STATE OF WISCONSIN
SUPREME COURT

APPEAL No. 2022AP1929-CR

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

V.

REYNALDO ROSALEZ,
DEFENDANT-APPELLANT-PETITIONER.

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 CIRCUIR COURT, THE HONORABLE GLENN H. YAMAHIRO, PRESIDING. MILWAUKEE COUNTY CASE No. 2018CF3441

PETITION FOR REVIEW

Respectfully submitted by:

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STATEMENT OF THE ISSUES

1. Should the question of whether the accused suffers from amnesia for purposes of invoking the McIntosh procedure require a formal "medical diagnosis" by a person with a medical degree?

   Answered by the court of appeals: "Yes."

2. Where an accused claims amnesia for purposes of invoking the McIntosh procedure, can the existence of amnesia be established through alternative medical evidence of a reliable nature including (1) undisputed documentation from drug manufacturer detailing memory loss as a significantly occurring side effect; (2) opinion of psychologist to a reasonable degree of scientific certainty that amnesia is not feined or exaggerated; and (3) no evidence from the State challenging (1) and (2) above?

   Answered by the court of appeals: "No."

3. If a lawyer is aware of his client's amnesia from the outset, is it objectively unreasonable (deficient performance under Strickland) for the lawyer to fail to advise the client of the McIntosh procedure before the client enters a plea?

   Answered by the court of appeals: "No."

4. If the sole evidence shows that the defendant would have opted for trial and would not have entered a plea had the defendant been properly advised on the McIntosh procedure, has the defendant shown a reasonable probability of a different outcome (prejudice under Strickland)?

   Answered by the court of appeals: Not answered.

STATEMENT OF CRITERIA SUPPORTING REVIEW

Real and significant questions of constitutional law are presented on critical questions that should be resolved by this Court respecting a defendant's due process right to a fair trial and, a defendant's right to the effective assistance of counsel during the plea process. WIS. STAT. 809.62(1r)(a).

A decision by the Supreme Court will help develop, clarify, or harmonize the law governing the rights of a defendant who suffers from amnesia, and the question presented is a novel one, the resolution of which will have statewide impact. WIS. STAT. 809.62 (1r)(c)(2).

The court of appeals' decision is in conflict with controlling opinions of the U.S. Supreme Court, the Wisconsin Supreme Court, and other decisions by the court of appeals. WIS. STAT. 809.62(1r) (d).

STATEMENT OF THE CASE

Reynaldo Rosalez has no memory of the events that currently imprison him (See R18:4). That is not to say that he does not know why he is imprisoned; he is fully aware that he pleaded no contest to sexual assault of child. (R36:12; R16). But, Rosalez does not remember anything about the time period during which the assault is said to have occurred. (See R18:4). In fact, he has absolutely no memory of then interacting with or sexually assaulting the victim, as she described. (Id.) That absence of memory is not a novel condition. (R96:9; A-Ap 13). Instead, it has persisted since the night on which the victim said assault occurred. (Id:44-45; A-Ap

48-49).

Rosalez told his trial counsel during pretrial litigation that he had no memory of the event. (See R36:3-4). The matter of Rozalez's absent memory was discussed on the record at his plea hearing as the basis for the State allowing him to plead no contest. (Id.) He told the PSI writer that he had no memory of the event. (R18:4). And then, when he spoke at sentencing, he reiterated he "would never have consciously harmed" the victim and "first found out...about the details" of the allegations when he was being charaged. (R49:32-33). He told the court that he simply had no "explanation as to what happened that night." (Id:32). According to trial counsel, Rosalez did not want to "attack[] the ordibility" of the victim or her mother "from the begining," and thus he did not "deny these events" occurred. (Id.:26). He pleaded no contest not because he remembered and knew that he had harmed the victim, but rather because he accepted as true what the victim said. (See id).

Relatedly, if Rosalez had gone to trial, he would have been little to help to his defense. In the pretrial stages, he could not have guided his attorney to defensive facts--he doesn't remember anything about the incident. (R18:4). What Rosalez does remember about that night is that he took his Ambien, drank some alcohol, and was skyping with his daughter when his memory goes blank. (Id.). The next thing he remembers is waking the next day in his own bed. (See id.). At trial, his testimony--if he had given it--would have by necessity consisted almost entirely of a single, repetitive answer: "I don't remember." (See R119:55-56; A-Ap 59-60). He could not testify to what he was thinking or doing during the alleged assaults. (Id.). He could not proffer any exculpatory explanation of his alleged interaction with the victim. (Id). And, quite frankly,

he could offer no meaningful answer to "Did you do it?" The best he could have offered in response is "I don't remember doing it," which is by no means exculpating. (Id.).

