STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2011AP1249
(Milwaukee County Cir. Ct. Case No. 2002CF4131)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSEPH J. JORDAN,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF AND FROM AN ORDER DENYING A MOTION FOR RECONSIDERATION ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. CONEN PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN

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QUESTIONS PRESENTED

1. In denying the postconviction motion of defendant-appellant Joseph J. Jordan, did the circuit court erroneously adopt the State's brief wholesale?
   - ♦ By its decision on Jordan's motion for reconsideration, the circuit court implicitly answered "No."
   - ♦ This court should answer "No."

2. Did the circuit court properly exercise its discretion when the court denied Jordan's request to proceed *pro se* in the circuit court in the proceedings under Wis. Stat. § 974.06?
   - By its rulings, the circuit court implicitly answered "Yes."
   - This court should answer "Yes."

3. Where Jordan had already pursued a *pro se* direct appeal, where the direct appeal included a claim of ineffective assistance of trial counsel, and where Jordan did not provide any reasons for failing to raise his present ineffective-assistance claim during the direct appeal (as required by Wis. Stat. § 974.06 and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994)), did the circuit court properly deny his present claim of ineffective assistance of trial counsel?
   - The circuit court did not address the ***Escalona-Naranjo*** bar.
   - This court should answer "Yes."

4. Assuming the ***Escalona-Naranjo*** did not apply to Jordan's present ineffective-assistance claim against trial counsel, did the circuit court properly deny the claim?
   - By its decision, the circuit court implicitly answered "Yes."
   - This court should answer "Yes."

5. Did Jordan's newly discovered evidence, which included at least one fabricated affidavit, merit a new trial?
   - The circuit court answered "No."
   - This court should answer "No."

6. Did the circuit court correctly deny Jordan's claim of ineffective assistance of postconviction counsel?
   - By its decision, the circuit court implicitly answered "Yes."
   - This court should answer "Yes."

7. Does this case merit a discretionary reversal for a new trial in the interest of justice?
   - By its decision, the circuit court implicitly answered "no."
   - This court should answer "No."

POSITION ON ORAL ARGUMENT AND PUBLICATION OF THE COURT'S OPINION

Oral argument. The State does not request oral argument.

Publication. The State does not request publication of the court's opinion.

STATEMENT OF THE CASE: FACTS AND PROCEDURAL HISTORY

As respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2.[1] Instead, the State will present additional facts in the "Argument" portion of its brief.

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[1] Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2011-12 edition.

STANDARD OF REVIEW

A. Ineffective Assistance Of Counsel.

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). "[T]o establish that postconviction or appellate counsel was ineffective, a defendant bears the burden of proving that trial counsel's performance was deficient and prejudicial." ***State v. Ziebart***, 2003 WI App 258, ¶ 15, 268 Wis. 2d 468, 673 N.W.2d 369.

> To establish deficient performance, the defendant must show that counsel's representation fell below the objective standard of "reasonably effective assistance." *Strickland,* 466 U.S. at 687-88. Reviewing courts should be "highly deferential" to counsel's strategic decisions and make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *State v. Carter,* 2010 WI 40, ¶ 22, 324 Wis. 2d 640, 782 N.W.2d 695 (quoting *Strickland,* 466 U.S. at 689). There is a "'strong presumption' that [counsel's] conduct 'falls within the wide range of reasonable professional assistance.'" *Id.* (quoting *Strickland,* 466 U.S. at 689).

State v. Domke, 2011 WI 95, ¶ 36, 337 Wis. 2d 268, 805 N.W.2d 364.[2] "To prove deficient perfor-

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[2] The supreme court has rejected "any substantive difference" between "tactical" and "strategic" decisions:

> We note that Wisconsin courts appear to use the terms "strategic" and "tactical" interchangeably. *See,*

(*footnote continues on next page*)

mance, a defendant must show *specific acts or omissions* of counsel that are 'outside the wide range of professionally competent assistance.'" ***State v. Arredondo***, 2004 WI App 7, ¶ 24, 269 Wis. 2d 369, 674 N.W.2d 647 (emphasis added) (quoting *Strickland*, 466 U.S. at 690). *See also* ***State v. Byrge***, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999) ("A defendant who alleges that counsel was ineffective by failing to take certain steps must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding."), *aff'd*, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477; ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994) (defendant must identify the specific acts or omissions that form the basis of the claim of ineffective assistance of counsel). An appellate court strongly presumes that counsel acts reasonably within professional norms. ***Arredondo***, 269 Wis. 2d 369, ¶ 24. "Prejudice occurs where the attorney's error is of such magnitude that there is a reasonable probability that,

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> *e.g., State v. Felton,* 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983) ("The prudent-lawyer standard requires that strategic or tactical decisions must be based upon rationality founded on the facts and the law. If tactical or strategic decisions are made on such a basis, this court will not find that those decisions constitute ineffective assistance of counsel. . . ."). We do not perceive any substantive difference between these terms in the context of an ineffective assistance of counsel claim.

State v. Harbor, 2011 WI 28, ¶ 71 n.14, 333 Wis. 2d 53, 797 N.W.2d 828.

absent the error, 'the result of the proceeding would have been different.' *Strickland*, 466 U.S. at 694; *Johnson*, 153 Wis. 2d at 129." ***State v. Erickson***, 227 Wis. 2d 758, 769, 596 N.W.2d 749 (1999).

> The function of a court assessing a claim of deficient performance is to determine whether counsel's performance was objectively reasonable. In making this determination, the court may rely on reasoning which trial counsel overlooked or even disavowed. Courts "do not look to what would have been ideal, but rather to what amounts to reasonably effective representation." Professionally competent assistance encompasses a "wide range" of behaviors.

