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 REPLY BRIEF

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ARGUMENT

I. Rosalez's attorney deficiently failed to advise him about the *McIntosh* rule.

The State makes two arguments in response to Rosalez's contention that his attorney deficiently failed to advise him of *State v. McIntosh*'s[1] rule. (*See generally* St.'s Br. at 2 (table of contents).) One: Rosalez failed to prove his amnesia, and thus cannot trigger entitlement to *McIntosh*. (*Id.*) And two: even if he is amnestic, Rosalez needn't have been advised of *McIntosh* because he would ultimately lose on the merits after a future, hypothetical trial. (*Id.*) Rosalez offers the following in reply.

A. The State's challenges to the adequacy of Rosalez's evidence are not convincing.

Rosalez's contention in these proceedings is that he is amnestic of the criminal acts that imprison him and that the postconviction court erred in finding to the contrary. (*See generally* Rosalez's 1st Br. at 2 (table of contents).)

Siding with the postconviction court, the State argues that Rosalez failed to present adequate evidence proving his amnesia. (St.'s Br. at 14-20.) In support of his amnesia claim, Rosalez adduced (1) his testimony that he took Ambien and cannot remember, (2) the report and testimony of a psychologist that Rosalez is not malingering, and (3) documentary evidence from Ambien's manufacturer establishing that amnesia is a known side effect of its standard usage. (*See* Rosalez's 1st Br. at 12-14.) But the State says that that evidence cannot fulfill *McIntosh*'s test because it is not "medical evidence." (St.'s Br. at 16.) Without offering a specific definition for that term, the State tells this Court that what Rosalez presented isn't it. Rosalez disagrees.

At one point, it seems as though the State wants to limit medical evidence to evidence from a doctor. (*See id.* at 16-17.) But surely, this Court doesn't want to write an opinion holding that medical evidence is limited to only those persons with

[1] 137 Wis. 2d 339, 404 N.W.2d 557 (Ct. App. 1987).

medical degrees. Our entire health industry is populated with medical professionals who do not possess a medical degree. Nurse practitioners, physician assistants, pharmacists, and psychologists—to name but a few—are all professionals intrinsic to the provision of modern medicine. And not one of those persons is a medical doctor, although each of them has an advanced degree. If a pharmacist was to offer evidence about the interaction of drugs, would that not be medical evidence? If a sexual assault nurse examiner testified about the likely cause of physical injuries found on a victim in the emergency room, would that not be medical evidence?

Why then should a psychologist's opinion like the one that Rosalez offered not count as medical evidence? Nothing in *McIntosh*'s holding—the seminal case governing an amnestic defendant—dictates that evidence from a medical doctor is necessary to prove amnesia. *McIntosh*, 137 Wis. 2d at 351. Sure, *McIntosh* concluded that evidence from a medical doctor was sufficient; but it said nothing about it being necessary. *See id.* at 346, 351. And thus, the report and testimony of Rosalez's psychological expert should be recognized as evidence capable of inclusion in this Court's assessment of whether Rosalez's amnesia claim is medically proven.

Similarly, the facts about Ambien contained in a publication produced by its own manufacturer should count as medical evidence. (*See* R.107.) In that publication, Ambien's manufacturer details the drug's "full prescribing information," including such things as "dosage and administration," "adverse reactions," and "clinical pharmacology." (*See id.*:1-2 (table of contents) (capitalization altered).) It makes no sense to call the information in that publication something other than medical evidence; it's information offered to patients and providers alike to ensure that the medication is "use[d] . . . safely and effectively." (*Id.*:1.) Like the testimony and report of Rosalez's psychologist, the drug facts set forth by Ambien's manufacturer in its own publication should count as evidence salient to the assessment whether Rosalez's amnesia claim is medically proven.

Significantly and contrary to the State's approach, *McIntosh* makes no mention of a doctor's medical diagnosis of amnesia. *See McIntosh*, 137 Wis. 2d at 346-52. Instead, as Rosalez pointed out in his opening brief, the psychiatrist in *McIntosh* offered only three conclusions: "(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 still legally competent. *Id.* at 346; (*see also* Rosalez's 1st Br. at 12). On

those findings, *McIntosh* concluded that the defendant's "permanent amnesia ha[d] been medically established." *McIntosh*, 137 Wis. 2d at 348. The result should be the same in Rosalez's case.