Despite Rosalez's amnesia and his trial counsel's apparent awareness of it, his trial counsel never discussed with him the possibility of filing a motion protesting that his amnesia would deny his right to a fair trial. (R96:16; Ap 20); see also State v. McIntosh, 137 Wis. 2d 339, 404 N.W. 2d 557 (1987)(leading case on subject). Indeed, when Rosalez pleaded no contest, he did not know that Wisconsin recognizes that an amnestic defendant may, by virtue of that amnesia, be unable to be fairly tried. Id. at 349-50. (R96: 46-48; A-Ap 50-52).

If Rozalez's trial counsel had hired an expert to develop facts relevant to a McIntosh claim, he would have learned that Rosalez shows no sign of malingering in his assertion that he cannot remember the night in question. (R62:11). On multiple instruments purposed on discerning whether a person is being untruthful in reporting mental health issues, Rosalez's score demonstrates that he is not faking his loss of memory. (Id.:8-10).

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

> Malingering was not found in the instruments as described, and feigning, exaggerating, minimizing, and mis-representing symptoms were not indicated. Subject's presentation was consistent with an individual who is responding in an honest and a self disclosing manner. More specifically, subject was consistent in his responses regarding overall functioning and regarding the night of the incidents in question.

> His responses and scores suggest that he is relatively honest and self disclosing with mental health professionals. He was found to be forthcoming both in the instruments and during clinical interviews. To a reasonable degree of psychological certainty, given the totality of the information, clinical malingering indicators or evidence that would call into question the veracity or consistency of his self report regarding amnesia the night of incidents in question were not found.

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

But Rosalez knew nothing of McIntosh's rule because his attorney failed to advise him about it. (R96:16; A-Ap 20). However, if trial counsel had informed Rosalez that a pretrial motion concerning his right to a fair trial was possible, Rosalez would have pleaded no contest. (R96:47-48; A-Ap 51-52). Instead, he would have filed the McIntosh motion and taken his case to trial with the specific purpose of establishing that his amnesia meant he could not be fairly tried. (Id.)

Postconviction, Rosalez filed a motion to withdraw his plea. (R61). He argued that it was the result of his counsel's ineffectiveness, insofar as his counsel had not explained the McIntosh rule to him. (Id. 11-17).

On June 9, 2022, the circuit court held a Machner hearing to address the issues raised in Rosalez's postconviction motion. (See R96: A-Ap at 5). Rosalez's trial attorney admitted during his testimony that he "never was exploring whether there was a defense

based upon [Rosalez's] amnesia." (R96:25; A-Ap 29). Defense counsel further admitted that he never discussed McIntosh or its rule with Rosalez:

> Q Am I understanding you correctly that when Mr. Rosalez was entering his plea he did not--at least from the conversations you had with him, he did not understand that he could make a pretrial motion raising his amnesia and then go to trial, and if he lost, raise that issue at that time?
>
> A I never had that discussion with him. It was not something that I talked discussed with him.
> (R96:16; A-Ap 20).

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

> Q Do you understand what the McIntosh case refers to?
>
> A I do somewhat, yes.
>
> Q When is the first time that you heard about that?
>
> A When I talked with [appellate counsel] about it.
>
> Q And did [trial counsel] ever bring that up to you?
>
> A No
>
> Q When you entered your plea, Mr. Rosalez, did you know that you had the ability to go to trial and later contest its fairness based on your amnesia?
>
> A No, I did not.
>
> Q Do you understand that that may have been a possibility now?
>
> A I understand it now, yes.
> (R96:46-48; A-Ap 50-52).

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

> Q ...Would you have entered your plea if you had known about the McIntosh rule?
>
> A NO, I would not.

Q Can you explain why not?

A Well, I would have taken it to trial. I only knew what [trial counsel] was telling me. I didn't know that I had--that there were other options out there as far as with my case.

Q Mr. Rosalez, would you prefer not to be convicted of this charge?

A Yes, I would.

Q And if a sucessful McIntosh defense had been presented, do you understand that you possibly could avoid conviction for this case?

A Yes, I do now.

Q Would you have--how would that have impacted your decision whether to go to trial or not?

A If I would have known?

Q Yes

A I would have gone to trial, yeah.
(R96:47-48; A-Ap 51-52).

Dr. Freiburger also testified at the postconviction hearing. Consistent with his report, he explained that Rosalez shows no evidence of malingering in is assertion that he is amnestic. (R96: 30; A-Ap 34). Dr Freiburger further explanied that there is no "single medical test that can be run on a person to determine whether they are, in fact, amnestic." (Id. 30; A-Ap 34). However, Dr. Freiburger testified that the tests he ran on Rosalez are "recognized in [his] field as the sort of tests that would help to assess whether a person is or is not amnestic." (Id. 31; A-Ap 35). According to Dr. Freiburger's assessment of those tests in Rosalez's case, as well as the other ancillary material he consulted, he said to a reasonable degree of psychological certainty that Rosalez is not falsely reporting his inability to remember the events in question. (R62:11).

