STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2010AP3143-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

TEREZ LAMAR COOK,

Defendant-Respondent.

APPEAL BY THE STATE OF WISCONSIN FROM AN ORDER GRANTING WIS. STAT. § 974.06 COLLATERAL POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MARINETTE COUNTY, HONORABLE TIM A. DUKET, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

J.B. VAN HOLLEN
Attorney General

DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 266-9594 (Fax)
obriendj@doj.state.wi.us

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

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BRIEF OF PLAINTIFF-APPELLANT

ISSUE PRESENTED

Did the trial court err when it ordered a new trial after concluding that Cook met his burden of proving counsel on direct postconviction review was ineffective for not challenging the effectiveness of trial counsel on several grounds?

The trial court ruled, in essence, that Cook's retained counsel on direct postconviction review failed to

challenge the effectiveness of trial counsel on grounds that were clearly stronger than the challenges counsel raised on direct appeal; and postconviction counsel's deficient performance was prejudicial because there is a reasonable probability Cook would have prevailed on direct review and won a new trial had those arguments been presented.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The state requests neither oral argument nor publication. The briefs of the parties should adequately address the legal and factual issues presented.

This case involves the application of established principles of law to the facts presented concerning a challenge to the effectiveness of appellate counsel for not challenging the effectiveness of trial counsel.

STATEMENT OF THE CASE

The State of Wisconsin appeals (113) from an order of the Marinette County Circuit Court, Honorable Tim A. Duket presiding, granting a motion for Wis. Stat. §974.06 collateral postconviction relief and ordering a new trial for Mr. Cook (111; A-Ap. 101).

After a trial held January 25-27, 2006, a Marinette County jury found Cook guilty of armed robbery, armed burglary, false imprisonment (3 counts), battery, theft of movable property and mistreatment of an animal causing death, all as party-to-the-crime and all as a repeat offender (33-40;139:106-07). A judgment of conviction was entered March 31, 2006 (45; A-Ap. 146-48).

Cook was represented at trial by Attorney Alf Langan. Cook then retained Attorney Milton Childs to represent him after conviction (61). Attorney Childs did not file any postconviction motions in the trial court. He appealed directly from the judgment of conviction (62).

Attorney Childs raised a number of alleged errors on appeal, including the ineffective assistance of trial counsel. In a decision dated and filed July 29, 2008, this court rejected those challenges and affirmed the judgment of conviction (76; A-Ap. 118-26). The Wisconsin Supreme Court allowed Cook to file an untimely petition for review (81), and denied review June 16, 2009 (87).

Cook returned to the trial court pro se and filed a motion for collateral Wis. Stat. §974.06 postconviction relief alleging ineffective assistance of both trial and postconviction counsel on direct review (89). Cook was appointed counsel (91) and filed three subsequent amended motions and briefs raising additional challenges (93; 95; 99; 101). In essence, Cook alleged in all of his pleadings that postconviction counsel on direct review was ineffective for not raising better challenges to the effectiveness of trial counsel than the ones he did raise.

The trial court, Honorable Tim A. Duket presiding, held evidentiary hearings on the motions over three days: June 7, 2010, August 30, 2010 and October 29, 2010 (141-42; 144). Judge Duket granted Cook's motion for a new trial orally from the bench at the conclusion of the October 29th hearing (144:144-58; A-Ap. 103-17), and in a written order issued thereafter (111; A-Ap. 101). Judge Duket ruled, in essence, that postconviction counsel was ineffective for not raising obvious and stronger challenges to the effectiveness of trial counsel than the challenges he did raise on direct review. Had those challenges been made in a postconviction motion and been proven at an evidentiary hearing, Judge Duket ruled, Cook would have won a new trial because postconviction counsel would have proven that trial counsel's performance was deficient and prejudicial in each of those respects, rendering the outcome of the trial unreliable. The state now appeals, asking this court to reverse and to reinstate the judgment of conviction (113).[1]

[1] At a hearing held March 22, 2011, Judge Duket rejected the joint efforts of the state and defense to resolve this case short of an (footnote continued)

The state proved to the jury's satisfaction that Cook and John Egerson burglarized and robbed the Harper home, terrorized Mr. and Mrs. Harper and their daughter, and shot the family dog, near Peshtigo in the early morning of May 22, 2005. The two men drove up from Milwaukee earlier that night in Egerson's Cadillac and met Ashley Sadowski and her friend Jessica Babic at Babic's house in Marinette County. Sadowski was Egerson's girlfriend. The two women drove the men past the Harper residence to a nearby park. Sadowski then loaned her car to the two men who drove back to the Harper residence to burglarize it while the women waited in Egerson's Cadillac in the park. The two women then picked the men up when Egerson called on a cell phone frantically telling them to come get them after he crashed Sadowski's car into a ditch. The four then drove in Egerson's Cadillac to Green Bay where they spent the night together at a motel (137:98-124; 138:12-30, 63-64).

Both women positively identified Cook in police photo arrays and in court as the man who accompanied Egerson to the Harper residence (137:115-16; 138:16, 229-30, 288-93; 139:28).

Additional relevant facts will be developed and discussed in the pertinent sections of the Argument to follow.

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appeal and a retrial by entering a plea agreement. Judge Duket ruled, in essence, that the recommended reduced sentence for Mr. Cook was too low and it is likely he will be convicted on retrial even with effective representation by new counsel. The state is moving this day to supplement the appellate record with that transcript of the March 22, 2011 hearing.

ARGUMENT

THE TRIAL COURT ERRED IN CONCLUDING THAT COOK MET HIS BURDEN OF PROVING POST-CONVICTION COUNSEL WAS INEFFECTIVE BECAUSE COOK FAILED TO ESTABLISH THAT THE ISSUES HE BELIEVES COUNSEL SHOULD HAVE LITIGATED ON DIRECT POSTCONVICTION REVIEW WERE OBVIOUS AND CLEARLY STRONGER THAN THE ISSUES COUNSEL DID RAISE.

With the assistance of retained counsel, Cook challenged his conviction on direct appeal on a number of grounds, including several challenges to the effectiveness of trial counsel. This court rejected those challenges and affirmed the judgment of conviction (76; A-Ap. 118-26).

Cook challenged via a Wis. Stat. §974.06 postconviction motion the effectiveness of retained postconviction counsel on direct review for not challenging trial counsel's effectiveness on several additional grounds. The trial court ordered a new trial after agreeing with Cook that postconviction counsel was ineffective for not pursuing these additional challenges to trial counsel's effectiveness, and there is a reasonable probability of a different outcome if he had.

The state believes the trial court erred in several respects and, indeed, made this case far more complicated than it needed to be. Whether viewed individually or collectively, the alleged shortcomings of trial counsel were not sufficient to merit a new trial and, therefore, it was reasonable for postconviction counsel not to raise them. While Cook's motion is rather specific when it comes to alleging deficient performance of both attorneys, its allegations of prejudice are non-specific and speculative. Cook offers plenty of proof that other

attorneys, and perhaps better attorneys, would have handled this trial and the direct appeal differently; but he can only speculate that it would have made any difference. All indications are that it would not.

A. The applicable law and standard for review of a challenge to the effectiveness of trial and postconviction counsel.

To establish the denial of his constitutional right to the effective assistance of counsel at trial, Cook bore the burden of proving that counsel's performance was both deficient and prejudicial to his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Johnson*, 153 Wis.2d 121, 127, 449 N.W.2d 845 (1990).

