STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2023AP458-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DUSTIN J. VANDERGALIEN,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF ENTERED IN THE DODGE COUNTY CIRCUIT COURT, THE HONORABLE MARTIN J. DE VRIES, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUES PRESENTED[1]

1. Has VanderGalien met his high burden to show that Wisconsin Stat. §§ 940.09(1)(am); 940.25(1)(am); and 346.63(2)(a)3. are unconstitutional to the extent that they permit conviction for driving with a restricted controlled substance in one's blood even if the restricted controlled substance detected is a non-impairing metabolite of cocaine?

There is an obvious rational basis for this prohibition. Illicit drugs vary widely in potency and effect, and people metabolize them differently. It is impossible to determine precisely when someone used them, what dose the person took, how long they were impaired by the substance, or how quickly their body metabolizes them. By the time their blood is drawn, such substances have often been metabolized into something else. The Legislature thus rationally determined that it served the legitimate interest in public safety to criminalize driving with metabolites of cocaine in one's blood to ensure that those who drive while under the influence of cocaine can still be prosecuted even if the cocaine has metabolized into another substance by the time their blood is drawn.

This Court should affirm VanderGalien's convictions.

2. Were VanderGalien's remaining plea withdrawal claims insufficiently pleaded or otherwise defeated by the record such that no hearing was required?

The circuit court appropriately denied VanderGalien's three remaining claims for plea withdrawal without holding a hearing. VanderGalien failed to plead sufficient facts to show that the prosecutor had a conflict of interest in this case or that it adversely affected VanderGalien in any way even if

[1] The State has reorganized the issues to address them in a more coherent fashion and avoid needless repetition of the legal principles to be applied.

a conflict existed. The circuit court properly found that VanderGalien failed to plead sufficient facts to establish deficient performance or prejudice in how his lawyer explained the read-in charges to him. And finally, the circuit court properly exercised its discretion in refusing to allow VanderGalien to withdraw his plea based on his claim that he misunderstood the effect of the read-in charges given that the record conclusively showed that it was explained to him three times: in the plea questionnaire, by the court at the plea hearing, and by the court again at sentencing.

This Court should affirm the circuit court's decision.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

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

STATEMENT OF THE CASE

Around 6:30 p.m. on July 30, 2019, Dodge County Sheriff's Officers, Horicon Police Department Officers, and myriad emergency services units responded after receiving multiple 911 calls reporting a head-on collision involving three cars and resulting in several severely injured and occupants. (R. 2:7, 10–12; 91; 92; 93.) The officers found two horribly mangled vehicles—a Chrysler 300 in which the driver, Dustin VanderGalien, was pinned and drifting in and out of consciousness, and a red Ford Focus with four trapped occupants: Victim B, the driver, who was pinned behind the steering wheel and also drifting in and out of consciousness; Victim G, the front passenger, who was clearly deceased; Victim D, the driver's side rear passenger, who appeared relatively uninjured but could not open the door of the vehicle; and Victim A, a 16-year-old girl, who was pinned in the rear passenger seat and had severe fractures to her upper legs.

(R. 2:7, 12–13; 92; 93.) Police broke the back passenger window and lifted Victim D out; VanderGalien and Victims A, B, and G had to be freed from the vehicles using extraction tools brought by the fire department. (R. 2:7–8, 12–13.)

A third vehicle, a Chevy Equinox, was parked on the gravel shoulder. (R. 2:10.) It was also heavily damaged in the front driver's side area and had multiple airbags deployed. (R. 2:10, 14; 91.) The three occupants of the Equinox (Victim R, Victim K, and Victim S) were able to exit the vehicle on their own, and fortunately had only minor injuries. (R. 2:12.)

Law enforcement learned what happened from multiple eyewitnesses including Karen Hug, whom VanderGalien sped past roughly 14 seconds before the crash. (R. 2:10–11, 15; 124:54–55.) Hug saw VanderGalien's car coming up quickly behind her, so she slowed for him to pass. (R. 124:54–55.) VanderGalien did so, but then never attempted to move back into the eastbound lane despite having nearly a third of a mile of open road to do so. (R. 124:53–55.) She saw the Chevy Equinox and the Ford Focus traveling westbound on County Highway E—the victims in the Equinox on the way to Wisconsin Dells, and the victims in the Focus to a baseball game in Beaver Dam—and that VanderGalien was still making no move to return to his lane. (R. 124:55.) Victim R saw VanderGalien's Chrysler barreling toward them and veered to the right toward the ditch to avoid the Chrysler, that thus side-wiped the Equinox. (R. 2:10–11, 15.) VanderGalien then struck the Focus fully head-on. (R. 124:58–59.) Data from the airbag module in VanderGalien's car showed that it was traveling 21 miles per hour over the speed limit at 76 mph at the time of the crash, and that the brakes had not been applied at any point in the five seconds beforehand; in fact, the engine throttle had been significantly increased over that time. (R. 90:1.)

Deputy Jeremy McCarty helped EMS personnel extricate VanderGalien from what remained of his car. (R. 2:8.) Upon leaning into the passenger side window, McCarty immediately smelled alcohol. (R. 2:8; 92.) Once the fire department was able to free VanderGalien from the vehicle, McCarty observed that the odor of intoxicating beverages was strong on his breath, he had multiple indicators of intoxication, and he admitted that he had been drinking "a few mixers." (R. 2:8.) He was too gravely injured, however, to perform field sobriety tests. (R. 2:9.) Roughly an hour after the crash and while VanderGalien was buckled to a stretcher, McCarty arrested him for operating a motor vehicle while impaired, and VanderGalien consented to a blood draw. (R. 2:8.) VanderGalien was then transported to UW Hospital by helicopter and McCarty drove there to obtain the blood draw, arriving at 8:33 p.m. (R. 2:8.) McCarty found VanderGalien extremely confused, however, and unable to remember any of the previous two hours' events; VanderGalien admitted to McCarty that he'd been drinking, but refused the blood draw. (R. 2:8–9.) McCarty thus applied for and obtained a warrant for the blood draw at 9:31 p.m., and the blood draw was completed at 10:21 p.m.—nearly four hours after the crash. (R. 2:9.)

Meanwhile, it came to light that one of the sheriff's deputies on scene was related to VanderGalien. (R. 2:12.) The Dodge County Sheriff's Office thus turned the investigation over to the Wisconsin State Patrol.[2] (R. 2:12.) Ten months later, on May 20, 2020, the blood draw results finally returned from the crime lab showing that VanderGalien's blood alcohol content at the time of the blood draw was .062/100mL, and that he had benzoylecgonine, a cocaine metabolite, in his blood at a level of 240ng/100mL along with several other

[2] Due to this and VanderGalien's hospitalization, (R. 24:3), his previous arrest was nullified and he was rearrested after the criminal complaint was filed on June 1, 2020. (R. 2; 3.)

drugs. (R. 2:15.) The State Patrol thereafter agreed to perform crash reconstruction and follow up with the victims about their injuries. (R. 2:15–18; 90; 120:5; 122:5–6.)

The State charged VanderGalien with 14 counts related to the crash, ranging from homicide by intoxicated use of a vehicle to operating with a detectable amount of a restricted controlled substance in blood causing injury. (R. 2:1–6.) VanderGalien challenged the constitutionality of the restricted controlled substance statute as related to benzoylecgonine, claiming it was not rationally related to any legitimate government interest because benzoylecgonine is not itself impairing, and sought dismissal of those charges. (R. 16.) The court denied the motion. (R. 123.) The charges were amended to more serious ones after the crash reconstruction report returned, including first-degree reckless homicide, first-degree reckless injury, and several first-degree recklessly endangering safety charges. (R. 45; 53; 122:17–18.)