In addition to Dr. Freiburger's report and testimony, Rosalez presented documentation from Ambien's manufacturer detailing that memory loss is a significantly occurring side effect of the medication. (R107, R108). Ambien's manufacturer explains:

> Complex sleep behaviors, including sleep-walking, sleep-driving, and engaging in other activities while not fully awake, may occur following the first or any subsequent use of AMBIEN. Patients can be seriously injured or injure others during complex sleep behaviors. Such injuries may result in a fatal outcome. Other complex sleep behaviors (e.g., preparing and eating food, making phone calls, or having sex) have also been reported. Patients usually do not remember these events. Postmarketing reports have shown that complex sleep behaviors may occur with AMBIEN alone at recommended doses, with or without the concomitant use of alcohol or other central nervous system (CNS) depressants...

(R107:4 section 5.1 (emphasis added).) In other words, Ambien's manufacturer warns its users that taking Ambien may cause them to forget having done any number of things from cooking to sex. (Id.) And, the manufacturer warns that amnesia can occur regardless of whether the user drank alcohol when taking their prescribed Ambien. (Id.) Furthermore, such memory loss could occur the first time or it could occur upon "any subsequent use." (Id. emphasis added).)

The State proffered no evidence that Rosalez has before remembered the events but was now feigning to have forgotten them. And, the State called no expert to contest Dr. Freiburger's conclusion, nor did it offer any evidence--expert testimony or otherwise--disputing the proposition that Ambien can cause memory loss. (See R96; A-Ap 5-71.) To the contrary, the State stipulated at the hearing to the admission of the documentary evidence that Rosalez presented from Ambien's manufacturer.

In its decision, the circuit court stated "it is important to compare the facts in [Rosalez's] case with those of the leading

case in this area with regard to amnesia, the McIntosh decision." (R119:5; A-Ap 76). In particular, the court focused on the fact that "the diagnosis [of amnesia] in the McIntosh case was not made by a psychologist. It was made by a psychiatrist." (Id.) The court went on to say that since Dr. Freiburger was not a "medical doctor" and did not affirmatively make a diagnosis of amnesia, "and also there have been numerous self-reports here that this was not a permanent condition of any sort, the Court believes it is necessary to look at the defendant, his testimony, his credibility, and any inconsistencies that have been made over the course of this case with regard to drug use, alcohol use, and the mixing thereof." (Id.5-6; A-Ap 76-77).

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

In its decision dated June 11, 2024, the court of appeals affirmed the circuit court's judgment of conviction entered on Rosalez's no-contest plea, and the circuit court's order denying his motion for postconviction relief (Appeal No. 2022AP1929-CR). The court of appeals concluded that the circuit court's finding that Rosalez failed to prove his amnesia was not clearly erroneous, and that, having not proved his amnesia, Rosalez could nor prevail on his ineffective assistance of counsel claim because counsel did not

perform deficietly by failing to discuss what would have been a futile defense.

The court of appeals based its decision on the principle that before the McIntosh framework applies, a defendant must show that "permanent amnesia has been medically established" and that the defendant bears the burden of establishing amnesia by "a clear preponderance of the credible evidence." The court of appeals contrasted the finding of amnesia in McIntosh 137 Wis. 2d at 348-49, with the failure to establish amnesia in Muench, 60 Wis. 2d at 392-93. The court of appeals summarized its view of the pertinent evidence of amnesia presented in Rosalez's case by suggesting that the sole evidence of amnesia consisted of an opinion from Rosalez's psychologist that "there was no evidence of malingering, or faking, or exaggerating symptoms from Rosalez about his lack of memory" (¶20).

The court of appeals ultimately held that "without a medical diagnosis on the record, Rosalez did not prove his amnesia by a clear preponderance of the credible evidence" (¶21). The court went on to reason that "[n]ot only did Rosalez lack a medical diagnosis, he presented no evidence on the issue of permanency" (¶21). The court of appeals thus found that "the circuit court's finding that Rosalez failed to prove his amnesia was not clearly erroneous" and "[a]s a consequence, Rosalez would not have been able to invoke McIntosh" (¶22). For this reason, the court of appeals found that counsel did not perform deficiently (¶22).

I. THE SUPREME COURT SHOULD ACCEPT REVIEW TO RESOLVE THE QUESTION ABOUT WHETHER A MEDICAL DIAGNOSIS BY A MEDICAL DOCTOR IS REQUIRED TO ESTABLISH AMNESIA BY A CLEAR PREPONDERANCE OF THE EVIDENCE FOR PURPOSES OF INVOKING THE MCINTOSH PROCEDURE, OR WHETHER THE EXISTENCE OF AMNESIA CAN BE ESTABLISHED THROUGH ALTERNATIVE RELIABLE EVIDENCE SUCH AS COMBINATION OF (1) DRUG MANUFACTURER'S WARNING OF POSSIBLE MEMORY LOSS; AND (2) OPINION OF PSYCHOLOGIST THAT DEFENDANT'S AMNESIA IS NOT FEIGNED OR EXAGGERATED.