On review of an ineffective assistance of counsel challenge, this court is presented with a mixed question of law and fact. The trial court's findings of historical fact will not be disturbed unless they are clearly erroneous. *See* Wis. Stat. §805.17(2). The ultimate determinations based upon those findings of whether counsel's performance was constitutionally deficient and prejudicial are questions of law subject to independent review in this court. *State v. Trawitzki,* 2001 WI 77, ¶19, 244 Wis.2d 523, 628 N.W.2d 801; *State v. Johnson*, 153 Wis.2d at 127-28. *See also State v. Pitsch*, 124 Wis.2d 628, 634, 369 N.W.2d 711 (1985); *State v. Wright*, 2003 WI App 252, ¶30, 268 Wis.2d 694, 673 N.W.2d 386.

> "Surmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky,* 559 U.S. __, __, 130 S. Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland,* 466 U.S., at 689-90, 104 S.Ct. 2052. Even under *de novo* review, the standard for

> judging counsel's representation is a most deferential one.

Harrington v. Richter, 131 S. Ct. 770, 788 (2011).

1. Deficient performance.

To establish deficient performance, Cook had to prove that counsel's errors were so serious he was not functioning as the "counsel" guaranteed by the Sixth Amendment to the United States Constitution. *See State v. Johnson*, 153 Wis.2d at 127 (citing *Strickland v. Washington*, 466 U.S. at 687). Judicial review of counsel's performance is highly deferential. The case is to be reviewed from counsel's perspective at the time of trial, not in hindsight, and Cook bore the burden of overcoming a strong presumption that counsel acted reasonably within professional norms. *State v. Trawitzki,* 244 Wis.2d 523, ¶40; *State v. Johnson*, 153 Wis.2d at 127 (citing *Strickland v. Washington*, 466 U.S. at 687).

The law strongly presumes that Attorney Childs rendered effective assistance to Cook on direct postconviction review and appeal. The law presumes he made all significant decisions in the exercise of reasonable professional judgment. *Strickland v. Washington*, 466 U.S. at 690; *Eckstein v. Kingston*, 460 F.3d 844, 848-49 (7th Cir. 2006). The law presumes Attorney Childs' decision to raise the challenges to trial counsel's performance that he did on direct review in 2008 was reasonable. *See State v. Marty*, 137 Wis.2d 352, 360, 404 N.W.2d 120 (Ct. App. 1987).

Cook had no constitutional right to force Attorney Childs to raise every nonfrivolous issue he wanted him to raise on direct review. *Jones v. Barnes*, 463 U.S. 745, 754 (1983); *Winters v. Miller*, 274 F.3d 1161, 1167 (2001). *See Knowles v. Mirzayance,* 129 S. Ct. 1411, 1422 (2009); *State v. Evans,* 2004 WI 84, ¶30, 273 Wis.2d 192, 682 N.W.2d 784. Attorney Childs was free to strategically select the strongest from among all the

nonfrivolous claims available to him in order to maximize the likelihood of success on direct review. *See Smith v. Robbins*, 528 U.S. 259, 288 (2000). As a matter of law, Attorney Childs is presumed to have performed reasonably in choosing what issues to raise and what not to raise on direct review. Cook can overcome that presumption only if he shows that the additional issues he believes Childs should have raised were both obvious and clearly stronger than the issues Childs did raise. *Smith v. Gaetz,* 565 F.3d 346, 352 (7th Cir. 2009). "'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of [postconviction/appellate] counsel be overcome.'" *Smith v. Robbins*, 528 U.S. at 288 (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). *See Winters v. Miller*, 274 F.3d at 1167. This is a tall order: "Notwithstanding [*Jones v.*] *Barnes,* it is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent." *Smith v. Robbins,* 528 U.S. at 288. *See Carter v. State,* 929 N.E.2d 1276, 1278 (Ind. 2010).

> The *Strickland* test also applies to assessing the effectiveness of appellate counsel. *See United States v. Cook,* 45 F.3d 388, 392 (10th Cir.1995). When a habeas petitioner alleges that his appellate counsel rendered ineffective assistance by failing to raise an issue on direct appeal, we first examine the merits of the omitted issue. If the omitted issue is meritless, then counsel's failure to raise it does not amount to constitutionally ineffective assistance. *See Parker v. Champion,* 148 F.3d 1219, 1221 (10th Cir.1998) (citing *Cook,* 45 F.3d at 392-93), *cert. denied*, 525 U.S. 1151, 119 S.Ct. 1053, 143 L.Ed.2d 58 (1999). If the issue has merit, we then must determine whether counsel's failure to raise the claim on direct appeal was deficient and prejudicial. *See Cook,* 45 F.3d at 394. For example, counsel's failure to raise a "dead-bang winner" on appeal – an issue that is both obvious from the trial record, and one which would have resulted in reversal on appeal – constitutes ineffective assistance. *See id.* at 395. When counsel omits an issue under these circumstances, counsel's performance is objectively unreasonable because the issue was obvious from

> the trial record, and the omission is prejudicial because the issue warranted reversal on appeal. *See id.*

Hawkins v. Hannigan, 185 F.3d 1146, 1152 (10th Cir. 1999).

Effective representation is not to be equated with a "not guilty" verdict. Cook was not entitled to error-free representation. Counsel need not even be very good to be considered constitutionally adequate. *State v. Wright*, 268 Wis.2d 694, ¶28; *State v. Mosley,* 201 Wis.2d 36, 49, 547 N.W.2d 806 (Ct. App. 1996); *McAfee v. Thurmer,* 589 F.3d 353, 355-56 (7th Cir. 2009) (citing *Dean v. Young,* 777 F.2d 1239, 1245 (7th Cir. 1985), *cert. denied*, 475 U.S. 1142 (1986)). Ordinarily, the defendant does not prove deficient performance unless he shows that counsel's deficiencies sunk to the level of professional malpractice. *See State v. Maloney*, 2005 WI 74, ¶23 n.11, 281 Wis.2d 595, 698 N.W.2d 583.

2. Prejudice.

If Cook proves deficient performance, he must then prove prejudice. He must show that, but for postconviction counsel's deficient performance, there is a reasonable probability he would have prevailed on direct review. *Smith v. Robbins,* 528 U.S. at 285-86 (so holding with respect to the alleged deficient performance of appellate counsel); *Hawkins v. Hannigan*, 185 F.3d at 1152. It is not enough to prove deficient performance and merely allege prejudice. Cook had to affirmatively prove prejudice. *State v. Allen,* 2004 WI 106, ¶26, 274 Wis.2d 568, 682 N.W.2d 433; *State v. Wirts,* 176 Wis.2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993).

B. The trial court erred in concluding that the issues it believes postconviction counsel should have raised were obvious and clearly stronger than the issues counsel did raise because Cook failed to prove a reasonable probability of a different outcome had those issues been raised on direct postconviction review.

The trial court found six challenges to trial counsel's effectiveness it believes postconviction counsel should have presented on direct review. For the reasons to follow, the trial court erred in ordering a new trial because, despite being given an extraordinary opportunity to do so at three hearings, Cook failed to prove those challenges would have made any difference.