Shortly thereafter, VanderGalien reached a plea agreement with the State whereby he pleaded no contest to count one, homicide by use of a vehicle with a restricted controlled substance in his blood as a second or subsequent offense; count three, use of a vehicle with a restricted controlled substance in his blood causing great bodily harm; and count 13, operating a vehicle with a restricted controlled substance in his blood causing injury as a second or subsequent offense. (R. 121:18.) The State agreed to cap its sentencing recommendation at the maximum sentence for the homicide and causing injury charges, and the remaining 11 charges were dismissed and read in. (R. 121:3, 18.)

A litany of people either submitted victim impact letters to the court or spoke at sentencing, particularly those close to the young man VanderGalien killed. (R. 80; 81; 124:9–44.) One of those who submitted a letter was Paula Justman, who was employed as a legal assistant in the Dodge Co.

District Attorney's office, on behalf of her family; her daughter had dated the deceased victim for a time. (R. 81.) The day before sentencing, defense counsel sent a lengthy sentencing memorandum to the court alleging that Dodge County District Attorney Kurt Klomberg was biased against him due to Ms. Justman's relationship to the victim, and thus treated VanderGalien more harshly than he deserved. (R. 84:3–4.) Counsel asked the court to "consider the apparent bias of the DA in this matter when considering his recommendations" for the maximum allowable sentence on counts 1 and 13, and follow the defense PSI recommendation of roughly eight years of initial confinement and seven years of extended supervision instead. (R. 84:4.) The court ultimately imposed a sentence of 17 years of initial confinement and 12 years of extended supervision. (R. 124:118.)

Postsentencing, VanderGalien moved for an evidentiary hearing, seeking to withdraw his pleas and dismiss all of the charges against him, on four grounds. (R. 137.) He reraised his claim that prohibiting operating a vehicle with a detectable amount of a non-impairing controlled-substancemetabolite in the blood was unconstitutional. (R. 137:6–10.) He next argued Ms. Justman's relationship to the victim required DA Klomberg to disqualify himself and seek a special prosecutor, and failure to do so amounted to a Due Process violation. (R. 137:10–12.) Third, he claimed that trial counsel was ineffective in failing to accurately explain the meaning and effect of read-in charges to him. (R. 137:13–16.) And finally, he claimed he did not knowingly, voluntarily, and intelligently enter his plea because he "was not aware that by agreeing to dismissed and read-in charges that he would effectively be admitting that he committed the conduct alleged in those charges." (R. 137:17–19.)

After further briefing, the circuit court denied the motion. (R. 158.) VanderGalien appeals.

ARGUMENT

I. VanderGalien's challenge to the constitutionality of criminalizing driving with a detectable amount of benzoylecgonine in one's blood fails.[3]

A. A person challenging the constitutionality of a statute bears the high burden of proving the statute unconstitutional beyond a reasonable doubt.

VanderGalien claims that there is no rational basis for restricting validly-licensed individuals from operating a motor vehicle while they have no impairing substances in their system, and therefore criminalizing driving with a non-impairing metabolite of cocaine in the blood violates substantive due process. (VanderGalien's Br. 16–22.) "Substantive due process forbids a government from exercising 'power without any reasonable justification in the service of a legitimate governmental objective.'" *State v. Radke*, 2003 WI 7, ¶ 12, 259 Wis. 2d 13, 657 N.W.2d 66 (citation omitted).

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[3] VanderGalien did not serve the Attorney General with notice that he was challenging the constitutionality of Wis. Stat. § 346.63(2)(a)3. Wis. Stat. § 806.04(11). VanderGalien merely listed the Attorney General as a recipient on his pretrial motion that was e-filed in the Dodge County Circuit Court. (R. 16:1.) Listing the Attorney General on a motion being electronically filed in a circuit court is not proper service. The circuit court should not have addressed this claim. *W.W.W. v. M.C.S*, 161 Wis. 2d 1015, 1025, 468 N.W.2d 719 (1991).

This failure is not jurisdictional, though, and can be cured. *In Matter of Estate of Fessler*, 100 Wis. 2d 437, 441, 302 N.W.2d 414 (1981). The State will presume that the defect in service has been cured. *Id.*

VanderGalien admits that the statutes prohibiting driving with a restricted controlled substance in one's blood[4] do not implicate a fundamental right or a suspect class and are therefore subject to rational basis scrutiny. (VanderGalien's Br. 16.) Under that demanding standard, this Court "will sustain a statute against a constitutional challenge if there is 'any reasonable basis' for the statute." *Radke*, 259 Wis. 2d 13, ¶ 11 (citation omitted). "That reasonable basis need not be expressly stated by the legislature; if the court can conceive of facts on which the legislation could reasonably be based, it must uphold the legislation as constitutional." *Id.*

VanderGalien does not say, however, whether he is making a facial or an as-applied challenge to the statute. (VanderGalien's Br. 16–22.) To the extent that he is raising an as-applied challenge to the statute as he claimed in the circuit court (R. 137:8), the claim is waived by his no-contest plea. *State v. (James) Jackson*, 2020 WI App 4, ¶¶ 7–11, 390 Wis. 2d 402, 938 N.W.2d 639 (as-applied challenges to the constitutionality of a statute are waived under the guilty-plea-waiver rule). VanderGalien appears to be raising a "categorical facial" challenge to the statute, though, because he is not alleging that Wis. Stat. § 346.63(2)(a)3. can never be constitutionally applied, but instead appears to argue that it

[4] VanderGalien challenges only Wis. Stat. § 346.63(2)(a)3.—causing injury by operation of a vehicle with a detectable amount of a restricted controlled substance in the blood. He makes no mention of the other two statutes under which he was convicted: Wis. Stat. §§ 940.09(1)(am) and 940.25(1)(am). The language used in these statutes is identical to the language in Wis. Stat. § 346.63(2)(a)3.; they differ only in the degree of harm caused. As explained below, the appellate courts have already rejected functionally the same argument that VanderGalien makes here regarding the identical language contained in these statutes, meaning VanderGalien cannot prevail on this basis for any of his convictions.

is unconstitutional in all applications when the substance found in the driver's blood is non-impairing. (VanderGalien's Br. 16 ("It is not rational to conclude that the government's interest [in safety] is reasonably achieved by prohibiting any detectable amount of an inactive, non-impairing substance in a driver's blood stream.").) *See Winnebago County v. C.S.*, 2020 WI 33, ¶ 14 n.6, 391 Wis. 2d 35, 940 N.W.2d 875 (explaining categorical facial challenges).

The Wisconsin Supreme Court has "made clear that this categorical approach to a facial challenge is still a facial challenge and is subject to the same facial challenge standard." *Id.* This requires the challenger to "show that the law cannot be enforced under any circumstances." *Id.* ¶ 14 (citation omitted). This Court "presume[s] that the statute under review is constitutional and the burden is on the party challenging the statute to prove that it is unconstitutional beyond a reasonable doubt." *Id.*

"'[B]eyond a reasonable doubt' expresses the force or conviction with which a court must conclude, as a matter of law, that a statute is unconstitutional before the statute . . . can be set aside." *Id.* "Thus, [this Court] indulge[s] every presumption to sustain the law if at all possible, and if any doubt exists about a statute's constitutionality, [the Court] must resolve that doubt in favor of constitutionality." *State v. Luedtke*, 2015 WI 42, ¶ 75, 362 Wis. 2d 1, 863 N.W.2d 592 (citation omitted).

B. The Legislative prohibition on driving with a detectable amount of a restricted controlled substance in one's blood even if it is a non-impairing metabolite of a different substance easily survives rational basis scrutiny.