Undisputed evidence in the record proves that: (1) Rosalez's amnesia is consistent with his Ambien usage (proven by the stipulated-to publication by Ambien's manufacturer); (2) that psychological instruments used to discern misrepresentation of symptoms did not recognize any malingering in Rosalez's claimed amnesia or its permanence (proven by Dr. Freiburger's report and testimony, as well as Rosalez's testimony); and (3) no challenge was ever made to Rosalez's competency. That puts him on the same page as the *McIntosh* defendant.

Admittedly, it seems easy to understand the genesis of the defendant's amnesia in *McIntosh*: he'd "received severe head injuries in [an] accident." *McIntosh*, 137 Wis. 2d at 346. Something about that physical cause of amnesia clicks in our brains as obvious because it's what is commonly portrayed in fictional accounts: a trauma to the head causes you to forget. *See, e.g., Regarding Henry* (Paramount Pictures 1991) (plot summary available at https://en.wikipedia.org/wiki/Regarding_Henry). But the genesis of Rosalez's amnesia should be no less understandable than the *McIntosh* defendant's. In fact, it should perhaps be *more* understandable because—instead of a fictional trope—Ambien's manufacturer admits that its drug causes people to forget, a fact which the State does not dispute. (R.107:21.) And thus, unlike in cases in which the cause of amnesia may not be known, Rosalez doesn't need a doctor detailing the physical mechanism by which trauma to the brain can cause memory loss. *Compare with State v. King*, 187 Wis. 2d 548, 556, 523 N.W.2d 159 (Ct. App. 1994) (doctor explaining that concussions can cause amnesia). We *know* for a fact that Ambien causes memory loss and Rosalez was taking Ambien. The evidence that Rosalez presented was sufficient to prove amnesia.

The State also points to *State v. Herling*[2] and hints that the matter of a psychologist's report has before been held insufficient to prove a *McIntosh* claim. (St.'s Br. at 17.) The problem for the State is that *Herling* never decided the sufficiency of the defendant's amnesia claim. *Herling*, 2014AP565 at ¶¶ 1, 11; (Reply Ap. at 3, 9). Instead, the only issue in *Herling* was whether the circuit court had applied the proper standard when assessing the defendant's amnesia claim. *Id.* ¶ 10;

[2] No. 2014AP565-CR, unpublished slip op. (Wis. Ct. App. Dec. 18, 2014).

(Reply Ap. at 9). Herling said that it had not and sought reversal on that basis. *Id.* ¶¶ 6, 10; (Reply Ap. at 6-7, 9). But he did not separately challenge the circuit court's adverse conclusion under the standard he thought was wrongly applied. *Id.* ¶ 10; (Reply Ap. at 9). This Court held that the circuit court applied the correct standard and, because Herling failed to challenge the circuit court's finding under that one, did not assess his amnesia claim on the merits. *Id.* ¶¶ 9-10; (Reply Ap. at 8-9). This Court's recognition of Herling's failure to challenge the circuit court's ruling is in no way authority establishing that psychological evidence cannot prove a *McIntosh* claim.

B. The State's argument about the merits of Rosalez's *McIntosh* claim is premature; what matters for deficiency is not whether Rosalez can now prove his trial unfair, but rather whether he can prove a viable pretrial motion about which he was not advised.

The State argues that trial counsel's failure to discuss *McIntosh* with Rosalez was not deficient because, following a hypothetical future trial, Rosalez would not be able to satisfy the *McIntosh* test and prove that trial unfair. (St.'s Br. at 21.) But that's getting the cart entirely before the horse.

What is key for deficiency purposes is not whether Rosalez would have ultimately succeeded in his *McIntosh* claim. It is instead whether he had a viable pre-trial motion under *McIntosh* about which his trial counsel did not inform him. And, if this Court accepts Rosalez's claim that he was amnestic, then *McIntosh* very clearly gave him a viable pretrial motion.

