*, 582 U.S. ____, ____, 137 S. Ct. 1958, 1965 (2017). "Instead," the relevant question is "whether the defendant was prejudiced by the 'denial of the entire judicial proceeding . . . to which he had a right.'" *Id.* (quoting *Roe v. Flores–Ortega,* 528 U.S. 470, 483 (2000)). Consistently, *Hill* tells courts to assess prejudice based on "'a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Id.* (quoting *Hill*, 474 U.S. at 59).

In *Lee*, the Court rejected the bright line rule that, for prejudice purposes, "a defendant must also show that he would have been better off going to trial." *Id.* Admittedly, reasoned the Court, that question is rightly applied "when the defendant's decision about going to trial turns on his *prospects of success* and *those are affected by the attorney's error*—for instance, where a defendant alleges that his lawyer should have but did not seek to suppress an improperly obtained confession." *Id.* (emphasis added). But, "[n]ot all errors . . . are of that sort," said the Court. *Id.*

In fact, the attorney error Rosalez avers here is not one that has any bearing on the prospect of his success at trial. Rosalez is not complaining, for example, that his attorney failed to exclude or to find evidence. He is not arguing that if his attorney had told him about *McIntosh*, he might have won a trial that he otherwise would have lost. In fact, the *McIntosh* rule "ha[s] nothing to do with" Rosalez's "prospects of acquittal at trial." *See id.* Relevantly, when an alleged deficiency does not go to the likelihood of trial success, the potential outcome of trial is not determinative of prejudice because "the inquiry [the Court] prescribed in *Hill v. Lockhart* focuses on a defendant's decisionmaking, which may not turn solely on the likelihood of conviction after trial." *Id.* Instead, in those circumstances, the prejudice inquiry focuses on whether it would have been rational for the defendant to reject the plea in favor of trial. *See id.* at 1968.

Consistent with *Lee*, the Seventh Circuit has before explained that a defendant's "personal choice to roll the dice is enough to satisfy the 'reasonable probability' standard" and prove *Strickland* prejudice in the plea withdrawal setting. *DeBartolo v. United States*, 790 F.3d 775, 778 (CA7 2015). In *DeBartolo*, the Seventh Circuit warned that "[j]udges and prosecutors should hesitate to speculate on what a defendant would have done in changed circumstances" when deciding *Strickland* prejudice. *Id.* The existence of "a reasonable probability that [the defendant] would not have pleaded guilty . . . is all that matters to" a prejudice finding. *Id.*

In Rosalez's case, there is a reasonable probability that—if he had been advised of the *McIntosh* rule—he would not have pleaded no contest, but instead gone to trial to fully effectuate his rights under *McIntosh*. Do not forget: the possible upside of a trial to Rosalez is significant. Consistent with *McIntosh*, if what occurred at trial proved that his amnesia precluded him from being fairly tried, it would result in dismissal of the charges against him. In other words, even if the jury convicted Rosalez at trial, that conviction could be set aside if the court subsequently concluded his trial had been unfair under *McIntosh*. Rosalez—rightly advised—would thus have had a significant incentive to reject the deal that was being offered to him in favor of a trial.

Balanced against that upside is the relatively insignificant downside to trial. Significantly, Rosalez's plea did not net him a change in the charges. (R.36:2; *also compare* R.7 *with* R.15:1.) It is not as though his plea allowed him to avoid criminal liability for some more serious offense than he would have faced had he gone to trial. Instead, he pleaded no contest to the original charges. One thus cannot point to some downward modification of the crime or the potential penalty as an incentive to Rosalez to plead rather than invoking *McIntosh* and going to trial. Instead, the availability of *McIntosh* and Rosalez's ability to assert it as a possible way by which to avoid liability altogether shows that going to trial would not have been an irrational choice.

Or, to put it differently, Rosalez's assertion that he would have chosen *McIntosh* and a trial over the proffered plea agreement constitutes a rational decision in light of the facts and circumstances of his case. Rosalez can thus show that he was prejudiced by his counsel's deficient performance because there is a reasonable probability that he would not have entered his plea but rather gone to trial. *Hill*, 474 U.S. at 59

His no contest plea was therefore the result of his counsel's ineffective assistance, and he should be allowed to withdraw it.

C. Rosalez proved prejudice.

As detailed above, Rosalez very clearly testified that he would not have taken a plea if he had known about *McIntosh*. (R.96:47-48; A-Ap 51-52.) He explained that he trusted his trial attorney and thought "that if there was something that would help [him], [trial counsel] would have talked to [him] about it." (*Id.*:51; A-Ap 55.) After all, Rosalez had known his trial attorney "for 30 years" and "knew he was a good attorney." (*Id.*:49-50; A-Ap 53-54.) He "thought that [trial counsel] would look at everything." (*Id.*:50; A-Ap 54.) He "considered him a friend; a friend of [his] family. When [trial counsel] told [Rosalez] that [he] would lose and that there was nothing that could be done, [Rosalez] just kind of lost all hope." (*Id.*) A plea was the only choice. (*See id.*)

But now, circumstances are different. Rosalez has an opportunity to find relief from his conviction: pursue a *McIntosh* motion and, if convicted, challenge the fairness of his trial in light of his amnesia. As Rosalez has before explained, the possibility of dismissal following trial is a huge incentive for him not to plead no contest. (*See* R.61:16-18.) And, against that possible result is the fact that he pleaded to the charged offense. It is not as though, by his plea, he scored dismissal of some counts or a reduction of the maximum penalty he faced. Instead, Rosalez pleaded to the charged offense. Thus, a conviction at trial would net him the very same conviction as did his plea.

Under those circumstances and consistent with Rosalez's postconviction testimony, it would have been rational for him to forgo the plea if he had been informed about *McIntosh*. *See Lee v. United States*, 582 U.S. ____, ____, 137 S. Ct. 1958, 1965 (2017). As such, he can prove prejudice derivative from his trial attorney's failure to inform him about *McIntosh*. *Id.*

CONCLUSION

Rosalez pleaded no contest without knowing that there was an avenue by which he could possibly have had his case dismissed: file a *McIntosh* motion and go to trial. He did not know of that option because his trial attorney never discussed it with him. Rosalez's trial attorney was thus deficient. Under the circumstances of Rosalez's

case, it would have been rational for him to not plead guilty, but rather to go to trial on the hopes that he could establish his right to dismissal. In that regard, Rosalez's plea is the result of his attorney's ineffectiveness. He asks this Court to reverse the postconviction court and remand his case with directions that he be allowed to withdraw his plea.

Dated this 17th day of March, 2023.

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RULE 809.19(8g)(a) CERTIFICATION

I certify that this brief conforms to the rules contained in Section 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 7,381 words, as counted by the commercially available word processor Microsoft Word.

Dated this 17th day of March, 2023.

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RULE 809.19(8g)(b) CERTIFICATION OF APPENDIX CONTENT

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Section 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the

issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 17th day of March, 2023.

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