VanderGalien cannot meet his burden to show that criminalizing driving with a non-impairing metabolite of

cocaine in one's bloodstream is unconstitutional. He begins from a mistaken premise: he claims that "[a] validly licensed individual has the right to operate a motor vehicle on a public highway when he has no impairing substances in his system." (VanderGalien's Br. 17.) He fails, however, to accompany this broad declaration with any citation. That is because no such right exists.

It has long been established that operating "an automobile upon the public highways is not a right, but only a privilege which the state may grant or withhold at pleasure." *State v. Stehlek*, 262 Wis. 642, 646, 56 N.W.2d 514 (1953). And "what the state may withhold it may grant upon condition." *Id.* One condition is that the person does not drive with any detectable amount of a restricted controlled substance, as defined in Wis. Stat. § 340.01(50m) and which includes "[c]ocaine or any of its metabolites," in the person's blood.[5] Wis. Stat. §§ 346.63(1)(am), (2)(a)3.; 340.01(50m)(c). VanderGalien claims that "problematically," not all of the restricted controlled substances prohibited by the statute "actually cause impairment,"[6] but "[i]mpairment has not been a prerequisite for prosecution under the 'driving under the influence' statute since 1981." *State v. Smet*, 2005 WI App 263, ¶ 13, 288 Wis. 2d 525, 709 N.W.2d 474. There are multiple rational bases for this condition.

As this Court recognized in *Smet* when faced with (and rejecting) a challenge to the identical language in Wis. Stat. § 346.63(1)(am) on substantially the same grounds VanderGalien raises here—that the statute is unconstitutional because it does not require that the State show impairment from the metabolite detected in the driver's

[5] The State assumes VanderGalien means to argue that this condition arbitrarily infringes upon his Fourteenth Amendment right to liberty and serves no legitimate government purpose.

[6] (VanderGalien's Br. 17.)

blood—"[t]he police power is the inherent power of the government to promote the general welfare, and covers all matters having a reasonable relation to the protection of the public health, safety and general welfare." *Smet*, 288 Wis. 2d 525, ¶ 7.

"The statute represents a legislative determination of public policy that public safety is per se endangered when a person drives a motor vehicle while having a specified concentration of . . . alcohol in the blood" regardless of whether the person is impaired. *Id.* ¶ 13 (citation omitted). "The placement of Wis. Stat. § 346.63(1)(am) in this statute plainly signifies an endorsement of that same legislative determination as it relates to drivers with a detectable concentration in their blood of various controlled substances." *Id.* The same is therefore of course true for Wis. Stat. § 346.63(2)(a)3., which differs from Wis. Stat. § 346.63(1)(am) only in that subsection (2)(a)3. criminalizes causing injury while driving with a detectable amount of a restricted controlled substance in the blood rather than the simple act of driving.

The purpose of this statute was "to make prosecutions easier, by removing the 'under the influence' requirement." *Luedtke*, 362 Wis. 2d 1, ¶ 69. "In addressing the problem of drugged driving, the legislature could have reasonably and rationally concluded that 'proscribed substances range widely in purity and potency and thus may be unpredictable in their duration and effect.'" *Id.* ¶ 77. "Further, because no 'reliable measure' of impairment exists for many illicit drugs, the legislature could have reasonably concluded that the more sensible approach was to ban drivers from having any amount in their systems." *Id.* It could thus "rationally conclude that a strict liability, zero-tolerance approach is the best way to combat drugged driving." *Id.*

And in light of this recognized legislative intent to make drugged driving prosecutions easier, there is an imminently rational reason for prohibiting operating a motor vehicle with any metabolite of cocaine in one's system even if the metabolite itself is not impairing: people are affected by and metabolize illicit drugs differently, and there is no way to reliably determine what dose of the illicit substance a person ingested or when. *See Luedtke*, 362 Wis. 2d 1, ¶ 77. Accordingly, proving that a person was actually intoxicated by illegal substances while driving is difficult, and the Legislature reasonably determined that a different approach was required to combat this dangerous behavior. *Id.*

And most importantly to the issue here, many restricted controlled substances metabolize quickly. *See* ARUP Labs., *Drug Plasma Half-Life and Urine Detection Window* (2022), https://www.aruplab.com/files/resources/pain-management/DrugAnalytesPlasmaUrine.pdf. The half-life of cocaine in the bloodstream, for example, is between .7 and 1.5 hours. *Id.* Further, some substances—cocaine included—continue to degrade in an unstabilized blood sample until analysis. *See* F. Musshoff and B. Madea, *Cocaine and benzoylecgonine concentrations in fluorinated plasma samples of drivers under suspicion of driving under influence*, 200 Forensic Science International 67–72 (2010), https://www.sciencedirect.com/science/article/abs/pii/S0379073810001453?via%3Dihub. This may leave the State unable to prosecute drugged drivers if the metabolites of those substances are not included in the definition of a restricted controlled substance, because the person may have metabolized the drug itself by the time his or her blood is drawn even though the person still had the intoxicating substance itself in his or her blood while driving.

This case is therefore a perfect example of why it was rational for the Legislature to choose this approach. Benzoylecgonine is strictly a cocaine metabolite; it cannot be present in the blood unless the person used some derivative of the coca plant. (R. 115:44.) VanderGalien caused such a severe crash that he was not stable enough to have his blood drawn until four hours later. Even under VanderGalien's own implied assertion that he could not have been driving with cocaine in his blood because cocaine is detectable in the bloodstream for four to six hours[7] (which assumes a certain threshold dose was taken and that VanderGalien ingested it immediately before driving, neither of which can be known, (R. 115:42), it is entirely plausible that VanderGalien had cocaine in his bloodstream while he was driving and it was simply metabolized into benzoylecgonine by the time his blood was drawn and analyzed—VanderGalien's own expert's testimony confirmed that. (R. 115:40–45.) This broad definition of restricted controlled substance in Wis. Stat. § 340.01(50m) is a legislative recognition that many drugs can be metabolized quickly and thus, particularly when a defendant who drives after using a restricted controlled substance causes a horrific crash like VanderGalien did, there may be no opportunity to draw the person's blood before the illicit drug is converted by the defendant's body into something else. That was precisely the rational purpose behind including metabolites of cocaine in the prohibition against driving with restricted controlled substances in one's blood even if those metabolites are non-impairing.

Including non-impairing metabolites of cocaine in the definition of "restricted controlled substance" is therefore "a reasonable and rational means to the legislative end" of promoting public safety by ensuring that those who drive with cocaine in their system can still be held accountable for their

[7] (VanderGalien's Br. 18.)

actions even if their blood cannot be drawn in time to detect the cocaine itself before it has been metabolized. *Cf. Luedtke*, 362 Wis. 2d 1, ¶ 76. It is of no moment that benzoylecgonine itself is not impairing because the Legislature rationally eliminated proof of impairment as a requirement for liability for driving under the influence no matter what restricted substance is found in the blood, including alcohol, decades ago. (VanderGalien's Br. 21.) This Court and the Wisconsin Supreme Court have held, time and time again, that criminalizing driving after having consumed certain substances without requiring a causal connection between intoxication from the substance and the harm caused, or even proof of any impairment at all, is rationally related to this legitimate government interest in public safety.[8] VanderGalien cannot and has not met his high burden to show otherwise with respect to non-impairing cocaine metabolites. His constitutional challenge to Wis. Stat. § 346.63(2)(a)3. must be rejected.