A. REVIEW IS WARRANTED BECAUSE A DECISION BY THE SUPREME COURT IS NEEDED ON THIS ISSUE.

The McIntosh procedure (addressed in detail below) was established by the Wisconsin Court of Appeals in 1987. State v. McIntosh, 137 Wis. 2d 339 (Ct. App. 1987). While the methodology for evaluating the issue of due process is established by the court with clarity, no clear parameters are established for determining the existence of amnesia in the first place (a threshold determination that is necessary to invoke the due process methodology). The Supreme Court has not addressed the issue since the McIntosh decision was handed down.

The Supreme Court did address the issue in an extremely abbreviated fashion more than fifty years ago. Muench v. State, 60 Wis. 2d 386 (1973). The legal analysis in that case amounts to a single paragraph. No parameters are established for the determination about amnesia even though the Supreme Court noted that "[t]he claim of amnesia is one easily fabricated after the event by one seeking to avoid responsibility for his acts," and then proceeded to rule that "it is an affirmative defense that must be established by the defendant by a clear preponderance of the credible evidence." Id. at 392-93.

Throughout every other area of law, a clear preponderance of the evidence means that a fact or a finding has been shown to be "more likely than not." Based on the current state of the law, that is not only the standard of proof required by the Wisconsin Supreme Court, it is the only requirement of the Wisconsin Supreme Court relative to meeting the threshold of proving amnesia. As such, the circuit courts and the court of appeals should not be arbitrarily adding further evidentiary requirements which ultimately serve to conflict with the law established by the Wisconsin Supreme Court. The requirement of a "medical diagnosis" by a medical doctor does exactly that.

This is an important principle of law and one that directly impacts the fundamental rights of criminal defendants. It is a principle not only worthy of review by the Wisconsin Supreme Court, but one that requires clarification and development by the Wisconsin Supreme Court. Petitioner respectfully submits that the Court therefore accept review of this case in order to establish clear parameters on the threshold question of what is required to prove amnesia for purposes of invoking the McIntosh procedure.

B. THE LAW GOVERNING AMNESIA AND THE CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The state and federal constitutions guarantee all defendants the right to due process. U.S. Const. Amend. XIV; Wis. Const. Art. I, §8. A fundamental component of due process is the defendant's opportunity to defend himself through the assisatnce of his counsel and the opportunity to present evidence. Jackson v. Virginia, 443 U.S. 307, 314 (1979), Chambers v. Mississippi, 410 U.S. 284, 294-95

(1973), State v. Hanson, 2012 WI 4, ¶45, 338 Wis. 2d 243, 808 N.W. 2d 390.

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

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

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

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

The impact of amnesia on a defendant's due process rights is a

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

Importantly, the seminal Wisconsin case dealing with an amnestic defendant's right to receive a fair trial recognized that "in many cases," assessing what occurred **at trial** is a key part of the analysis. McIntosh, 137 Wis. 2d at 349. Indeed, the McIntosh factors require consideration of things like "the strength of the prosecution's case' and "facts and circumstances which would indicate whether or not the defendant had a fair trial." Id. at 349-50. By their very nature, the weight of those factors can be known only after trial has been conducted. And thus, McIntosh noted that deciding whether an amnestic defendant's right to a fair trial can be respected often "will have to await the trial's end." Id. at 349. After trial, the court can look to the McIntosh factors "to determine whether, in light of the defendant's disability, he or she nonetheless received a fair trial." Id. at 351.

Proof that a defendant has amnesia is an obvious condition precedent to establishing an amnesia-based due process violation. Id.

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

C. ROSALEZ PROVED THAT HE IS AMNESTIC AND THUS ENTITLED TO THE MCINTOSH PROCEDURE.

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

Regarding McIntosh's first element of proof--consistency between amnesia and the triggering event--Rosalez showed that his amnesia was consistent with Ambien use, regardless of its combination with

alcohol. The parties stipulated to the admission of documentation from Ambien's manufacturer detailing that memory loss is a significantly occurring side effect of the medication. (R107-108). Ambien's manufacturer acknowledges and warns that **any** use of Ambien at standard dosage can cause behaviors that patients do not remember, with or without use of alcohol. (R107:4 sec. 5.1). Ambien's manufacturer even warns its users that taking Ambien may cause them to forget having done any number of things including sex. (Id.) And they make clear that memory loss can happen regardless of whether the user drank alcohol while taking Ambien. (Id.) Interestingly, the matter of Rosalez's amnesia did not become apparently contested until Rosalez decided to challenge his plea during postconviction proceedings. (See R36:2, R49:23-25). As Rosalez has before explained, the State agreed to allow him to plead no contest--rather than guilty--becuase of his professed amnesia. (R36:2). And the sentencing court spoke of the admitted awareness of instances in which people on Ambien had become amnestic, as is Rosalez's claim here (R49:23-25).

