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SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT

Case No. 2022AP1929 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

REYNALDO ROSALEZ,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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ARGUMENT

Reynaldo Rosalez petitions this Court for review of the Court of Appeals' decision affirming his judgment of conviction and the order denying his motion to withdraw his plea of no contest. *State v. Rosalez*, No. 2022AP1929-CR, 2024 WL 2930726 (Wis. Ct. App. June 11, 2024); (Pet-App. 3–9.) He seeks review of his single claim of ineffective assistance of counsel, which he claims led him to unknowingly plead no contest to one count of second-degree sexual assault of a child under the age of 16. (Rosalez's Pet. 17–32.) He claims that trial counsel was ineffective for not informing him of a defense based on his alleged amnesia caused by an interaction between Ambien and alcohol when he sexually assaulted the victim pursuant to *State v. McIntosh*, 137 Wis. 2d 339, 404 N.W.2d 557 (Ct. App. 1987). *See Rosalez*, 2024 WL 2930726, at *1–2. This case does not offer the prospect of law development and therefore is unsuited for review by this Court.

The Court of Appeals affirmed the denial of Rosalez's ineffectiveness claim because the circuit court's dispositive factual finding was not clearly erroneous. *Rosalez*, 2024 WL 2930726, at *1. Specifically, the circuit court did not clearly err in finding that Rosalez failed to prove that he suffered from amnesia as a medical fact. *Id.* at *5. Therefore, Rosalez could not have raised the *McIntosh* defense even if trial counsel informed him of it. *Id.* Trial counsel was not deficient for not informing Rosalez of a meritless defense. *Id.*

Rosalez can obtain reversal only by demonstrating that the circuit court clearly erred in making this finding. Cases that turn narrowly on a circuit court's factual finding are ill-suited to law development, which is the purpose of this Court. Wis. Stat. § 809.62(1r); *see Nedivdek v. Kuipers*, 2009 WI 44, ¶ 4, 317 Wis. 2d 340, 766 N.W.2d 205 (per curiam). This case offers an opportunity for, at most, error correction, which is

generally not a valid basis for review. *See, e.g., State v. Gajewski*, 2009 WI 22, ¶ 11, 316 Wis. 2d 1, 762 N.W.2d 104 (per curiam). In addition, this type of case is inappropriate for review because the petitioning party bears such a heavy burden to show that the finding was clearly erroneous. Under that standard, a reviewing court will affirm a circuit court's findings "even if contrary findings could also reasonably be made based on the same evidence." *Hennessy v. Wells Fargo Bank, N.A.*, 2020 WI App 64, ¶ 16, 394 Wis. 2d 357, 950 N.W.2d 877. Thus, even if this Court were inclined to engage in error correction—which is not consistent with the statutory criteria for review—this Court would invariably affirm pursuant to the deference owed to a circuit court's findings.

Rosalez argues that the Court of Appeals erred by requiring him to establish his amnesia as a medical fact in order to invoke *McIntosh*. (Rosalez's Pet. 20–22.) But the Court of Appeals derived that requirement from a faithful reading of *McIntosh* and this Court's application of *McIntosh* in *Muench v. State*, 60 Wis. 2d 386, 210 N.W.2d 716 (1973). The Court of Appeals correctly observed that, in *McIntosh*, a psychiatrist had "medically established" the defendant's "permanent amnesia." *Rosalez*, 2024 WL 2930726, at *4 (quoting *McIntosh*, 137 Wis. 2d at 348–49). *Muench*, by contrast, refused to apply *McIntosh* because the defendant had provided only his "subjective statements" rather than "medical evidence." *Rosalez*, 2024 WL 2930726, at *4 (quoting *Muench*, 60 Wis. 2d at 392). Rosalez, thus, seeks error correction where no error exists.