[8] *State v. Luedtke*, 2015 WI 42, ¶ 77, 362 Wis. 2d 1, 863 N.W.2d 592 (holding that the identical provision criminalizing driving with a restricted controlled substance in Wis. Stat. § 346.63(1)(am) is rationally related to the government's interest in public safety without requiring proof of impairment or scienter); *State v. Smet*, 2005 WI App 263, ¶¶ 12–20, 288 Wis. 2d 525, 709 N.W.2d 474 (holding that Wis. Stat. § 346.63(1)(am) is rationally related to the government's interest in public safety and does not require evidence of intoxication to be constitutional); *State v. Gardner*, 2006 WI App 92, ¶¶ 15–24, 292 Wis. 2d 682, 715 N.W.2d 720 (holding that Wis. Stat. § 940.25(1)(am) was constitutional without requiring a causal link between ingestion of the controlled substance and the harm caused); *State v. Loomer*, 153 Wis. 2d 645, 451 N.W.2d 470 (Ct. App. 1989) (same for Wis. Stat. § 940.25(1)); *State v. Caibaiosai*, 122 Wis. 2d 587, 594, 363 N.W.2d 574 (1985) (holding that Wis. Stat. § 940.09(1)(a) was constitutional without requiring a causal connection between intoxication and a victim's death); *see also* Wis. Stat. § 346.63(2m) (prohibiting those under 21 from driving with any alcohol at all in the bloodstream).

II. The rest of the claims in VanderGalien's postconviction motion were insufficiently pleaded and conclusively disproven by the record, so the circuit court properly denied them without a hearing.

A. Circuit courts are not required to hold evidentiary hearings on motions that are missing key facts, conclusory, or defeated by the existing record.

"[T]o adequately raise a claim for relief, a defendant must allege 'sufficient material facts—*e.g.*, who, what, where, when, why, and how—that, if true, would entitle the defendant to the relief he seeks.'" *State v. Romero-Georgana*, 2014 WI 83, ¶ 37, 360 Wis. 2d 522, 849 N.W.2d 668 (citing *State v. Allen*, 2004 WI 106, ¶ 23, 274 Wis. 2d 568, 682 N.W.2d 433). Conclusory statements that do not contain these key facts are insufficient to entitle the defendant to a hearing. *Allen*, 274 Wis. 2d 568, ¶ 12.

The sufficiency of the allegations in the motion, however, is not the end of the analysis. "[A] circuit court has the discretion to deny a defendant's motion—even a properly pled motion—to withdraw his plea without holding an evidentiary hearing if the record conclusively demonstrates that the defendant is not entitled to relief." *State v. Sulla*, 2016 WI 46, ¶ 30, 369 Wis. 2d 225, 880 N.W.2d 659.

Assessing a defendant's entitlement to an evidentiary hearing is thus a two-pronged inquiry, and the defendant must overcome both to be entitled to a hearing. *State v. Spencer*, 2022 WI 56, ¶ 49, 403 Wis. 2d 86, 976 N.W.2d 383. If the motion is insufficiently pleaded or the record shows that the defendant could not prevail on the claims, the circuit court is not required to hold a hearing. *Id.*

"This court will uphold the circuit court's findings of fact unless they are clearly erroneous." *State v. Thiel*, 2003 WI 111, ¶ 21, 264 Wis. 2d 571, 665 N.W.2d 305. "'Whether a defendant's [postconviction motion] "on its face alleges facts which would entitle the defendant to relief" and whether the record conclusively demonstrates that the defendant is entitled to no relief' are questions of law that [an appellate court] review[s] de novo." *Sulla*, 369 Wis. 2d 225, ¶ 23 (citation omitted).

This Court reviews "only the allegations contained in the four corners of [the defendant's] motion, and not any additional allegations that are contained in [the defendant's appellate] brief." *Allen*, 274 Wis. 2d 568, ¶ 27. If the defendant's motion does not contain the requisite material facts, "presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," then this Court reviews the circuit court's decision to grant or deny a hearing "under the deferential erroneous exercise of discretion standard." *Id.* ¶ 9; *see also State v. Balliette*, 2011 WI 79, ¶ 18, 336 Wis. 2d 358, 805 N.W.2d 334.

"A court exercises discretion when it considers the facts of record and reasons its way to a rational, legally sound conclusion." *State v. Jeske*, 197 Wis. 2d 905, 912, 541 N.W.2d 225 (Ct. App. 1995). "The court's discretionary determinations are not tested by some subjective standard, or even by [this Court's] own sense of what might be a 'right' or 'wrong' decision in the case, but rather will stand unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion." *Id.* at 913.

B. The circuit court appropriately found that VanderGalien's claim that he should be permitted to withdraw his plea because the prosecutor had a conflict of interest was both forfeited and meritless.

1. VanderGalien did not timely move to withdraw his plea on this ground, therefore the claim should be reviewed under the rubric of ineffective assistance of counsel.

VanderGalien did not move to withdraw his plea based on any alleged "conflict of interest" on DA Klomberg's part when he learned that a legal assistant in the District Attorney's Office submitted a victim impact letter to the court. Instead, he used this information to argue to the circuit court that this raised an inference that DA Klomberg was biased against him, and therefore the court should disregard his sentencing recommendation. (R. 84:3–4.) The circuit court thus correctly found that VanderGalien forfeited any claim that this alleged conflict amounted to a due process violation warranting plea withdrawal. (R. 158:7.)

"No procedural principle is more familiar to this Court than that a constitutional right . . . may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *United States v. Olano,* 507 U.S. 725, 731 (1993) (citation omitted) *see also State v. Pinno,* 2014 WI 74, ¶ 56, 356 Wis. 2d 106, 850 N.W.2d 207. This includes due process claims. *See Kenosha Cnty. Dept. of Human Serv. v. Jodie W.*, 2006 WI 93, ¶¶ 21, 24, 293 Wis. 2d 530, 716 N.W.2d 845.

"To preserve an alleged error for review, 'trial counsel or the party must object in a timely fashion *with specificity* to allow the court and counsel to review the objection and correct any potential error.'" *State v. Torkelson*, 2007 WI App 272, ¶ 25, 306 Wis. 2d 673, 743 N.W.2d 511 (emphasis added)

(citation omitted); *cf. Cross v. State,* 45 Wis. 2d 593, 605, 173 N.W.2d 589 (1970) ("An accused cannot follow one course of strategy at the time of trial and if that turns out to be unsatisfactory complain he should be discharged or have a new trial."). VanderGalien received Ms. Justman's letter a week before sentencing, and he did not move to withdraw his plea based on DA Klomberg's alleged "conflict of interest" then. (R. 80; 84.)

Circuit courts are prohibited from sua sponte vacating a defendant's validly entered plea unless the court finds that there was fraud in procuring it or "a party intentionally withheld material information which would have induced the court not to accept the plea." *State v. Comstock*, 168 Wis. 2d 915, 922, 485 N.W.2d 354 (1992). Nothing in the record suggests that DA Klomberg "intentionally withheld" from the court that an assistant in his office knew one of the victims, that this information was somehow material to the charges to which VanderGalien pleaded, or explains how or why telling the court that someone employed in the Dodge County DA's Office knew one of the victims would have "induced the circuit court not to accept the plea." *Id.* The facts alleged in the complaint were amply sufficient to support the charges—both parties readily agreed upon that at the plea hearing, and VanderGalien himself admitted they were true—and VanderGalien pointed to nothing suggesting that any action taken during investigation and prosecution of his case was somehow influenced by Ms. Justman's knowing one of the victims. (R. 2:6–17; 84; 121:17, 22; VanderGalien's Br. 22–32.)

The circuit court was thus obligated to consider this information in the context in which VanderGalien offered it, and that was as a request for leniency at sentencing. (R. 84.) VanderGalien received that consideration from the circuit court. (R. 158:7.) Having received the sentencing benefit he requested, he forfeited any argument that any alleged conflict of interest warranted plea withdrawal.

"The normal procedure in criminal cases is to address [forfeiture] within the rubric of the ineffective assistance of counsel." *State v. Erickson*, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999). And the record shows that VanderGalien could not show that his attorney was deficient for opting to use this information to argue for a lighter sentence instead of seeking plea withdrawal, nor could he establish prejudice.

a. Defense counsel made a reasonable strategic decision to argue for a lenient sentence based on this alleged conflict of interest rather than seek plea withdrawal.