Regarding McIntosh's second criteria--the absence of reason to doubt amnestic permanency--Dr. Freiburger, a forensic psychologist, testified that tests commonly utilized in his field to assess the veracity of a person's self-report of amnesia showed that Rosalez is not malingering in that claim. Rosalez underwent a psychological evaluation purposed on a assessing his claim that he has no memory of the assault. Dr. Freiburger tested Rosalez with several psychological instruments to gauge whether he might be malingering in his amnesia. (R62:7-10). Relevant psychological research has before noted that formal testing of the sort utilized by Dr. Freiburger in this case can successfully ferret out false claims of amnesia. See

Bernice A. Marcolpulos, Laysa Hedjar, & Beth C. Arredondo, **Dissociative Amnesia or Malingered Amnesia? A case Report**, 16 J. Forensic Psych. Practice 106 (MaR.30, 2016). But in Rosalez's case, not one of the instruments with which he was tested showed him to be falsely reporting his lack of memory. (R62:10). Dr. Freiburger ultimately concluded that "[m]alingering was not found" by the tests that were performed on Rosalez. (Id.) Likewise, Rosalez demonstrated no "feigning, exaggerating, minimizing, [or] mis-representing [of his] symptoms." (Id.11). Dr. Freiburger concluded, "[t]o a reasonable degree of scientific certainty," that none of the "clinical malingering indicators or evidence that would call into question the veracity or consistency of [Rosalez's] self report regarding amnesia" were found. (Id.) Rosalez's performance on those instruments is thus proof that he is truthfully reporting his amnesia.

Consistently, Rosalez's trial attorney admitted that Rosalez maintained throughout the representation that he had no memory of what occurred. (R96:9); A-Ap 13). Even at the evidentiary hearing in this case, Rosalez continued to profess a complete lack of memory regarding the offense with which he is charged. (Id.:44-45; A-Ap 48-49). And, as noted, even the State and the sentencing court had no trouble accepting Rosalez's asserted lack of memory **before** Rosalez sought to withdraw his plea. It seems that the parties and the court were all on the same page that Rosalez could not remember the incident **until** he sought to invoke his rights under McIntosh. Rosalez can thus prove beyond a preponderance of the evidence that he is amnestic.

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

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

D. ROSALEZ'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE POSTCONVICTION COURT ADDED AN ELEMENT TO THE STANDARD OF PROOF REQUIRED TO ESTABLISH AMNESIA.

However, when deciding that Rosalez had not proven his amnesia, the postconviction court added an element to the McIntosh test that is unsupported by that decision. Namely, the court focused on the fact that "the diagnosis [of amnesia] in the McIntosh case was not made by a psychologist. It was made by a psychiatrist." (R119:5; A-Ap 76). And, the postconviction court relied on the fact that Rosalez's expert was not a psychiatrist to conclude that Rosalez had not satisfied the McIntosh proof. But McIntosh does not stand for the proposition that a psychiatrist is needed or required to determine amnesia is present, nor is it expressly clear in McIntosh that a psychiatrist made such a diagnosis.

Instead, as explained above, all that a defendant needs to prove is that (1) amnesia is consistent with the triggering event, (2) there's been no reason offered to doubt amnestic permanence, and (3) that the defendant is not making a competency challenge. McIntosh, 137 Wis. 2d at 348. There is nothing in McIntosh holding that a particular sort of expert is necessary to prove that a person is amnestic.

Importantly, what is present in the record in Rosalez's case was more than enough to meet the criteria outlined in the McIntosh decision, even though his expert offered only psychological and not psychiatric testimony. And thus, the postcomviction court erred in adding a factor to the McIntosh test that the decision does not

require.

In addition to erroneously adopting a legal standard not recognized by McIntosh, the circuit court additionally made an error of fact. That is to say, the postconviction court additionally reasoned that "there have been numerous self-reports here that this was not a permanent condition of any sort." (R119:6; A-Ap 77). But the record will not support that statement. To the contrary, Rosalez has never self-reported that his amnesia about the underlying incident was temporary. Indeed, all of the testimony at the hearing supported the opposite conclusion that Rosalez has never waivered in his ability to recall what occurred. As such, the postconviction court's reliance on "numerous self-reports" concerning non-permanent amnesia was clearly erroneous. The record simply does not support that factual finding, which the postconviction court relied upon when denying Rosalez's motion. As such, the circuit court's decision is based on a clearly erroneous factual finding.

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

> [In] the absence of any diagnosis and--and I think, frankly, the statement that he did not dispute at sentencing where it was stated he didn't know if he was unable to remember what happened or if that it was such a painful event he could not force himself to remember it seems to be a more likely scenario to the Court. I do not find any basis here to find he suffers from amnesia. (R119:8-9; A-Ap 79-80).

That logic is confounding.