1. Postconviction counsel's failure to challenge trial counsel's inability to secure the presence of David Hall.

Cook argues, and the trial court held, it was prejudicially deficient performance for trial counsel not to secure the presence of David Hall to testify at trial; and it was prejudicially deficient performance for postconviction counsel not to raise the issue. The trial court was wrong because Cook failed to prove trial counsel was deficient for not obtaining Hall's presence and failed to prove prejudice.

The relevant facts developed at trial and at the postconviction hearing

On cross-examination of Ashley Sadowski, defense counsel established that she knew a David Hall, that Hall and Egerson were acquainted since childhood, that Hall's physical description generally matched that of Cook and that Hall was friends with a young man who used to date the Harpers' daughter, Molly (137:126-29). Sadowski and

Jessica Babic testified at trial that David Hall was at Babic's house briefly while Egerson and Cook were there before the burglary; and Hall (and Hall's girlfriend) picked the two women up at a gas station after Egerson and Cook drove them from Green Bay back to Marinette County the next day. Cook and Egerson then left, and Hall was arrested at Babic's house later that day (137:114-15, 159-64; 138:36-37, 57, 62-63).

Babic denied seeing Hall with a gun when she briefly saw Hall at her house before the burglary, denied that Hall told her he knew about the plan to rob the Harper residence and denied that Hall accompanied Egerson to the Harper residence that night (138:39, 40, 63, 65). Babic testified she learned that Hall was arrested the next day on a probation hold (138:60).[2]

The defense theory at trial was that Hall, not Cook, accompanied Egerson to invade the Harper residence (139:31-56). The two women lied about the identity of Egerson's accomplice (139:42-43). Cook was at Babic's house earlier, but pulled out of any plot before Egerson and Hall went to the Harper house. Police interviewed Hall in connection with this offense but did not charge him (138:196-97). Defense counsel introduced a booking photo of Hall at trial to show the jury his physical description was similar to that provided by the Harpers of one of the assailants (139:11). Ashley Sadowski also positively identified Hall's photo at trial (139:13).

In his statement to police, Cook denied any involvement in the home invasion but admitted, as the two

[2] Defense counsel also asked Sadowski on re-cross whether she saw Hall with a gun that night at Babic's house. Before she could answer, counsel withdrew the question when the prosecutor objected to it as being beyond the scope of re-direct (137:171-72). Sadowski testified at the postconviction hearing that, while Hall often carried a gun on other occasions (144:38, 40), she denied seeing Hall with a gun at Babic's house that night (144:50-51).

women testified, that he was at Babic's house with them and Egerson shortly before the home invasion. Cook also admitted that he was in the Wal-Mart parking lot with the four others when Egerson directed the two women to go into the store and buy gloves, bandanas and duct tape after 3:00 a.m. shortly before the home invasion; and admitted that he left the next day with Egerson (18:176, 179-80, 214-15, 233-34, 239; *see* 138:223-25). Cook did not tell police that Hall was in any way involved.[3]

A cigarette butt containing Cook's DNA was recovered by police from Sadowki's crashed car driven by the burglars to and from the Harper residence (138:116, 159-60). Defense counsel explained this by theorizing that Cook shared a cigarette with Sadowski in her car when she was in Milwaukee to visit Egerson the week before (139:36, 48). Defense counsel pointed to the lack of Cook's DNA on the head wrap and glove also found inside the car; and the lack of his DNA or fingerprints at the Harper residence (139:50-51). Counsel noted that, unlike Cook, police failed to obtain Hall's DNA sample to compare with any of the items found in the car or at the scene (139:50). Counsel insisted that police failed to adequately investigate Hall's involvement, making Hall the "biggest hole" in the state's case (139:51-52).

Although defense counsel tried to locate Hall before trial, his efforts were unsuccessful (138:65-66). Even Hall's probation and parole agent did not know where he was at the time of trial (138:313-14). According to the Wisconsin Department of Corrections, David Hall was listed as being on "absconder status" from December 12, 2005, when his probation and parole agent issued a warrant for his arrest, until his apprehension on the warrant February 27, 2006 (141:7-9, 14; 142:161-62). Cook's trial took place a month before Hall's arrest, January 25-27, 2006.

[3] Cook chose not to testify at trial (139:15-16). His denial of involvement in the home invasion was introduced through his statements to police.

Hall testified at the postconviction hearing. He admitted, as Sadowski and Babic both testified, that he was at Babic's house briefly before the Harper home invasion when Egerson and an unidentified male friend of Egerson's were there (144:99-100, 102, 115). Hall also admitted that he and his girlfriend picked up the two women at a gas station the next day (144:103). Hall denied any knowledge of the Harper home invasion, denied ever casing out the Harper residence in the past and denied having a gun (144:101, 104, 106-07, 114).

Retained postconviction counsel on direct review, Milton Childs, testified at the postconviction hearing that he strategically chose not to challenge trial counsel's inability to locate David Hall because Childs believed Hall would have simply invoked his Fifth Amendment privilege against self-incrimination (which should not be done in front of the jury, *State v. Heft,* 185 Wis.2d 288, 292-93, 302-03, 517 N.W.2d 494 (1994)), or denied involvement altogether. Childs also noted that trial counsel produced Hall's photo for the jury to show it approximated the description of one of the two assailants provided by the Harpers (141:51-53; *see* 141:31-32; 142:159-60).

Trial attorney Alf Langan testified at the postconviction hearing that neither he nor the prosecutor could locate Hall and, if the prosecutor had anything exculpatory concerning Hall, he would have been obligated to disclose it to the defense. *See Brady v. Maryland,* 373 U.S. 83, 87 (1963). Langan contacted prison authorities and even used the DOC's "inmate locator system" to no avail (142:44-46, 49-51).

a. Deficient performance.

The trial court held that both attorneys were ineffective because Langan should have done a better job

of trying to locate Hall (144:124-25).[4] With all due respect, this conclusion is not only patently absurd, it directly contradicts the trial court's own findings earlier in the same hearing that Langan's performance was not deficient because Hall was indeed an "absconder" and "on the lamb" at the time of trial (142:163-64; 144:119; A-Ap. 140-41).

Perhaps O. J. Simpson's "dream team" could have found Hall, but the prosecutor and the corrections officials in whose custody Hall was supposed to be could not find him. It is unreasonable to suggest that Attorney Langan was required to do what state authorities were unable to do: find the absconding Hall. To this very day, Cook offers no proof where Langan could have found Hall. *See State v. Arredondo,* 2004 WI App 7, ¶36, 269 Wis.2d 369, 674 N.W.2d 647 (offer of proof deficient for failing to show where the missing witness lived or could be found).

Moreover, the trial court's ruling directly conflicts with this court's decision on the direct appeal. Childs challenged on direct appeal trial counsel's failure to ask for a continuance when he could not locate Hall. This court rejected that claim (76:8, ¶16; A-Ap. 125). Childs was not deficient because he raised essentially the same issue on direct appeal that Cook's current counsel accuses him of not raising. Cook wanted Childs to challenge trial counsel's failure to produce Hall; an argument, as discussed above, that has been rendered meritless by proof of Hall's absconder status. Childs instead unsuccessfully challenged on appeal trial counsel's failure to ask for a continuance of the trial to locate Hall. Because that claim failed, so must the virtually identical one being raised here. *See State v. Witkowski,* 163 Wis.2d 985, 990-92, 473 N.W.2d 512 (Ct. App. 1991) (a §974.06 litigant is

[4] Egerson was unavailable to testify at trial because he was separately charged with these offenses and eventually convicted (141:104). This court affirmed his conviction. *State v. Egerson,* Appeal No. 2007AP1475-CR. Cook did not call him to testify at the postconviction hearing.

not permitted to artfully rephrase, or put a new theoretical twist on, an old claim rejected on direct review). In hind-sight, the continuance would have been for one month, when Hall was finally arrested on the violator warrant.