The standard by which counsel's representation of a criminal defendant must not fall "below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 686, 688 (1984). Courts reviewing counsel's performance "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and that counsel "made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 689–90. The tactics chosen by defense counsel in pursuing the defendant's objectives need not be the ones that in hindsight look best to a reviewing court or postconviction counsel. *State v. Felton*, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). This high measure of deference means that a court "may not grant relief" unless the record reveals "that counsel took an

approach that no competent lawyer would have chosen." *Dunn v. Reeves*, 141 S. Ct. 2405, 2410 (2021).

Here, the circuit court found that defense counsel made a reasonable strategic decision to use the information that a legal assistant in the DA's office had a personal relationship with one of the victims to argue for leniency at sentencing. (R. 158:7.) The circuit court was correct in that regard. Trial counsel had very little to argue on VanderGalien's behalf. The facts of this case were appalling: VanderGalien was streaking down the highway at 21 miles per hour over the speed limit, in the wrong lane, for over 1600 feet. (R. 124:53.) There were no obstructions in the road, there was nothing wrong with his vehicle, and an eyewitness said she was able to see the oncoming traffic even from well behind VanderGalien. (R. 124:55.) VanderGalien made no attempt to avoid the victims' cars and never even stepped on the brakes before slamming into them. (R. 124:53–55.) He ended one life and irreparably damaged countless others with his pernicious actions. (R. 124:3–49.) He had amphetamine, fentanyl, and metabolites of cocaine in his system, his blood alcohol content was still a .06 even four hours after the crash, and this was his third OWI offense—clearly the repercussions of the previous two weren't sufficient to alter his behavior. (R. 2:15, 17.) Defense counsel therefore reasonably opted to use the fact that a legal assistant in the DA's office knew one of the victims to attempt to paint DA Klomberg as biased and that this case wasn't actually as egregious as he made it sound. (R. 84; 124:93–106.) Defense counsel argued that this was a horrible accident, not recklessness; the blood test didn't show any presumptive impairment; and that VanderGalien was an alcoholic but otherwise a productive citizen who had been seeking treatment and was full of remorse for what happened. (R. 124:93–106.) That was a rational decision.

In contrast, had defense counsel sought plea withdrawal on this basis and it was granted, there was no telling how a subsequent prosecution with a different prosecutor may proceed. All of the dismissed charges would be back on the table along with any other charges a new prosecutor may have found appropriate. The read-in charges alone carried 122 years of sentencing exposure. (R. 53.) The facts of this case were awful, and VanderGalien's plea allowed him to plead to only three of over a dozen charges with an agreement that the State would seek sentencing based only on two of them. (R. 58.) Counsel could reasonably determine that it was in VanderGalien's best interests to leave this plea agreement intact and use this information to try to persuade the court to disregard the State's sentencing recommendation instead. The fact that VanderGalien would now like to change tactics and seek to withdraw his plea based upon this information does not make defense counsel's decision unreasonable.

b. VanderGalien failed to explain why he would have insisted on going to trial if a special prosecutor handled the case.

VanderGalien additionally could not show prejudice.

First, the circuit court's finding that there was no conflict of interest shows that even if defense counsel had requested that a special prosecutor be appointed based on Ms. Justman's knowing one of the victims, the request would have been denied. (R. 158:5–7.) A defendant is not prejudiced from counsel's failure to make a motion that would have failed. *State v. (Frederick) Jackson*, 229 Wis. 2d 328, 344, 600 N.W.2d 39 (Ct. App. 1999).

Second, VanderGailen failed to show how or why he would have insisted upon a trial had a special prosecutor been appointed. *State v. Bentley*, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996) (citation omitted) ("In order to satisfy the prejudice prong of the *Strickland* test, the defendant seeking to withdraw his or her plea must allege facts to show 'that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'").

VanderGalien cannot meet this burden. Again, the facts of this case were extremely aggravated and it strains credulity to think VanderGalien could have been in a better position had a special prosecutor taken over the case. The evidence would not have changed. Any and every charge that could be supported by the facts would have been available for the new prosecutor to pursue. There were multiple eyewitnesses who could testify to the events, and the crash reconstruction report meant that a conviction on at least reckless homicide and several reckless injury charges would be highly likely at trial. VanderGalien failed to explain why he rationally would have chosen to reject the plea bargain and move to disqualify the prosecutor in these circumstances. VanderGalien cannot show he'd have insisted upon a trial if a special prosecutor handled the case.

2. VanderGalien's "conflict of interest" claim was really a selective prosecution claim, and it was both insufficiently pleaded and fails on the merits under either doctrine.

a. VanderGalien failed to show a conflict of interest.

VanderGalien claims that the fact that an employee in the Dodge County DA's office knew the young man VanderGalien killed created "a conflict of interest . . . which

ethically required DA Klomberg and the Dodge County District Attorney's Office to recuse itself from prosecuting this matter," and that he made out a prima facie case of prejudicial conflict in his motion simply because he received a high bond, a multitude of serious charges, and a recommendation for a lengthy prison sentence. (VanderGalien's Br. 22–31.) He is wrong.

"[I]n a postconviction setting, the defendant must show by clear and convincing evidence that the attorney had an actual conflict of interest." *State v. Kalk*, 2000 WI App 62, ¶ 16, 234 Wis. 2d 98, 608 N.W.2d 428 (addressing a prosecutorial conflict claim). "An actual conflict of interest exists when the attorney is actively representing a conflicting interest." *Id.* "An actual conflict is not 'a mere possibility or suspicion of a conflict [that] could arise under hypothetical circumstances." *Id.* (citation omitted). "Rather, an actual conflict occurs when an 'attorney's advocacy is somehow adversely affected by the competing loyalties.'" *Id.* (citation omitted).

Prosecutors are not neutral and have obligations to their client, the State of Wisconsin. They have a conflict of interest in a case only when circumstances exist that would either: (1) tempt the prosecutor to shortchange the interests of *the State* in handling the case, such as when the defendant has a close personal relationship with the prosecutor or a key witness has information that a prosecutor would have conflicting loyalties in presenting[9]; (2) the prosecutor previously represented the defendant and thus had

[9] *See State v. Smith*, 198 Wis. 2d 584, 543 N.W.2d 512 (Ct. App. 1995) (prosecutor had a conflict of interest where the key witness against the defendant claimed to have also purchased drugs from the prosecutor's brother); *State v. Stehle*, 217 Wis. 2d 50, 53, 577 N.W.2d 29 (Ct. App. 1998) (assistant district attorney's alleged conflict of interest where defendant robbed the ADA's ex-wife's home).

knowledge that could be used against the defendant in the case[10]; or (3) an actual conflict exists, meaning the prosecutor's actual advocacy is affected by loyalties owed to others and the defendant makes a prima facie showing that the charging decision was in some way influenced by it or the plea negotiations were distorted because of it.[11]

VanderGalien failed to provide any facts in his motion that would establish an actual conflict of interest on DA Klomberg's part or any prejudice VanderGalien suffered from it even had such a conflict existed. (R. 137:11–12.) As the circuit court aptly noted, there was no evidence that DA Klomberg or Ms. Justman had any privileged or prejudicial information about VanderGalien that was used against him, nor any reason that DA Klomberg would neglect the State's interests or his duty to seek justice simply because a legal assistant in the DA's office knew one of the victims. (R. 158:6–7.) As elected public officials, District Attorneys—especially those in smaller counties—inevitably deal with victims, witnesses, and defendants in an infinite variety of relationships with varying degrees of proximity. They are not required to disqualify themselves every time they know someone who knows a victim in a criminal case; that would impose an impossible burden upon the District Attorney and the criminal justice system generally.