Rosalez relies on the fact that the *McIntosh* amnesia defense is unusual and rarely litigated as a basis for review. (Rosalez's Pet. 13–17.) Rosalez, however, ignores the dispositive factual finding that precludes the need to address *McIntosh* in any depth. Rosalez's mere invocation of a rarely cited case does not signal an opportunity for law development.

This Court would not even need to address *McIntosh* in affirming the circuit court. The State would renew its argument that Rosalez failed to prove prejudice. To prove prejudice, Rosalez would have to show that he would not have pleaded no contest and would have proceeded to trial absent trial counsel's deficient performance. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *State v. Bentley*, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996). In the present case, it was clear that Rosalez pleaded no contest because he knew he would be found guilty at a trial, and he wished to spare the victim from testifying at trial. (R. 49:20–21, 26, 33, 38.) Accordingly, the circuit court credited Rosalez for his remorse and acceptance of responsibility when imposing his sentence. (R. 49:37–38.) Later at the *Machner*¹ hearing, the circuit court found Rosalez's testimony not credible, undermining Rosalez's post-plea assertions that he intended to go to trial. (R. 96:45, 49–50, 53; 119:6–8.) A reviewing court affords great deference to a circuit court's credibility determination. *Tang v. C.A.R.S. Prot. Plus, Inc.*, 2007 WI App 134, ¶ 19, 301 Wis. 2d 752, 734 N.W.2d 169. Thus, the extrinsic evidence of Rosalez's intent to plead no contest combined with his not credible testimony at the *Machner* hearing invariably leads to the conclusion that he failed to prove prejudice.

Finally, if this Court were to grant review, the State would argue that this Court should overturn *McIntosh* as wrongly decided. The State did not advance this argument in the Court of Appeals because that court cannot overturn its own precedent. *Cook v. Cook*, 208 Wis. 2d 166, ¶ 53, 560 N.W.2d 246 (1997). But this Court may of course do so with no special justification. *See, e.g., Evers v. Marklein*, 2024 WI 31, ¶ 25, ___ Wis. 2d ___, ___ N.W.2d ___ (collecting cases).

¹ *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

The State would urge this Court to overturn *McIntosh* if this Court accepted review.

McIntosh “adopt[ed] the rule and reasoning” of *Wilson v. United States*, 391 F.2d 460 (D.C. Cir. 1968). *McIntosh*, 137 Wis. 2d at 351, 404 N.W.2d 557. However, *Wilson* rests on a weak foundation. The decision in *Wilson* included three opinions from the three judges on the panel, with one judge concurring for the sake of “avoid[ing] the impasse of a 3-way split.” *Wilson*, 391 F.2d at 466 (Leventhal, J., concurring). The Seventh Circuit has declined to follow *Wilson*, noting that “[n]o other circuit . . . has adopted [its] comprehensive approach,” which requires a court to assess competency before trial and at the trial’s completion. *United States v. Andrews*, 469 F.3d 1113, 1119 (7th Cir. 2006). In declining to follow *Wilson*, the Supreme Court of Rhode Island determined that there were other sufficient guarantees that allow for a fair trial for one who claims amnesia. *State v. Peabody*, 611 A.2d 826, 832–33 (R.I. 1992). For the same reasons that the Seventh Circuit and the Supreme Court of Rhode Island declined to follow *Wilson*, the Court of Appeals erred in relying on *Wilson* when it decided *McIntosh*.

Because Rosalez’s petition for review fails to provide this Court an opportunity to develop the law (except in a way that would render his challenge moot by overruling *McIntosh*), this Court should deny it.

CONCLUSION

This Court should deny Rosalez's petition for review.

Dated: July 22, 2024

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this petition or response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition or response produced with a proportional serif font. The length of this petition or response is 1220 words.

Dated: July 22, 2024.

Electronically signed by:

Michael J. Conway
MICHAEL J. CONWAY
Assistant Attorney General

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 Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

I further certify that a copy of the above document was mailed to:

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Dated: July 22, 2024.

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