The postconviction court is suggesting that one of the two scenario's is present: either Rosalez is unable to remember, or Rosalez cannot force himself to remember. From that premise, the postconviction court concludes that there is no basis to find amnesia. But, in either situation, Rosalez cannot remember. And

amnesia is precisely, by definition, the loss of memory, **viz** the inability to remember. Again, the stated basis for the postconviction court's decision is clearly erroneous: saying that someone cannot remember but is not amnestic. That's not a thing.

In sum, there is simply no evidence in the record contradicting Rosalez's claim of amnesia or Dr. Freiburger's conclusion that he is not malingering. The State had no evidence that Rosalez has before remembered the events but is only now feigning to have forgotten them. Furthermore, the State called no expert to contest Dr. Freiburger's conclusion, nor did it offer any evidence--expert testimony or otherwise--disputing the proposition that Ambien can cause memory loss.

E. THE COURT OF APPEALS PERPETUATED THE ERROR BY AFFIRMING THE CIRCUIT COURT'S DECISION BASED EXPRESSLY ON THE SO-CALLED LACK OF A "MEDICAL DIAGNOSIS."

On a clear preponderance of the evidence that was presented to the circuit court, Rosalez showed that his amnesia is consistent with the medication he was on and demonstrated through unrefuted psychological testing that he is not feigning his amnesia. Those are the two salient criteria established by the expert and acknowledged by the court in the McIntosh case. Thus, under the standard of proof required by the courts in Muench and McIntosh, Rosalez made the requisite showing. Therefore, applying the established principles from the existing case law, the court of appeals should have recognized that the circuit court had improperly added a required element to the existing standard of proof. Had the court of appeals done so, the court would have reversed the decision of the circuit court as

(1) inconsistent with Muench and McIntosh, (2) internally illogical, and (3) factually erroneous.

Rather than recognizing and addressing these problems, the court of appeals doubled down on the circuit court's error. The court of appeals expressly held that "without a medical diagnosis on the record, Rosalez did not prove his amnesia by a clear preponderance of the credible evidence" (¶21). The court of appeals went on to state "Not only did Rosalez lack a medical diagnosis, he presented no evidence on the issue of permanency" (¶21). The court of appeals cited to Muench, 60 Wis. 2d at 392, which, according to the court of appeals, cited a lack of "medical evidence" of amnesia (¶21). The court of appeals then cited McIntosh for the proposition that, "in that case, the defendant's "permanent amnesia [had] been medically established" by a court-appointed psychiatrist" (¶21).

The court of appeals' decision is, in actuality, diametrically opposed to the established law of Muench and McIntosh. In Muench, there was no medical evidence of any kind. There was absolutely no basis to find that the defendant suffered from amnesia apart from his subjective report of amnesia. Rosalez's case is just the opposite. While he does subjectively report amnesia like the defendant in Muench, he does not claim that the court should find he has met the standard of proof based on that evidence alone. Quite the contrary--Rosalez produced credible medical evidence to meet the standard of proof. Indeed, the medical evidence produced by Rosalez (drug manufacturer warnings of possible amnesia and psychological testing confirming that the amnesia was real) went unrefuted by the State.

Not only is Rosalez's case readily distinguisable from Muench, it is in direct alignment with McIntosh. Where the cause of amnesia

in McIntosh was medically established through the recognized mechanism of a blow to the head, the cause of amnesia in Rosalez's case was medically established through the recognized mechanism of a side effect of Ambien. In McIntosh, a psychiatrist offered a professional opinion that McIntosh's amnesia was consistent with his injuries, and there was no reason to doubt the permanence of a significant part of his memory loss. In Rosalez's case, a psychologist offered an opinion that was materially indistinguishable from the psychiatric opinion in McIntosh.

Here, the court of appeals added the evidentiary requirement of a "medical diagnosis," and then created specious factual distinctions in order to find that the added evidentiary requirement had not been met. First, the court of appeals fallaciously addressed the psychological opinion:

> "The psychologist clarified that the tests measured only whether Rosalez was lying about his lack of memory, not whether he suffered from amnesia" (¶20).

The court relies on a distinction without a difference. Rosalez was psychologically tested. The tests showed his amnesia was real (not feigned or exaggerated). The amnesia (memory loss) was brought about by the use of Ambien--a medically-recognized cause. Rosalez would respectfully submit that there is no material distinction between a psychiatrist diagnosising amnesia from a blow to the head and a psychologist confirming through testing that the reported amnesia from Ambien use is real. Testing that showed Rosalez was not lying about his amnesia is not materially different than testing showing he suffered from amnesia.

Secondly, the court of appeals tacitly identifies a shortcoming on the issue of permanency as being somehow dispositive. There are two major problems with this aspect of the court's decision. One,

relative to the events in question, no one claims that Rosalez's amnesia is somehow temporary. Obviously, memory loss of a specific time period brought about by the use of medication and one which has persisted for years is not transient or temporary. Secondly, the court in McIntosh expressly addressed the scenario where the amnesia appears to be temporary:

> "Where the amnesia appears to be temporary, an appropriate solution might be to continue the trial for a reasonable period to see whether the defendant's condition improves."
> McIntosh, 137 Wis. 2d at 349.