None of the circumstances showing a prosecutorial conflict are present here. There was no information about VanderGalien to be gleaned from Ms. Justman's relationship to the victim. Indeed, Ms. Justman did not even say anything about VanderGalien in her letter; she merely spoke about the victim's good character. (R. 81.) DA Klomberg did not file charges for nearly a year until the blood test results came

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[10] *State v. Kalk*, 2000 WI App 62, ¶¶ 18–21, 234 Wis. 2d 98, 608 N.W.2d 428.

[11] *Smith*, 198 Wis. 2d at 591.

back, and he did not move to amend them until the Wisconsin State Patrol's crash reconstruction report returned showing there was nothing wrong with VanderGalien's car, that he never applied the brakes, and that he was traveling at 76 miles per hour with the car fully in the wrong lane for at least 14 seconds. (R. 2; 45; 122:5–6.) In other words, the charging decisions were plainly based on the evidence received as the investigation unfolded and DA Klomberg's legal research on whether certain charges were supported by the evidence. (R. 122:4–7.) VanderGalien failed to provide any facts in his motion to even suggest that these decisions were made based on improper animus or some improper influence. (R. 137:11–12.) And VanderGalien received an extremely beneficial plea offer—his sentencing exposure was reduced by over 100 years from what he was facing on the amended charges, the State agreed to cap its sentencing recommendation to the maximum allowable on only two of the three charges to which he was pleading, and 10 charges were dismissed and read in. (R. 53; 121:9.) The notion that VanderGalien's receiving a lenient plea offer could somehow show that loyalty to an employee caused the DA to be biased against him defies logic.

To be sure, DA Klomberg asked the court to impose the maximum sentence for the two charges to which VanderGalien pled no contest, but the facts of this case were heinous. The crash resulted in pure carnage altering dozens of lives, it was entirely VanderGalien's fault, and this was VanderGalien's third OWI offense. (R. 2; 90; 91; 92; 93; 124:3–49.) Though prosecutors have an ethical obligation to seek justice, that does not entitle a defendant to the most lenient treatment conceivable under the law. The prosecutor has a duty to the public to hold people accountable for the harm they cause and to do what is best for public safety; that is part of the calculation of what it means to do justice. Here, that clearly meant a substantial prison sentence. The mere fact that a legal assistant in the Dodge County District Attorney's

Office had a personal relationship with one of the victims in this case did not create a disqualifying conflict for DA Klomberg, and VanderGalien failed to plead any facts in his motion that would show otherwise or that any of the DA's decisions in this case were affected by Ms. Justman's knowing the victim in any way.

VanderGalien fails to cite a single case—from any jurisdiction—holding that a legal assistant's friendship with a victim in a criminal case ethically conflicts the District Attorney personally out of the case. (VanderGalien's Br. 24–31.) VanderGalien's entire support for this proposition is a single, six-year-old law review article that advocates for group decision making in prosecutor's offices to avoid "distort[ed] judgment" based on implicit biases and professional ambition. (VanderGalien's Br. 24–31); Bruce A. Green and Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. Rev. 463, 535 (2017).) The article itself acknowledges that it is a broad critique of prosecutorial discretion generally that is based on social science and not the law. *Id.* at 479–84. It hardly establishes that such a tangential, second-order relationship between the District Attorney and a victim in a criminal case such as the one that existed here creates a disqualifying conflict of interest for the DA. At any rate, VanderGalien did not provide this off-point article to the circuit court, so it cannot be a basis for reversal. (R. 137); *See Allen*, 274 Wis. 2d 568, ¶ 27.

VanderGalien otherwise simply points to the bare fact that Wis. Stat. § 978.045(1r)(bm)8. *permits* a District Attorney to seek a special prosecutor if he or she "determines that a conflict of interest exists regarding the district attorney or the district attorney staff." (VanderGalien's Br. 25.) But he has not established that an employee in the District Attorney's Office simply knowing a victim *is* a conflict of interest for the prosecutor, let alone an inherently prejudicial one that *requires* disqualification of the DA, personally.

Moreover, subsection (1r) of the statute is permissive only, and it allows a District Attorney to seek a special prosecutor if, in his or her independent evaluation of the circumstances, he or she finds there is a conflict of interest. Wis. Stat. § 978.045(1r)(bm)8. Its purpose is to control the Department of Administration's expenditures, not to mandate recusals on the part of District Attorneys. *State v. Bollig*, 222 Wis. 2d 558, 571, 587 N.W.2d 908 (Ct. App. 1998). DA Klomberg determined that there was no conflict requiring a special prosecutor and thus did not ask for one. The statute is simply irrelevant here.

The circuit court properly found that VanderGalien did not make a prima facie showing of an actual conflict of interest in his postconviction motion nor provide any facts showing prejudice, and it therefore properly denied this claim.

b. VanderGalien is actually raising a selective prosecution claim, and it also fails.

What VanderGalien actually appears to be arguing is a selective prosecution claim, not a conflict of interest claim.[12] And he could not prevail on it, either.

"A prosecutor has great discretion in deciding whether to prosecute in a particular case." *State v. Kramer*, 2001 WI 132, ¶ 14, 248 Wis. 2d 1009, 637 N.W.2d 35. This "necessarily involves a degree of selectivity," therefore "a prosecutor's conscious exercise of some selectivity in enforcement does not in itself create a constitutional violation." *Id.* "A violation of the Fourteenth Amendment of the United States Constitution will occur, however, when a defendant can show 'persistent

[12] After finding that there was no conflict, the circuit court viewed this as a prosecutorial vindictiveness claim and correctly found that VanderGalien could not prevail under that doctrine because he was not retaliated against for asserting a legal right. (R. 158:5–7.)

selective and intentional discrimination in the enforcement of the statute in the absence of valid exercise of prosecutorial discretion." *Id.* (citation omitted). "A defendant establishes a prima facie case when the facts presented are sufficient to raise a reasonable doubt as to the prosecution's purpose." *Id.* ¶ 16. This requires a defendant to "show that he or she has been singled out for prosecution while others similarly situated have not (discriminatory effect) and that the prosecutor's discriminatory selection was based on an impermissible consideration such as race, religion or other arbitrary classification (discriminatory purpose)." *Id.* ¶ 18. "In cases involving solitary prosecutions, [to show discriminatory purpose] a defendant may also show that 'the government's discriminatory selection for prosecution is . . . motivated by personal vindictiveness on the part of a prosecutor." *Id.* (citation omitted).

VanderGalien's pleading does not overcome the first hurdle of showing discriminatory effect because his own pleadings show he was far from the only person prosecuted under these statutes, and he made no effort whatsoever to plead any facts showing that the other defendants to whom he compared himself were factually similarly situated to him but treated differently. (R. 84:22–32; 137:10–12.) He could not overcome the discriminatory purpose prong either, because he failed to plead any facts showing personal vindictiveness on the part of the prosecutor. (R. 84; 137:11–12.)

VanderGalien's argument was, and is, based solely upon his perception that he was "prosecuted more severely" than other defendants charged under one of the statutes prohibiting driving with a restricted controlled substance in their blood. (R. 137:11–12; VanderGalien's Br. 28–30.) The only evidence he provides to attempt to show discriminatory effect or purpose, though, is that he received a high bond, amended charges, and a high sentencing recommendation—with no showing that these things did not occur in any other

cases. (R. 137:11–12; VanderGalien's Br. 28–30.) From that, he concludes that because a legal assistant in the Dodge County DA's Office was close to the man VanderGalien killed, DA Klomberg must have been personally biased against him and that's why he took these actions. (VanderGalien's Br. 28–31.) Setting aside for a moment that VanderGalien offered not a single fact to support that vast inferential leap, this is not a viable avenue to attack a conviction under either a conflict of interest theory or a selective prosecution theory.