It was eminently reasonable for Attorney Childs not to make an issue out of trial counsel's inability to produce David Hall. There were better issues than this one that was, after all, essentially rejected on direct review.

b. Prejudice.

Hall would not have added much even if trial counsel should have located him with Herculean efforts. At the postconviction hearing, as expected, Hall denied involvement in the burglary, yet admitted to being at Babic's house when Egerson and an unidentified male were there shortly before it occurred; and admitted to picking up the two women the next day. This merely confirmed what defense counsel had already established at trial: that Hall was at Babic's house shortly before the home invasion, picked up the girls the next day, was on probation, was arrested and questioned by police about this crime, knew Egerson, yet his DNA was not tested against the items recovered in the car and at the crime scene. Trial counsel also introduced Hall's booking photo to show the jury that his physical description approximated that of one of the assailants provided by the Harpers.

Hall's presence at trial would have done nothing to dispel the powerful impact of Cook's admissions to police that he, too, was at Babic's house shortly before the home invasion; he was at the Wal-Mart with the others shortly before the home invasion when Egerson directed the two women to purchase gloves, bandanas and duct tape; and he left with Egerson the next day. Hall's presence would have also done nothing to dispel the powerful impact of the presence of Cook's DNA on a discarded cigarette butt found by police inside the crashed getaway car.

To this very day, Cook has yet to come up with a motive for the two women to (a) falsely accuse him while they truthfully accused Egerson; and (b) protect Hall at his expense. At the very most, trial attorney Langan might have convinced the jury that Hall was *also involved* in the conspiracy with Egerson and Cook to rob the Harpers, but that would have been of no help to Cook. And, it would have only confirmed trial counsel's reasonable belief that Hall would plead the Fifth if found and called to the stand to avoid implicating himself in this conspiracy. Even with Hall's testimony, it would have been difficult for Cook to convince the jury that only Hall accompanied Egerson to the Harper house absent any motive for the two women to both protect Hall and falsely accuse Cook of being there.[5]

Finally, Hall's postconviction testimony steadfastly denying his involvement confirms what this court observed on direct appeal in response to Attorney Child's virtually identical argument that trial counsel should have requested a continuance to try to locate Hall: "As the State aptly points out, 'it defies credulity to suggest that Hall, in a Perry Mason moment, would have proclaimed his own guilt and exonerated Cook.'" (76:8, ¶16; A-Ap. 125). Hall's postconviction testimony proved the truth of that common sense observation. There were no "Perry Mason moments" when Hall testified at the postconviction hearing and, presumably, there would be none at a retrial.

[5] In his closing argument, Langan offered a motive for *Egerson* to protect Hall: they were life-long friends (139:42). This does not, however, provide a motive for the two women to both protect Hall and falsely accuse Cook.

2. Postconviction counsel's failure to make an issue of trial counsel's lack of objection to testimony that Cook temporarily discontinued his interview with police at the end of the first day.

The relevant facts developed at the trial and the postconviction hearing

Cook was arrested May 31, 2005, hiding out in his girlfriend's apartment in Sheboygan (138:182-83, 241-44, 275-76). He was interviewed by Marinette County Detectives Baldwin and O'Neil that same day and the next. After being given *Miranda* warnings and waiving his right to silence and to the presence of counsel, Cook admitted to police the first day that he knew Egerson, but denied any involvement in the home invasion. Cook admitted in his statement the next day to being in Marinette County when the home invasion occurred, was at Babic's house with Egerson and the two women before the burglary, was in the Wal-Mart parking lot when Egerson directed the two women to purchase gloves, bandanas and duct tape at 3:21 a.m. shortly before the home invasion, and returned with Egerson to Milwaukee the next day (138:176-80, 214-15, 225, 233-39, 259-60).

Both detectives testified, without objection by Cook, that the first day's interview ended after Cook denied involvement in the offense, admitted knowing Egerson, and then said he did not want to talk anymore (138:176, 215, 233-35, 260). The next day, Cook reinitiated conversation with police who once again read the *Miranda* warnings which Cook again waived and gave the inculpatory statements summarized above (138:179-80, 239; 139:3-4). *See* (76:4-5, ¶¶8-9; A-Ap. 121-22).

On direct appeal, Attorney Childs argued that trial counsel should have moved to suppress the inculpatory statements obtained by police on the second day of

questioning because police failed to scrupulously honor Cook's exercise of his right to remain silent when he terminated the interview the day before. This court rejected that argument (76:5-6, ¶¶10-11; A-Ap. 122-23).

This court also refused to consider Childs' related argument that trial counsel was ineffective for not objecting to the testimony that Cook exercised his right to remain silent after the first day's interview because Childs failed to support the argument with legal authority (76:6, ¶12; A-Ap. 123). This court went on to conclude, however, that there was no prejudice resulting from the admission of Cook's statements:

> Cook never confessed to the crime but, rather, admitted to being in the vicinity on the day in question. This was consistent with the defense's claim that Cook drove to the area with John Egerson, backed out of committing the crime, and was replaced by another man with a similar appearance to Cook.

(76:7, ¶13; A-Ap. 124).

The trial court found deficient performance by Langan for not objecting to the testimony that the interview ended on the first day when Cook said he did not want to talk anymore or give a written statement (142:125-26; A-Ap. 128-29). The trial court never discussed the separate issue of prejudice.

a. Deficient performance.

Cook failed to prove deficient performance. The jury knew that the interview spanned two days. The first day's interview obviously ended for some reason. It ended after Cook admitted knowing Egerson but denied involvement in the home invasion. The next day, after a fresh set of *Miranda* warnings, the jury learned that Cook persisted in his denial, but was now admitting to being in Marinette County, being at Babic's house with Egerson and the others, being at the Wal-Mart where the women

purchased the burglary tools at Egerson's direction, and returning to Milwaukee with Egerson the next day.

It was reasonable for trial counsel Langan not to object, move to strike, move for a mistrial or request a curative instruction in response to the testimony about why the first day's interview ended (141:138-39). The jury was in all reasonable probability more impressed by what Cook admitted to on the second day than by why he ended the interview on the first day. The state never used Cook's decision to end the first day's interview against him at trial (139:3-4, 19-31, 56-59). Moreover, trial counsel got Detective O'Neil to admit on cross-examination at the close of the defense case that it is not unusual for a suspect to be nervous during a police interview about a serious offense even when the suspect is innocent (138:260-63).

The state never used Cook's silence against him; the state only used his admissions to virtually everything except walking into the Harpers' home. Cook did not testify, so the state never had the opportunity to impeach him with his silence after day one of the interview even if that was its intent. The state did not use his silence in closing argument to the jury.