Thus, the court of appeals in Rosalez's case completely misconstrued and misapplied the issue of permanency.

This case provides a classic and important example of the need for clarification in and development of the law. The issue is of grave consequence to individual defendants and to the criminal justice system as a whole. The Supreme Court has only addressed the issue in an extremely cursory and abbreviated fashion. That was more than fifty years ago. The issue is worthy of, and presently cries out for, a more comprehensive analysis from the Court -- an analysis that will guide the courts and the parties through these murky waters in a very meaningful way.

II. ROSALEZ'S SIXTH AMENDMENT RIGHTS WERE VIOLATED DUE TO TRIAL COUNSEL'S INEFFECTIVE ASSISTANCE IN FAILING TO ADVISE ROSALEZ THAT HE COULD CHALLENGE HIS RIGHT TO A FAIR TRIAL UNDER MCINTOSH. ROSALEZ SHOULD BE ALLOWED TO WITHDRAW HIS PLEA DUE TO HIS COUNSEL'S INEFFECTIVENESS.

A. LAW GOVERNING INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE PLEA PROCESS.

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

A defendant seeking to prove ineffective assistance must show both deficient performance by counsel and resulting prejudice. Strickland, 466 U.S. at 687. In the plea withdrawal setting, as with any other, deficient performance occurs whenever counsel's representation falls below the range of competence demanded of attorneys in criminal cases. Hill, 474 U.S. at 56-57. The prejudice component "focuses on whether counsel's constitutionally ineffective performance affected the outcome **of the plea process**," id. at 59 (emphasis added), to such a degree that it rendered it unreliable, Strickland, 466 U.S. at 693-694. If a defendant can prove a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial," he can establish prejudice. Bentley, 201 Wis. 2d at 312, 548 N.W. 2d at 54 (quoting Hill, 474 U.S. at 59). When the defendant proves prejudice derivative of his counsel's deficient performance--that is, a plea that otherwise would not have been entered--the court must grant relief and allow the plea to be withdrawn. See Williams v. Taylor, 529 U.S. 362, 394-95 (2000). No supplemental, abstract inquiry into the "fairness" or "reliability" of the proceedings is permissible. Id.

B. ROSALEZ'S ATTORNEY WAS DEFICIENT IN FAILING TO ADVISE HIM OF THE MCINTOSH RULE AND ITS APPLICABILITY TO HIS CASE.

As discussed above, Rosalez's trial attorney admitted during post-conviction testimony that he "never was exploring whether there was a defense based upon [Rosalez's] amnesia." (R96:25; A-Ap 29). And defense counsel further admitted that he never discussed McIntosh or its rule with Rosalez. (R96:16; A-Ap 20).

For his part, Rosalez confirmed that trial counsel never made him aware of McIntosh or the possibility of going to trial to ultimately avoid a conviction. (R96:46-48; A-Ap 50-52).

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

Through that lens, the matter of failing to discuss McIntosh proves objectively unreasonable. Even if Rosalez told his attorney that he did not want to put the victim through trial, trial counsel should **still** have advised Rosalez about McIntosh. We know based on trial counsel's testimony that (1) he is familiar with McIntosh (R96:19; A-Ap 23) and (2) he knew that Rosalez said he could not remember the crime (Id.9; A-Ap13). Under those circumstances, telling Rosalez about McIntosh would have been part of the "discussion with the client and an analysis of relevant law" that the ABA Standards contemplate defense counsel will undertake before counseling a client to plead guilty. ABA, Crime Justice Stds.: Def. Functions § 4-6.1(b).

Rosalez absolutely needed to know about McIntosh so that he could meaningfully assess whether to enter a plea. As Rosalez explained postconviction, given what he now knows about McIntosh, he would not have entered a plea. (R96:48; A-Ap 52). He would instead have undertaken a trial with the aim of having his conviction thrown out as the result of an inability to be fairly tried. (Id.) Rosalez's pretrial choice to take a plea--even if bottomed on a want to spare the victim a trial--was wholly uninformed by the existence of McIntosh and the possibility that, even if he is found guilty at trial, he could still garner dismissal of the charges against him. That gaping hole in Rosalez's knowledge is the result of his trial counsel's failure to tell him that, even though he had no defense, he may still have avoided criminal liability altogether pursuant to McIntosh.

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

C. ROSALEZ WAS PREJUDICED BY COUNSEL'S DEFICIENT PERFORMANCE.

We cannot now assess how Rosalez's McIntosh claim would come out because he has not had a trial, leaving key elements of the McIntosh test unknown. See McIntosh, 137 Wis. 2d at 349. But the inability to decide whether Rosalez could be fairly tried is not dispositive. What matters for prejudice in these circumstances is not how Rosalez's McIntosh claim would be decided, but rather what impact the ability to make that claim would have had on Rosalez's decision whether to plead no contest.