The manner in which a prosecutor exercises the broad discretion entrusted to him or her is not reviewable by the courts. "When probable cause exists for prosecution, the court should not consider the subjective motivations of the district attorney in making his charging decision, except to determine whether a discriminatory basis was involved" such as race or religion. *State v. Annala*, 168 Wis. 2d 453, 472–73, 484 N.W.2d 138 (1992). A mere claim that the District Attorney had an "improper motive" for pursuing the case in a particular manner is insufficient.[13] *Id.*

> The prosecuting attorney has wide discretion in the manner in which his duty shall be performed, and such discretion cannot be interfered with by the courts unless he is proceeding, or is about to proceed, without or in excess of jurisdiction. Thus, except as ordained by law, in the performance of official acts he may use his own discretion without obligation to

[13] The defendant's "improper motive" argument that the Wisconsin Supreme Court rejected as unreviewable in *Annala* was very similar to VanderGalien's. There, the defendant claimed that the prosecutor issued the criminal complaint to alleviate pressure the victim's parents were placing on him; that he believed the complaint would be dismissed; and when it was not, he pursued the case to avoid public embarrassment and unfavorable publicity. *State v. Annala*, 168 Wis. 2d 453, 472, 484 N.W.2d 138 (1992). The Court held that non-discriminatory subjective motivations of the district attorney such as these are not subject to judicial review. *Id.* at 472–75.

> follow the judgment of others who may offer suggestions; and his conclusion in the discharge of his official liabilities and responsibilities are not in any wise subservient to the views of the judge as to the handling of the state's case.

State v. Johnson, 74 Wis. 2d 169, 174, 246 N.W.2d 503 (1976) (citation omitted). Prosecutorial discretion (and, for that matter, circuit courts' sentencing discretion) is a societal recognition that each case is different and should be resolved based upon the individual's culpability and the facts of the individual case. *See Jung v. State*, 32 Wis. 2d 541, 548, 145 N.W.2d 684 (1966). "The district attorney is elected to wrestle with balancing all of the interests involved to arrive at a decision whether to prosecute" and how to pursue a case, and accordingly "[i]n the absence of meritless charges or discriminatory motives, [courts] should not second guess" the prosecutor's decisions. *Annala*, 168 Wis. 2d at 474.

That proscription notwithstanding, VanderGalien failed to provide any facts even insinuating that he was prosecuted "more severely" than others similarly situated to him, let alone that DA Klomberg did so simply due to personal animus motivated by a legal assistant in the DA's office knowing one of the victims. (R. 137:11–12.) He merely posed a series of rhetorical questions about how his case proceeded and pointed to the sentences other defendants had received, with zero facts provided to show that these allegedly "severe" actions were not taken in those cases, or that those other cases were even remotely factually similar to his. (R. 137:12.) He then conclusorily declared that he had made a prima facie showing of bias against him. (R. 137:12.) That is insufficient to plead discriminatory effect, purpose, or prejudice.

At any rate, the record conclusively demonstrates beyond a reasonable doubt that every decision about which VanderGalien complains was a valid exercise of prosecutorial discretion. That DA Klomberg aggressively pursued this case should come as no surprise, given how egregious

VanderGalien's conduct was—again, this was VanderGalien's third OWI offense, he was driving 21 miles over the 55 mph speed limit with multiple substances in his system, and he rammed head-on into oncoming traffic while still accelerating despite having a clear view of the road and over a third of a mile to return to his lane—and the horrific, lasting harm he caused to so many people, both directly and indirectly. (R. 2:10–11, 15; 90; 124:10–46, 54–55.) And VanderGalien certainly did not provide any facts that would suggest that DA Klomberg acted based on personal animus toward him rather than on the facts of the case. (R. 137:11–12.) Indeed, he still has not done so.

That DA Klomberg handled the case himself is utterly irrelevant.[14] District Attorneys are of course expected to prosecute cases in their jurisdictions; that is their primary duty. Wis. Stat. § 978.05(1). The high bond requested[15] is not unusual when a defendant is facing serious charges that may cause them to flee even if they have not in the past, which the circuit court explicitly recognized and authorized—twice. (R. 119:24–26; 120:9–10.) The charges being amended to more serious ones after the initial complaint was filed[16] is also expressly permitted by law and completely unremarkable, particularly in cases like this one where the investigation is still ongoing after charges have been filed. (R. 122:5–6); Wis. Stat. § 971.29; *State v. Cameron*, 2012 WI App 93, ¶ 13, 344 Wis. 2d 101, 820 N.W.2d 433 ("Because a 'prosecutor's initial charging decision "may not reflect the extent to which an individual is legitimately subject to prosecution,"' before trial, 'the prosecutor must remain free to exercise his or her broad discretion to determine which charges properly reflect

[14] (VanderGalien's Br. 29; R. 137:11–12).

[15] (VanderGalien's Br. 29; R. 137:11–12).

[16] (VanderGalien's Br. 29; R. 137:11–12).

society's interests'"). The amendment, too, was authorized by the court. (R. 122:17–20.)

And the mere fact that DA Klomberg's sentencing recommendation was allegedly higher than in other cases where the defendant was charged with what VanderGalien deems "comparable offenses" simply because they were convictions under one of the same statutes is meaningless.[17] VanderGalien provided nothing showing what the State's recommendations even were in those cases, and no showing whatsoever that he was similarly situated to those defendants. (R. 84:23–32; VanderGalien's Br. 29–30.) None of those cases had seven victims: one dead and six others with lasting injuries and trauma, not to mention that caused to their friends and families. (R. 124:70–71, 87–88.) VanderGalien's reckless conduct in careening eastbound in the westbound lane of the highway at 76 miles per hour for an extended period of time despite having ample open road to move back into his lane alone was outrageous. When factoring in the number of innocent people VanderGalien gravely harmed, the numerous substances found in his blood, and the fact that this was his third offense, as DA Klomberg pointed out, this case was "as aggravated as it gets." (R. 124:71, 89–90.) Naturally, the State's sentencing recommendation and the sentence the court ultimately imposed in this case were going to be higher than in others with less monstrous facts.

Every action taken by DA Klomberg in this case that VanderGalien claims proves "bias" is no more than should be expected of a diligent prosecutor faced with a devastating set of facts and a recidivist defendant. Stated differently, the record conclusively demonstrates beyond a reasonable doubt that all of these actions were exercises of valid prosecutorial discretion. The circuit court properly denied this claim.

[17] (VanderGalien's Br. 29; 137:11–12.)

C. The circuit court properly denied VanderGalien's ineffective assistance of counsel claim as insufficiently pleaded and conclusively refuted by the record.

Again, to be entitled to a hearing, a defendant seeking to withdraw his plea based on ineffective assistance of counsel must plead sufficient material facts, meaning the who, what, where, when, why, and how, to establish that counsel performed deficiently, and that in the absence of the deficient performance he would have insisted on going to trial. *Allen*, 274 Wis. 2d 568, ¶ 23; *Bentley*, 201 Wis. 2d at 314. Also, the record must not conclusively demonstrate that he is due no relief. *Sulla*, 369 Wis. 2d 225, ¶ 30. VanderGalien made neither showing in his postconviction motion, and the record conclusively demonstrates he could not prove prejudice.