The law regarding comments on a defendant's post-Miranda silence

In *Doyle v. Ohio*, 426 U.S. 610 (1976), the Supreme Court held that the use of a defendant's silence in response to *Miranda* warnings for purposes of impeaching trial testimony is unconstitutional because it violates the defendant's right to due process. The Court explained that, because *Miranda* warnings contain an "implicit" assurance that "silence will carry no penalty" at trial, it would be "fundamentally unfair and a deprivation of due process to allow the arrested person's [post-*Miranda*] silence to be used to impeach an explanation subsequently offered at trial." *Id.* at 618.

In *Anderson v. Charles*, 447 U.S. 404 (1980), the Supreme Court held that *Doyle v. Ohio* does not apply in situations where "a defendant . . . voluntarily speaks after receiving *Miranda* warnings [because he] has not been induced to remain silent." *Id.* at 408.

> The test for determining if there has been an impermissible comment on a defendant's right to remain silent is whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the defendant's right to remain silent.

State v. Cooper, 2003 WI App 227, ¶19, 267 Wis.2d 886, 672 N.W.2d 118 (citing *State v. Nielsen,* 2001 WI App 192, ¶32, 247 Wis.2d 466, 634 N.W.2d 325). There is no due process violation when the prosecutor's cross-examination was not ""manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment" on the defendant's right to remain silent.'" *United States v. Mora*, 845 F.2d 233, 235 (10th Cir. 1988) (quoted sources omitted). A court will not find "manifest intent" if some other explanation for the cross-examination is equally plausible. *Id.*

When a defendant has chosen to speak with police rather than rely on the protections afforded him by *Miranda*, the state may use whatever he said, or failed to say, in his statement to police to impeach trial testimony. *See, e.g., United States v. Davenport*, 929 F.2d 1169, 1174-75 (7th Cir. 1991) (the privilege against self-incrimination does not permit a suspect to engage in "selective disclosure followed by a clamming up" because, having already given an exculpatory version of their activities to IRS agents, the defendants "forfeited their privilege not to answer questions concerning that version"); *Lindgren v. Lane*, 925 F.2d 198, 201 (7th Cir. 1991) (an agent's testimony regarding defendant's compound statement that he had been out fishing all night but "he didn't wish to say any more" did not amount to a *Doyle* violation).

The prosecutor did not make "unfair use" of Cook's silence against him at trial. *Anderson v. Charles*, 447 U.S. at 408. The prosecutor did not cross-examine Cook about his silence because he did not testify. The prosecutor never used Cook's silence as substantive evidence of guilt and never referred to this testimony in closing argument to the jury. *Ouska v. Cahill-Masching*, 246 F.3d 1036, 1047-49 (7th Cir. 2001); *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1017 (7th Cir. 1987). *See Bieghler v. McBride*, 389 F.3d 701, 705 (7th Cir. 2004) (the prosecutor did not equate silence with guilt, "the evil condemned in *Doyle* as undermining the privilege against self-incrimination"). The prosecutor did not equate Cook's silence at the end of the first day with guilt. He equated Cook's *admissions* on the second day with guilt. What occurred here, "was a far cry from what transpired in *Doyle*, which featured repeated and blatant exploitation of the defendants' post-arrest silence." *Bieghler v. McBride,* 389 F.3d at 705.

When viewed in the proper context of the entire interview spread out over two days, it is plain that the state did not use as substantive evidence of guilt, or comment on, Cook's decision to temporarily stop the interview at the end of the first day. *See State v. Cooper,* 267 Wis.2d 886, ¶¶19-20; *State v. Nielsen,* 247 Wis.2d 466, ¶34. Cook did not testify, so the state could not impeach him with silence. Nor did the state argue that his decision to end the interview after the first day, only to resume it the second day, was inconsistent with his claim of innocence. *See State v. Ewing,* 2005 WI App 206, ¶14, 287 Wis.2d 327, 704 N.W.2d 405.

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The trial court, therefore, erred as a matter of law in concluding that trial counsel's performance was prejudicially deficient for not objecting to the unobjectionable. *State v. Nielsen,* 247 Wis.2d 466, ¶36.

b. Prejudice.

It follows, then, that Attorney Childs' failure to develop this argument on direct appeal was non-prejudicial.

This court already held on direct appeal that Cook failed to prove prejudice resulting from trial counsel's decision not to move to suppress his statements (76:7, ¶13, A-Ap. 124). This ruling applies equally to the alleged reference to silence because the important point was that Cook's statements to police were consistent with the defense theory that Cook was around, but backed out of any plan to invade the Harper home before it occurred. *Id.* This dovetails with the argument above that the state never used Cook's silence against him; the state used his admissions. Cook, in turn, used his statements as best as he could in lieu of his testimony to bolster his shaky withdrawal theory. The state used Cook's statements to prove circumstantially that Cook participated. Cook failed to prove prejudice.

3. Postconviction counsel's failure to challenge trial counsel's decision not to object to Mrs. Harper's in-court identification of Cook's eyes.

The relevant facts developed at the trial and postconviction hearing

At trial, Margaret Harper described the ordeal she and her family went through during the home invasion. She described how the two assailants hid their faces from view with bandanas, but she could see their eyes (137:215). She did not identify either of the assailants in police photo arrays before trial, and there was no preliminary hearing or other pretrial proceeding where she would have had the opportunity to view Cook.

At trial, and as a complete surprise to defense counsel, Mrs. Harper testified that she had a "flashback" when she saw Cook in the courtroom earlier that day and said she recognized him as one of the assailants by his eyes (137:216). Mrs. Harper explained that she could only see his eyes (137:217-18). When asked by defense counsel to elaborate why she could identify Cook by his eyes, Mrs. Harper explained that Cook's eyes gave the appearance he was upset at the time of the robbery (137:225). Her husband, Jimmy Harper, did not identify Cook when he testified right before her (137:186-202), even though Mr. Harper said one of the assailants lost his mask during the struggle (137:204). Marinette Detective Miller testified that neither Mr. nor Mrs. Harper gave him a description of the assailants. Only their daughter, Molly Harper, provided a general description, stating that she believed the assailants were two black men (138:94; 142:76-77, 85).

Trial counsel did not object because Mrs. Harper's in-court identification of Cook's eyes came as a complete surprise to him. Instead, counsel challenged her identification in closing argument, pointing out (without objection by the state) that Mrs. Harper failed to identify Cook's photo in a police photo array. Counsel questioned her ability to identify Cook only by his eyes in the dark room (139:46-48).

Attorney Langan testified consistently at the postconviction hearing that Mrs. Harper's identification testimony came as a complete surprise to him, he did not object or request an eyewitness identification instruction, but he challenged her ability to identify Cook only by his eyes in closing argument (141:64, 69-70, 81-82, 92, 95-96).

Attorney Childs explained that he did not challenge Langan's failure to object to Mrs. Harper's in-court identification because he did not believe it was a strong appellate issue (141:38).

The trial court ruled at the postconviction hearing that Langan was ineffective for not objecting or moving to strike Mrs. Harper's in-court identification testimony because it was inadmissible (142:175-77; A-Ap. 143-45). The court later added that Langan should have moved for a continuance or requested an instruction on eyewitness identification (144:146-47; A-Ap. 105-06). The trial court had earlier acknowledged, however, that the jury could have found it "far-fetched" that Mrs. Harper was able to make a positive identification of Cook only by his eyes (141:87-88).

a. Deficient performance.