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

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

In Rosalez's case, there is a reasonable probability that--if he had been advised of the McIntosh rule--he would not have pleaded no contest, but instead gone to trial to fully effectuate his rights under McIntosh. Do not forget: the possible upside of a trial to Rosalez is significant. Consistent with McIntosh, if what occurred at trial proved that his amnesia precluded him from being fairly tried, it would result in dismissal of the charges against him. In

other words, even if the jury convicted Rosalez at trial, that conviction could be set aside if the court subsequently concluded his trial had been unfair under McIntosh. Rosalez--rightly advised--would thus have had a significant incentive to reject the deal that was being offered to him in favor of a trial.

Balanced against that upside is the relatively insignificant downside to trial. Significantly, Rosalez's plea did not net him a change in the charges. (R36:2; also compare R7 with R15:1). It is not as though his plea allowed him to avoid criminal liability for some more serious offenses than he would have faced had he gone to trial. Instead, he pleaded no contest to the original charges. One thus cannot point to some downward modification of the crime or the potential penalty as an incentive to Rosalez to plead rather than invoking McIntosh and going to trial. Instead, the availability of McIntosh and Rosalez's ability to assert it as a possible way by which to avoid liability altogether shows that going to trial would not have been an irrational choice.

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

III. THE CIRCUIT COURT AND THE COURT OF APPEALS MISAPPLIED THE STRICKLAND ANALYSIS.

The circuit court never made a determination on the issue of ineffective assistance of counsel. (R119:9). Thus, the circuit court never applied Strickland to Rosalez's claim of ineffective assistance of counsel.

The court of appeals addressed the ineffective assistance of

counsel claim in half a sentence:

> "As a consequence, Rosalez would not have been able to invoke McIntosh, and trial counsel does not perform deficiently by failing to discuss with him a defense that was not available." (¶22).

Thus, the appellate court disposed of the ineffective assistance of counsel claim on the merits by finding that Rosalez's attorney did not perform deficiently.

The court of appeals misapplied law that has been clearly established by both the U.S. Supreme Court and the Wisconsin Supreme Court. On the Sixth Amendment claim, the two-pronged Strickland test must be applied to counsel's performance at the time that counsel acted or failed to act. Strickland v. Washington, 466 U.S. (1984). The proper application of Strickland to the plea process has been addressed by the U.S. Supreme Court. The law is clearly established:

> To demonstrate ineffective assistance of counsel in the plea bargaining arena, [Rosalez] must establish that his trial counsel's performance: (1) fell below an objective standard of reasonable competence and (2) that he was prejudiced by his counsel's deficient performance. To succeed in showing prejudice, [Rosalez] must show that it was in fact reasonably probable that but for the misadvice of his trial counsel he would not have pleaded guilty and would have insisted on going to trial. Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed. 2d 180 (1993).

Rosalez clearly made these showings. The Strickland test is met. Rosalez's Sixth Amendment rights were violated. Rosalez informed trial counsel of his amnesia and Ambien use. At that point, it was objectively unreasonable for counsel not to inform Rosalez of the McIntosh rule. A competent attorney, acting reasonably, would not fail to disclose McIntosh to his client before a plea is entered. That is the only question for purposes of assessing counsel's performance at the time counsel acted or failed to act.

No one disputes that, had Rosalez been informed about McIntosh, he would not have entered his plea and would have instead opted to go to trial. That is the only question to be answered on the prejudice prong.

Thus, the appellate court misapplied Strickland and Lockhart. The issue is not whether Rosalez would have ultimately prevailed on the McIntosh claim, the issue is whether or not it was reasonable for counsel not to inform Rosalez about McIntosh, and whether it is reasonably probable that, had counsel done so, Rosalez would have opted to forgo his plea. Had the appellate court correctly applied established law, Rosalez would have prevailed on his Sixth Amendment claim of ineffective assistance of counsel and would have been allowed to withdraw his plea.

Rosalez respectfully submits that the Supreme Court should accept review of this case under WIS.STAT. 809.62(1r)(d) because the court of appeals' decision is in conflict with controlling opinions of the U.S. Supreme Court.

CONCLUSION

For reasons set forth above, Rosale respectfully requests that the Supreme Court accept review of this case.

Dated this 10 day of July, 2024.

Reynaldo Rosalez

Reynaldo Rosalez

CERTIFICATION OF MAILING

Petitioner, Reynaldo Rosalez, hereby certifies pursuant to Wis. STAT. §809.80(3)(e) that he is a confined person at Dodge Correctional Institution and that he delivered his correctly addressed PETITION FOR REVIEW and APPENDIX TO PETITION FOR REVIEW to the proper institution authorities for mailing on the date set forth below. He further certifies that the proper First Class postage for the U.S. Postal Service was pre-paid.

Dated 10 day of July, 2024.

Reynaldo Rosalez

Reynaldo Rosalez