In Rosalez's plea withdrawal case, the pretrial viability of *McIntosh* is not whether he could prove that his future trial would be unfair. *See McIntosh*, 137 Wis. 2d at 349. It is instead whether his amnesia gave him the opportunity to challenge the fairness of his trial once it was done. *See id.* As even the State recognizes, postponing a decision on a *McIntosh* challenge until after trial best allows a court to flesh out the test's elements. (St.'s Br. at 21.) In Rosalez's case, a court considering the merits of his *McIntosh* claim cannot now fully know: "[t]he extent to which the amnesia affected [his] ability to testify in his own behalf;" "[t]he strength of the prosecution's case;" or "any other facts and circumstances which would indicate whether or not [Roslez] *had* a fair trial." *McIntosh*, 137 Wis. 2d at 349-50 (emphasis added). Those unknowns—equaling half of the *McIntosh* factors—render premature

any attempt to now measure the future success of Rosalez's *McIntosh* claim. *See id.* at 349 (explaining "in many cases such an assessment will have to await the trial's end").

Thus, if properly advised, Rosalez could have filed his *McIntosh* motion, gone to trial, and afterward—once all the relevant facts were known—fought out the fairness of his trial. That he was not advised of that scenario constitutes deficient performance.

In addition to being too soon, the State's merits argument also seems to trip itself up. At one point, the State writes, "Rosalez's only path to acquittal required cross-examining and impeaching the victim—a strategy to which his amnesia did not relate." (St.'s Br. at 23.) Apparently, to the State, that weakens Rosalez's *McIntosh* claim. But, contrary to the State's assertion, Rosalez's amnesia directly relates to his ability to cross-examine or impeach the victim.

Recall, Rosalez and the victim would be the only two persons with direct evidence of what occurred that night. And now, only one of them can recall the events. Rosalez's amnesia thus disallows him from challenging the victim's version based on differences in recollection; he has none. His ability to cross-examine and impeach her is thus directly diminished by his amnesia.

The State's merits argument misses the mark again later when contending that, "[e]ven if Rosalez's alleged amnesia affected his decision to testify, it would not have meaningfully altered the course of his trial." (*Id.*) But *McIntosh* asks not whether the defendant's amnesia affects the decision to testify; instead, it questions "[t]he extent to which the amnesia affected the defendant's *ability* to testify in his own behalf." *McIntosh*, 137 Wis. 2d at 349-50 (emphasis added). It is not as though Rosalez is amnestic about some ancillary occurrence. Instead, his amnesia is of the pertinent time period, making him unable to testify at all about the events because he cannot remember them. That he could not proffer any testimony whatsoever concerning the allegations—either admitting or denying guilt—impugns the fairness of his trial, but just how much must await a full awareness of the trial evidence.

Because Rosalez's trial has not happened, the true merit of his *McIntosh* claim cannot be assessed. But that is no impediment to success in this Court. What is key for deficiency purposes is that he had a viable pre-trial motion about which he'd not

been informed. The record is clear that Rosalez's attorney did not address *McIntosh* with him; he was therefore deficient.

II. A proper assessment of prejudice must consider that, during trial proceedings, Rosalez knew nothing about *McIntosh* and the affiliated ability to have the charges against him dismissed. Through that lens, Rosalez can show that he would not have pleaded no contest.

Like Rosalez, the State recognizes the importance of *Lee v. United States*, 137 S. Ct. 1958 (2017), to assessing his prejudice claim. (*Compare* Rosalez 1st Br. at 19-22 *with* St.'s Br. at 25-26.) At one point, the State selectively quotes from *Lee* to make prejudice seem like an insurmountable hurdle for Rosalez. (St.'s Br. at 25.) But a close reading of *Lee* shows that the State's argument fails for what it omits.