Trial counsel's performance was deficient only if *Strickland* requires clairvoyance.

Wisconsin law as it existed at the time of trial allowed for Mrs. Harper's surprise in-court identification testimony. *State v. Marshall,* 92 Wis.2d 101, 117-118, 284 N.W.2d 592 (1979). It is firmly established that the issue of deficient performance is determined based on the law applicable at the time of trial; not the law applicable when postconviction counsel gets around to filing the ineffective assistance challenge. *Lockhart v. Fretwell,* 506 U. S. 364, 372-73 (1993); *State v. Silva,* 2003 WI App 191, ¶¶11-12, 266 Wis.2d 906, 670 N.W.2d 385. The fact that the law changed to some extent thereafter, *see State v. Hibl,* 2006 WI 52, ¶¶9-10, 14-15, 20, 31, 46-47, 56, 290 Wis.2d 595, 714 N.W.2d 194, does not retrospectively render trial counsel deficient.[6]

Moreover, as discussed above, trial counsel challenged Mr. Harper's ability to identify him merely by his eyes. Detective Miller testified that only the Harpers'

[6] The court in *Hibl* did not overrule *Marshall*, but directed courts to perform a "gate-keeping" function with respect to a surprise in-court identification such as this one. Consequently, Mrs. Harper's identification is conceivably still admissible after *Hibl*.

daughter, Molly, was able to provide any sort of a detailed description of the assailants. Counsel also argued, without objection by the state, that Mrs. Harper was unable to pick out Cook's photo in an array. It was reasonable, therefore, for Attorney Childs to decide that this issue was not sufficiently strong, in light of *Marshall,* to merit raising on postconviction review. Because trial counsel's performance was not deficient under the law applicable at the time of trial, postconviction counsel's performance was not deficient for deciding against making an issue out of Mrs. Harper's in-court identification.[7]

b. Prejudice.

Cook failed to prove a reasonable probability of a different outcome even if Mrs. Harper was not allowed to testify she recognized Cook by his eyes. As discussed at length above, Cook's defense was severely damaged by the presence of his DNA in the getaway car, his association with Egerson, and his presence with Egerson and the others shortly before and shortly after the home invasion. He was also harmed by the absence of any reason for the two women to both protect Hall and falsely accuse him.

[7] Cook spent much of his argument in the trial court and here discussing the vagaries of cross-racial identifications. Mrs. Harper only identified Cook by his eyes. Most of the rest of his head was covered by a bandana. Cook fails to explain how the problems associated with cross-racial identifications are present here where Mrs. Harper did not see his body or facial features and did not pick Cook out of a lineup containing other Africa-American men. *See State v. Ewing,* 287 Wis.2d 327, ¶2 (the witness identified Ewing, a former employee of the robbed establishment, "as one of the robbers based on his voice and eyelashes").

4. Counsel's performance with regard to the alleged grant of "immunity" in exchange for the testimony of the two female accomplices.

The relevant facts developed at the trial and postconviction hearing

Cook alleges that postconviction counsel was ineffective for not challenging trial counsel's alleged failure to establish the supposed grant of "immunity" from the prosecutor to Ashley Sadowski and Jessica Babic in exchange for their testimony implicating him in the home invasion. The trial court ruled that trial counsel was deficient and, therefore, postconviction counsel was ineffective for not making an issue of this.

Ashley Sadowski testified at trial that no one told her she would get immunity in exchange for her testimony, but "as far as I know I wasn't getting charged . . . I wasn't told I was getting charged, if I was getting charged" (137:174-75). Sadowski understood that she could still be charged and could plead the Fifth Amendment (137:177). On re-cross examination by Attorney Langan, Sadowski testified that no promises were made to her by the state, she had not yet been charged, but did not know for sure whether she would be charged (137:183-84). Sadowski then testified she was told she would not be charged, but in the back of her mind she realized it is possible she could still be charged because the state made no promises (137:184-85).[8]

[8] Out of the presence of the jury, Jessica Babic testified that police told her she would not be charged (137:182). The prosecutor explained, also out of the presence of the jury, that the women had not been charged but no one promised them immunity. Attorney Langan concurred that the prosecutor told him before trial the women had not been granted immunity (137:172-73).

Detective Baldwin testified at trial that no promises or threats were made to Sadowski in exchange for her testimony, and he never told her she would not be prosecuted (138:180). He explained to her that the charging decision was up to the district attorney (138:200). On cross-examination by defense counsel, Detective Baldwin also testified that when first interviewed, Sadowski lied and denied any involvement, stating that she was at Babic's house all night, and woke up the next morning to find her car stolen (138:197-98).

Sadowski testified at the postconviction hearing that she knew she could still be charged as a party-to-the-crime (144:44).

Attorney Langan testified that he asked Babic out of the presence of the jury about her understanding as to whether or not she would be charged, but failed to ask her those questions in front of the jury. He also did not request an accomplice jury instruction (142:15-18, 21-22). Langan was satisfied with the general instructions on witness credibility given at trial (142:31-33). Langan testified on cross-examination that he explored this topic with Sadowski in front of the jury even though he did not do the same with Babic (142:72-74). The prosecutor pointed this out in his argument to the court (142:144-45).

Langan got Jessica Babic to admit on cross-examination that she did not initially tell police that David Hall was at her house earlier that night (138:37-39, 62-63).

The trial court ruled Langan was ineffective because he failed to establish that the two women got "*de facto* immunity" from the state, giving the prosecutor power over them (144:45-46), and failed to ask for an accomplice instruction (142:147; 144:147-48; A-Ap. 137; A-Ap. 106-07). It followed, according to the court, that Attorney Childs was ineffective for not raising this issue on direct review.

a. Deficient performance.

It was reasonable for Childs to decide not to raise this issue on direct review because Langan succeeded in drawing out from both Sadowski and Detective Baldwin trial testimony before the jury that Sadowski had not yet been charged, Sadowski believed she would not be charged, but no one made any promises to her, no one granted her immunity, she realized she could still be charged, and the charging decision was ultimately up to the district attorney. Counsel also established through Detective Baldwin that Sadowki had lied initially about hers and Babic's involvement, stating that they were both at Babic's house all night and someone stole her car.

Certainly, counsel could have requested an accomplice jury instruction, but the instruction on witness credibility given at trial was sufficient to enable the jury to adequately assess the credibility of the two women (139:89-91). Moreover, it should have been obvious to the jury that the women were deeply involved with Sadowski's boyfriend, Egerson, in this venture and knew they were in some jeopardy. Both women admitted they lied to police. The jury did not need an accomplice instruction to realize that these women were highly motivated to give testimony favorable to the state, whether or not they expected to be charged in the future. The fact remains that the state did not then, and has not even now, promised these women immunity in exchange for their testimony.

The jury knew full well that these women had every incentive to provide testimony favorable to the state and might even lie to ensure that they would not be charged. The undisputed fact remains that the state did not enter into any sort of a "deal" with either woman. *Compare State v. Delgado,* 194 Wis.2d 737, 535 N.W.2d 450 (Ct. App. 1995) (trial counsel was ineffective for failing to prove through the accomplice's attorney that the accomplice had been promised a reduced charge - from murder - in exchange for his testimony at the preliminary

hearing and trial; and the accomplice lied when he testified at both hearings that no such promise had been made. *Id.* at 743-49, 754-55).

b. Prejudice.