The only factual basis for this claim that VanderGalien provided in his motion was an affidavit from postconviction counsel stating that his trial attorney did not "believe" he adequately explained the effect of read-in charges to VanderGalien, and a conclusory allegation that VanderGalien did not believe the court could consider read-ins at sentencing. (R. 137:15–16; 136:1.) He did not provide any affidavit from trial counsel to this effect, though, and he provided no facts showing what trial counsel actually told VanderGalien regarding the read ins. (R. 136; 137; 138; 139; 140.) Nor did VanderGalien himself explain what defense counsel told him about read ins, what he did not understand, why he believed read ins could not be considered at sentencing when the plea questionnaire and the court expressly told him otherwise, or why he would have evaluated the plea differently if he'd been told something different. (R. 137:15–19.)

VanderGalien's motion merely pointed to the fact that the State argued at sentencing that it believed the read ins should be considered admissions of guilt on those offenses, and apparently relies on that to show that he misunderstood

the read ins. (R. 137:14–15; VanderGalien's Br. 34–35.) The fact that the State was mistaken about this at *sentencing*, however, says nothing about what defense counsel told VanderGalien or what VanderGalien understood *when entering his plea* three months before that. Moreover, defense counsel opposed that construction of the read ins at sentencing and correctly stated that read ins are not admissions of guilt to those crimes. (R. 137:14.) And all VanderGalien provided the circuit court about this was a single sentence stating that he did not think the read-in charges would be considered at sentencing, and a bald assertion that "[i]f VanderGalien had been properly informed of the effects of dismissed but read-in charges at sentencing, he would have elected to proceed to trial" with no accompanying explanation why. (R. 137:13–18.)

As the circuit court properly found, those are conclusory allegations without sufficient material facts to support them. (R. 158:12.) A defendant cannot show that defense counsel inadequately explained something to him without providing at least *something* substantive showing with specificity what defense counsel told the defendant and why it was wrong. *Allen*, 274 Wis. 2d 568, ¶ 23. Further, *Bentley* established nearly thirty years ago that "a defendant must do more than merely allege that he would have pled differently" to establish prejudice; "such an allegation must be supported by objective factual assertions." *Bentley*, 201 Wis. 2d at 313. VanderGalien failed to explain why he would have elected to proceed to trial on 13 charges with 190 years of sentencing exposure simply because the trial court could consider the conduct underlying the read ins when imposing a sentence on three charges that capped his exposure at less than a third of that time. VanderGalien provided no objective factual assertions to support either prong of an ineffective assistance claim.

Even so, the record shows that VanderGalien could not prove prejudice because: (1) the explanation was contained in the plea questionnaire; (2) the circuit court correctly explained it to VanderGalien during the plea colloquy; (3) defense counsel gave a correct explanation of the effect of read-in charges on the record; and (4) VanderGalien did not dispute the restitution amount that necessarily included the read ins.

As the circuit court noted, the plea questionnaire that VanderGalien and his lawyer both signed stated,

> I understand that if any charges are read-in as part of a plea agreement they have the following effects:
>
> - Sentencing – although the judge may consider read-in charges when imposing sentence, the maximum penalty will not be increased
> - Restitution – I may be required to pay restitution on any read-in charges.
> - Future prosecution – the State may not prosecute me for any read-in charges.

(R. 59:2.) VanderGalien confirmed on the record that he signed the plea questionnaire, reviewed it with his attorney before he signed it, and understood its contents. (R. 121:9–10.) He further confirmed that he was 36 years old, completed 10 years of schooling, and could read, write, and understand English. (R. 121:10.) He also admitted that all of the facts in the criminal complaint, upon which all of the charges including the read-ins were based, were true. (R. 121:17.) The circuit court additionally expressly explained the effect of read-in charges to VanderGalien during the plea colloquy, engaging in the following exchange:

> Q: There are various charges that will be dismissed and read in under this agreement. [Listing charges]. Those charges will be dismissed and read in.
>
> That means that the court may consider these charges when imposing sentence and you may be required to pay restitution on each of these read-in

> charges; however, the maximum penalties will not be increased and the state will be prohibited from any future prosecution of these read-in charges; do you understand that?
>
> A: Yes, your honor.

(R. 121:9.) Trial counsel further confirmed that he had gone over the plea questionnaire with VanderGalien, was satisfied that he understood it, and that VanderGalien's plea was being made freely, voluntarily, and intelligently. (R. 121:16.) True, at sentencing, the State asked to have the read ins considered admitted. (R. 124:69–70.) Trial counsel objected, however, and agreed that the court could consider the facts underlying the read ins but not that they were admissions of guilt, and the court noted that read ins were explained during the plea colloquy and again reiterated, "you can't increase the maximum because of them, but they are to be considered by the Court." (R. 124:94–95, 109.) All of that was perfectly accurate: read ins are not considered admission of guilt to the charges, but courts "may consider uncharged and unproven offenses" and even "facts related to offenses for which the defendant has been acquitted" at sentencing. *Sulla*, 369 Wis. 2d 225, ¶ 32 (citations omitted). And finally, VanderGalien did not dispute the amount of restitution, which could only be reached by factoring in some of the read-in charges. (R. 112:1; 128:3.)

In short, this case is exactly like *Sulla*. The defendant there also claimed that his attorney misinformed him of the effect of read ins causing him to misunderstand them, but (1) counsel described their effect accurately, and (2) in light of the plea questionnaire, plea colloquy, sentencing transcript, and the fact that the defendant did not dispute the restitution amount, the Wisconsin Supreme Court held that the record conclusively demonstrated Sulla was correctly informed of and understood the effect of the read ins. *Sulla*, 369 Wis. 2d 225, ¶¶ 37–53. All of those factors are present here, too.

VanderGalien ignores the circuit court's reliance on these portions of the record and zeroes in on the court's mention that it properly considered the read ins, and that the State and defense counsel disagreed at sentencing on how they should be viewed. (VanderGalien's Br. 34–36.) None of that matters. The record shows that VanderGalien was correctly informed of the effect of the read ins and confirmed that he understood them when entering his plea. The circuit court properly exercised its discretion in denying this claim without a hearing based on the insufficiency of VanderGalien's pleading and the existing record.

D. As shown above, VanderGalien understood the effect of the read-in charges.

VanderGalien's final claim is a permutation of his ineffective assistance of counsel claim, this time alleging that his plea was not knowingly, voluntarily, and intelligently entered because he "was not aware that by agreeing to dismissed and read-in charges that he would effectively be admitting that he committed the conduct alleged in those charges." (R. 137:18.) This claim must be rejected, for two reasons.

First, this is not a viable avenue to independently attack a plea when the defendant was represented by counsel and was not otherwise misinformed by the court. *Hill v. Lockhart*, 474 U.S. 52, 56–60 (1985) (citation omitted) ("Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases,'" and the defendant's ability to show prejudice); *cf. State v. Riekkoff*, 112 Wis. 2d 119, 128–29, 332 N.W.2d 744 (1983) (defendant's guilty plea was not knowingly, intelligently, and voluntarily entered when the court, the prosecutor, and defense counsel

all misinformed the defendant that his ability to appeal a pretrial ruling would survive a guilty plea). VanderGalien was never misinformed by the court about the effect of the read-ins and he presented nothing showing that his attorney misinformed him about them, either.

Second, as shown above, VanderGalien was repeatedly correctly advised that the read ins could be considered at sentencing, his attorney's statement at sentencing about how read ins should be considered was correct, and the record conclusively demonstrates VanderGalien understood this. His pleading mirrors that made in *Sulla*, where the defendant also claimed his attorney was ineffective for not sufficiently explaining read ins, rendering his plea unintelligently entered. *Sulla*, 369 Wis. 2d 225, ¶¶ 36–53. That was deemed insufficient to require an evidentiary hearing on a materially indistinguishable record. *Id.* The same result should reflect from the record in this case.

CONCLUSION

This Court should affirm the circuit court.

Dated this 18th day of July 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 10,984 words.

Dated this 18th day of July 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 Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 18th day of July 2023.

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