It is true that, in explaining why it was rejecting the Government's argument, the Supreme Court wrote, "'As a general matter, . . . a defendant who has no realistic defense to a charge supported by sufficient evidence will be unable to carry his burden of showing prejudice from accepting a guilty plea.'" (St.'s Br. at 25 (quoting *Lee v. United States*, 137 S. Ct. 1958, 1966 (2017).) However, when later explaining its own reasoning, the Court fleshed that out: "A defendant without any viable defense will be highly likely to lose at trial. And a defendant facing such long odds will rarely be able to show prejudice from accepting a guilty plea that offers him *a better resolution* than would be likely after trial." *Lee*, 137 S. Ct. at 1966 (emphasis added). As Rosalez explained in his opening brief, he pleaded no contest to the very same charges that he would have been convicted of at trial. (Rosalez 1st Br. at 21.) Thus, the necessary caveat to trigger *Lee*'s comment about a defendant "rarely be[ing] able to show prejudice"—*viz.*, pleading to "a better resolution"—is not present in Rosalez's case. *Id.*

The State leans into trial counsel's testimony that Rosalez "always wanted a trial," noting that "[b]oth the trial court and trial counsel believe that this case was never in a trial posture." (St.'s Br. at 27.) But Rosalez disagrees that the record so obviously shows he never wanted a trial. First of all, Rosalez's trial attorney was admittedly investigating a possible intoxication defense. (R.96:9-10; A-Ap 13-14.) Why would Rosalez's trial counsel have been investigating the viability of a defense if the case was always in plea posture? Second, Rosalez explained at the postconviction hearing that he was in plea posture only after his attorney told him

he couldn't succeed at trial because the intoxication defense wouldn't work. (*Id.*:46; A-Ap 50.)

Key to understanding prejudice in Rosalez's case is the fact that one must assess his pre-plea decisions through the lens of his ignorance about *McIntosh* and what it offered him. The motives that Rosalez expressed during the trial process were driven by his ignorance of the ability to avoid criminal liability via *McIntosh*. What is more, trial counsel's explanation of what he perceived to be Rosalez's motivations is also tainted by Rosalez's ignorance about *McIntosh*. Whereas trial counsel never talked with Rosalez about *McIntosh*, he could not meaningfully explain what impact its rule had on Rosalez's pre-plea thought processes. After all, on trial counsel's admitted non-discussion of the matter, *McIntosh* undoubtedly had no impact at all on Rosalez's decision to plead or go to trial.

So, yes, Rosalez took a plea and avoided putting the victim through trial. But, when he did that, he did not then know that *McIntosh* provided him a route to outright dismissal of the charges *only if* he went to trial. As Rosalez explained at the postconviction hearing, if he'd known about *McIntosh* he would not have entered his plea. (R.96:46-48; A-Ap 50-52.) And Rosalez has significant evidence in support of the proposition that *McIntosh* would have factored into his analysis if he had known about it. Namely, no one disputes that he has professed amnesia since the beginning of the case. The matter is referenced at his plea hearing (R.36:3-4); in the PSI (R.18:4); and at sentencing (R.49:32-33). Postconviction, trial counsel admitted that Rosalez continuously denied remembering the event. (R.96:9). And surely it must go without saying that no one wants to be a convicted sex offender if it can be avoided.

It is not as though Rosalez has, postconviction, come up with the idea that he cannot remember and, on that post hoc discovery, begun claiming that he would not have pleaded no contest. Instead, Rosalez's amnesia has been a constant throughout these proceedings. If any fault is to be laid at Rosalez's pre-plea silence about *McIntosh*, it must be laid at his attorney's feet for not having discussed the case with him.

Rosalez has shown what *Lee* mandates that he show: that it would have been rational for a person in his situation to give up a plea and instead go to trial. *Lee*, 137 S. Ct. at 1968. He can thus prove prejudice.

CONCLUSION

For those reasons and the ones stated more thoroughly in his opening brief, Rosalez asks this Court to reverse the postconviction court and remand with direction that he be allowed to withdraw his plea.

Dated this 15th day of June, 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 2,837 words, as counted by the commercially available word processor Microsoft Word.

Dated this 15th day of June, 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 15th day of June, 2023.

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