The trial court was quick to find deficient performance but, again, did not adequately articulate why this was prejudicial. The jury had already been told through the testimony of Sadowski and Detective Baldwin that the women had not yet been charged, no one promised them anything, and while Sadowski expected not to be charged, she realized she could be. Even if the jury had heard essentially the same testimony through Babic, and been given an accomplice instruction in addition to the credibility instruction, there is no reasonable probability of a different outcome. The jury already knew that both women lied to police and that both had plenty of incentive to testify favorably for the prosecution. The fact that the state had some control over them – *de facto* or otherwise – should have been obvious to the jury. The fact remains there never was any secret side agreement between these witnesses and the state that went undisclosed to the jury.

The result would not likely change because Sadowski's and Babic's testimony was so thoroughly corroborated by Cook's own inculpatory statements confirming virtually everything they had to say about his activities both before and after the home invasion. Their testimony was thoroughly corroborated by Cook's admitted friendship with Egerson; by the presence of Cook's DNA on a cigarette butt found in the crashed getaway car owned by Sadowski, the same car Sadowski testified she loaned to Egerson and Cook to commit the crimes; by the fact that a cell phone registered in the name of Cook's girlfriend, and given to Cook by her, was used to call Sadowski and Babic in the moments after the home invasion (137:110-12, 121, 152-54; 138:182-83, 240-46, 267).

Sadowski and Babic only put Cook in their company that night. Cook's statement to police put him in their company, but also in the company of Egerson at critical times both immediately before and after the home invasion. Cook's cigarette butt and cell phone put him in Sadowski's car with Egerson both before and immediately after the home invasion. An accomplice jury instruction would not have made any difference under these circumstances. In all reasonable probability, that instruction would not have caused the jury to give any less credence to the thoroughly corroborated testimony of the two women.

5. Trial counsel's performance with regard to whether Hall possessed a gun at Babic's house shortly before the home invasion.

The relevant facts developed at the trial and postconviction hearing

The facts and argument concerning this claim are subsumed in the more general argument concerning the inability to locate Hall for trial at "B. 1." above.

Suffice it to say that Babic testified at trial Hall did not know about the plan to rob the Harpers and Babic did not see Hall with a gun that night (138:39, 65). On cross-examination by Langan, Babic admitted she did not tell police that Hall was at her house earlier that night (138:37-39, 62-63). Sadowski testified at the postconviction hearing that Hall often carried a gun, but she did not see him with a gun at Babic's house that night (144:50-51).

Hall testified at the postconviction hearing and admitted to being at Babic's house, but denied having a gun that night or knowing anything about the home invasion. Hall admitted knowing Egerson and picking up the women the next day (144:99-107).

As discussed above, there is no reasonable probability of a different outcome at a retrial because, just as at the first trial, no one was prepared to testify that Hall had a gun with him that night or knew about plans for a home invasion. That is why it was reasonable for Attorney Childs to decide not to make an issue of this on direct review. Again, Cook has failed to prove deficient performance or prejudice.

6. The performance of both attorneys with regard to the cell phone records.

The relevant facts developed at the trial and postconviction hearing

While Sadowski and Babic waited in the park in Egerson's Cadillac for the two men to return from the Harper burglary, Sadowski received a frenzied call from Egerson on a cell phone he had left for them, demanding that they pick the men up because they had driven Sadowski's car into a ditch. There were several calls in short order (137:110-12, 121-22, 152-54; 138:25, 29). Police investigators learned from cell-site tracking information that three calls were made shortly after 4:00 a.m. from a location near a cell tower in Peshtigo, not far from the Harper residence. The calls emanated from a cell phone owned by a Sheboygan woman named Stacy Thede to a cell phone owned by Egerson. Police went to visit Ms. Thede and, lo and behold, Cook was hiding out at her Sheboygan residence. Thede explained at trial that Cook was her boyfriend and she had purchased the cell phone contract for him. Cook was arrested and his cell phone was recovered at Thede's apartment (138:182-83, 240-46, 267, 280-85).

Thede testified for the defense that Cook told her his cell phone was missing some time before May 21st (138:268-69).

The trial court asked defense counsel why he allowed the state to introduce hearsay testimony through Detectives Baldwin and O'Neil about the cell-site tracking information rather than force the state to produce the cell phone provider's records and put on an expert witness to explain and authenticate them (138:300). Attorney Langan explained that he obtained the cell-site records in discovery, reviewed them and thought the state was going to introduce them at trial but it did not (*id.*).

In his closing argument, Langan made it a point of emphasis that the state never produced either the cell phone records or the cell phones themselves. He argued from this that the state produced no evidence connecting Cook to any cell phone used in the robbery (139:39-40).

Attorney Childs testified at the postconviction hearing he did not challenge Langan's effectiveness for letting the state prove the cell-site tracking information through the testimony of the detectives, rather than through an expert from the cell phone provider, because he did not believe it was a "strong issue" (141:35).

Trial attorney Langan testified at the postconviction hearing that he thought the state would introduce the cell phone records but, in any event, he had reviewed the records after receiving them in discovery and saw no need to challenge their veracity (141:106-11). Langan explained that Detective O'Neil had obtained a document subpoena for the cell phone records from the provider and they were included in discovery (142:79-80). Langan explained further that the defense approach was not to challenge the veracity of the cell phone records, which would likely not have succeeded, but to prove through Thede that Cook's cell phone had been lost or stolen before the crime occurred (142:81).

The prosecutor argued at the postconviction hearing that it makes no difference how the cell phone information came into evidence; through hearsay testimony of the investigating detectives or through a

representative of the cell phone provider. At a retrial, the state would simply put on the latter rather than the former. The defense theory would still be that his phone was missing or stolen. There was nothing then, and there is nothing now, to indicate the records would have been inadmissible at trial. The prosecutor also noted defense counsel argued to the jury that the state failed to put in the cell phone evidence and thereby failed to connect Cook to the cell phones used in the crime (142:95, 128-31). The phone records were in everyone's hands before trial, they speak for themselves, and the proof would not be any different if the evidence came in through a representative of the cell phone provider rather than through the detectives (144:141-43).

Despite all this, the trial court found Langan deficient for not making the state produce someone from the cell phone provider to verify this information. Furthermore, the trial court held, had Langan interposed a "hearsay" objection to the detectives' testimony, the trial court would have sustained it and not allowed the state to introduce the records or any testimony from a representative of the cell phone provider because no such person was on the state's witness list (142:133-39; 144:154-56; A-Ap. 130-36; A-Ap. 113-15).

Cook presented no evidence, and to this very day Cook offers no proof, that the cell phone records were not authentic, were unreliable, inaccurate or misleading. Cook offers no evidence that the cell site tracking information obtained from those records by the detectives regarding the calls made on Cook's phone, as related to the jury, was wrong. Absent any such proof forthcoming from Cook, this court must assume that they were authentic and accurate.

a. Deficient performance.

Attorney Childs reasonably decided not to make an issue of Langan's decision against objecting to the

detectives' testimony about the phone records because, as noted immediately above, there is nothing to indicate that the matters revealed in their testimony were unreliable, unauthentic, or wrong. It remains to this day an undisputed fact that the cell phone purchased for Cook by his girlfriend, Thede, was used several times in the vicinity of the home invasion minutes after it occurred. Cook offers no proof to the contrary.

This evidence was arguably not "hearsay" at all because it was not offered to prove the truth of the matter asserted – that Cook's cell phone was used in the robbery – but only to show how police ended up at Thede's apartment in Sheboygan where they also found Cook. Wis. Stat. §908.01(3).

And, as the trial court itself acknowledged, hearsay testimony received without objection is admissible (138:300). Wisconsin law is clear that hearsay evidence is admissible if there is no objection to it because hearsay is deemed to be competent evidence, admissible unless objected to. *Virgil v. State,* 84 Wis.2d 166, 185, 267 N.W.2d 852 (1978); *Caccitolo v. State,* 69 Wis.2d 102, 113, 230 N.W.2d 139 (1975); *State v. Heredia,* 172 Wis.2d 479, 482 n.1, 490, 493 N.W.2d 404 (Ct. App. 1992). It was reasonable for Childs to decide that Langan's decision not to object to the detectives' testimony on a factual point that was undisputed then and remains undisputed now, rather than waste trial time and resources to force the state to call an expert witness from the cell phone provider on what is still an undisputed fact, was a reasonable call for Langan to make. Again, O. J. Simpson's well-compensated Hollywood "dream team" might have done things differently, but *Strickland* does not demand performance to that standard; only minimal competence.

b. Prejudice.

This case did not turn on the detectives' cell phone testimony. It turned on the testimony of Sadowski and

Babic, as strongly corroborated by Cook's inculpatory statements confirming everything they had to say about him other than his presence at the Harper home: his friendship with Egerson, his admitted presence with Egerson and the two women both before and after the robbery, the discovery of his DNA on the cigarette butt inside Sadowski's crashed getaway car, and the lack of any motive for the two women to protect Hall *and* frame Cook.

Moreover, regardless whether the cell phone evidence came in through an expert witness from the phone provider or through the detectives, the undisputed fact remains that police used the information from the cell phone provider to find Cook hiding out at his girlfriend's Sheboygan apartment. This resulted in his arrest, his damaging statements, the acquisition of his DNA sample and the positive identifications made of him by Sadowski and Babic as the man who accompanied Egerson that night. Cook does not argue, and the trial court did not hold, that any of this evidence should have been excluded from trial. So, the outcome would have been no different had the detectives merely testified they received a "lead" that took them to Thede's Sheboygan apartment, rather than testify that cell phone records led them to Thede's apartment.

Had Childs raised the issue on direct appeal, this court would no doubt have rejected it because the information in the records is not disputed and there is nothing to indicate proof directly through an expert from the cell phone provider, rather than through the detectives, would have served any purpose other than prolonging the trial. It most assuredly would not have changed the outcome one whit.[9] Therefore, it was reasonable for

[9] To get around all this, the trial court adopted a truly bizarre notion of *Strickland* prejudice. It reasoned that had Langan interposed a "hearsay" objection to the detectives' testimony, it would have sustained it, yet would not have allowed the state to call a witness from the phone provider mid-trial to authenticate the (footnote continued)

Childs to decide not to make an issue of this because Langan acted reasonably. The trial court erred in concluding otherwise.

C. The trial court erred in ruling that the overall performance of Attorneys Childs and Langan requires reversal even if no single error does.

The trial court ordered a new trial because it believed the alleged errors of both Attorneys Langan and Childs cumulatively require it, even if no individual error does.

The state has demonstrated that the trial court missed the mark badly in every one of its determinations that both Langan at trial, and Childs on postconviction review, performed deficiently and prejudicially so. Even if one could now second-guess certain decisions made by those attorneys, there is no proof of prejudice; only speculation. The jury had before it plenty of information to adequately assess the credibility of Sadowski and Babic.

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records and explain how the cell tracking information was obtained (142:133-39; 144:154-56). The court's analysis betrays a loss of focus. The issue is not whether the state would have been allowed to call a cell phone expert mid-trial had Langan successfully objected; it is whether there is a reasonable probability of a different outcome had the cell phone information come in through an expert from the cell phone provider rather than through the detectives' hearsay testimony. Cook's complaint, after all, is not about who was included on the state's witness list; but about how the cell phone evidence came in. The trial court also failed to explain why this was *inadmissible* hearsay or why it makes any difference in light of the fact that the circumstances of Cook's arrest at his girlfriend's apartment, and everything that flowed therefrom, would remain admissible.

Cook was not done in by the fact that David Hall was "on the lamb" at the time of trial because there would have been no "Perry Mason moment" had Hall testified. Cook was not done in by the fact, established at trial, that Sadowski and Babic had yet to be charged or had motives to curry favor with the state because their credibility was strongly challenged yet their testimony was so strongly corroborated. Cook was not done in when the jury learned he stopped the police interview, only to voluntarily resume it the next day at which time he incriminated himself. Cook was not done in by the surprise identification testimony of Mrs. Harper, admissible under Wisconsin law at the time of trial. Cook was not done in by the fact that both Sadowski and Babic would have testified they did not see Hall with a gun that night; or by the fact that Hall, had he testified, would have denied having a gun or knowing anything about the plan to invade the Harper home. Cook was not done in by the detectives' hearsay testimony relating to the undisputed fact that cell-site information enabled police to find him and learn that a cell phone purchased for him by Cook's Sheboygan girlfriend was used moments after the home invasion.

Cook was done in by his own inculpatory statements that corroborated most of the state's evidence, by his admitted association with Egerson, and by the presence of his DNA and his cell phone inside the getaway car. Cook was done in by the fact that at trial, and to this very day, he could not provide a motive for the two women to lie in order to both protect David Hall and frame Cook.

> Lest there be any misunderstanding, a convicted defendant may not simply present a laundry list of mistakes by counsel and expect to be awarded a new trial. A criminal defense attorney's performance is not expected to be flawless. The Sixth Amendment does not demand perfection.

> There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Moreover, in most cases errors, even unreasonable errors, will not have a cumulative impact sufficient to undermine confidence in the outcome of the trial, especially if the evidence against the defendant remains compelling. Finally, each alleged error must be deficient in law—that is, each act or omission must fall below an objective standard of reasonableness—in order to be included in the calculus for prejudice.

State v. Thiel, 2003 WI 111, ¶61, 264 Wis.2d 571, 665 N.W.2d 305.

The trial court erred when it concluded that both trial counsel and postconviction counsel acted unreasonably and prejudicially so in any or all of the respects it cited. Because Cook received a fair trial with a reliable result in a case where even the best of attorneys would likely not have obtained a different outcome because of overwhelming evidence of his guilt, the trial court erred when it ordered that Cook receive another fair trial.

CONCLUSION

Therefore, the plaintiff-appellant, State of Wisconsin, respectfully requests that the trial court's order

granting §974.06 postconviction relief be REVERSED and that the judgment of conviction be reinstated.

Dated at Madison, Wisconsin this 8th day of June, 2011.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 266-9594 (Fax)
obriendj@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,994 words.

Dated this 8th day of June, 2011.

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DANIEL J. O'BRIEN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 8th day of June, 2011.

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DANIEL J. O'BRIEN
Assistant Attorney General