State v. Koller, 2001 WI App 253, ¶ 8, 248 Wis. 2d 259, 635 N.W.2d 838 (citations omitted). *See also* ***State v. Kimbrough***, 2001 WI App 138, ¶ 31, 246 Wis. 2d 648, 630 N.W.2d 752 ("our function upon appeal is to determine whether defense counsel's performance was objectively reasonable according to prevailing professional norms").

> Whether counsel was ineffective is a mixed question of fact and law. *State ex rel. Flores v. State*, 183 Wis. 2d 587, 609, 516 N.W.2d 362 (1994). The circuit court's findings of fact will not be disturbed unless shown to be clearly erroneous. *State v. McDowell*, 2004 WI 70, ¶ 31, 272 Wis. 2d 488, 681 N.W.2d 500. The ultimate conclusion as to whether there was ineffective assistance of counsel is a question of law. *Flores*, 183 Wis. 2d at 609.

State v. Balliette, 2011 WI 79, ¶ 19, 336 Wis. 2d 358, 805 N.W.2d 334. *See also* ***id.*** ¶¶ 21-27; ***State v. Westmoreland***, 2008 WI App 15, ¶ 18, 307 Wis. 2d 429, 744 N.W.2d 919 ("Conclusions by the trial court whether the lawyer's performance was

deficient and, if so, prejudicial, present questions of law that we review *de novo*.").

"A criminal defendant who claims ineffective assistance of counsel cannot ask the reviewing court to speculate whether counsel's deficient performance resulted in prejudice to the defendant's defense. The defendant must affirmatively prove prejudice." ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993). *See also* ***Erickson***, 227 Wis. 2d at 774 (speculation does not satisfy the prejudice prong of *Strickland*).

If the defendant fails on either prong — deficient performance or prejudice — the ineffective-assistance-of-counsel claim fails: "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." ***Strickland***, 466 U.S. at 697. Thus, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." ***Id.***

The two-part ***Strickland*** test for proving ineffective assistance of counsel applies to ineffective-assistance claims against postconviction and appellate counsel. ***Smith v. Robbins***, 528 U.S. 259, 285-86 (2000) (applying the *Strickland* analysis to a claim of ineffective assistance of appellate counsel on direct appeal). To establish ineffective assistance of postconviction or appellate counsel as a "sufficient reason," a defendant must adequately plead and prove the ineffectiveness of postconviction or appellate counsel. ***Balliette***, 336 Wis. 2d

358, ¶¶ 62-78; *see also* ***id.*** ¶¶ 21-27. When a defendant's claim of ineffective assistance of postconviction counsel rests on postconviction counsel's failure to assert a claim of ineffective assistance of trial counsel, the defendant must also establish trial counsel's ineffectiveness. ***Ziebart***, 268 Wis. 2d 468, ¶15. If a defendant has already pursued a direct appeal, ineffective assistance of postconviction or appellate counsel can provide the "sufficient reason" under Wis. Stat. § 974.06 and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), for failing to raise on direct appeal a claim of ineffective assistance of trial counsel. ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996).

B. New Trial Based On Newly Discovered Evidence.

"In order to set aside a judgment of conviction based on newly-discovered evidence, the newly-discovered evidence must be sufficient to establish that a defendant's conviction was a 'manifest injustice.'" ***State v. Plude***, 2008 WI 58, ¶ 32, 310 Wis. 2d 28, 750 N.W.2d 42 (citation omitted). The decision to grant or deny a motion for a new trial based on newly-discovered evidence rests in the circuit court's sound discretion. ***Id.*** ¶ 31. Such motions, however, "'are entertained with great caution.'" ***State v. Morse***, 2005 WI App 223, ¶ 14, 287 Wis. 2d 369, 706 N.W.2d 152 (citation omitted).

To obtain a new trial based on newly discovered evidence, a defendant must prevail in a multi-pronged inquiry. ***State v. Love***, 2005 WI 116, ¶¶ 43-44, 284 Wis. 2d 111, 700 N.W.2d 62.

> [A] defendant must first prove by clear and convincing evidence that "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative."
>
> If the defendant makes this showing, then "the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial." The reasonable probability determination does not have to be established by clear and convincing evidence, as it contains its own burden of proof. A reasonable probability of a different outcome exists if "there is a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt."

Id. (first set of brackets added) (citations and footnote omitted). *Cf.* ***Morales v. Johnson***, 659 F.3d 588, 605 (7th Cir. 2011) (to prevail on an actual-innocence claim, inmate "'must show that "in light of new evidence, it is more likely than not that no reasonable juror would find him guilty beyond a reasonable doubt,"'" which requires "'"new reliable evidence — whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence — that was not presented at trial"'" and "requires a stronger showing than that required to establish *Strickland* prejudice" (citations omitted)). Evidence that fails to satisfy even one of the five criteria does not qualify as newly discovered evidence and therefore cannot suffice to warrant a new trial. ***State v. Kaster***, 148 Wis. 2d 789, 801, 436 N.W.2d 891 (Ct. App. 1989). Whether a reasonable probability exists that a jury would reach a different result would be reached in a new trial presents an appellate court with a question of law. ***Plude***, 310 Wis. 2d 28, ¶ 33.

In determining the reasonable probability of a different result on retrial, the circuit court may determine the credibility of the new testimony proffered by the moving party. ***State v. Carnemolla***, 229 Wis. 2d 648, 660-61, 600 N.W.2d 236 (Ct. App. 1999); ***State v. Terrance J.W.***, 202 Wis. 2d 496, 501, 550 N.W.2d 445 (1996). If the circuit court finds the newly discovered evidence credible, the court determines whether a jury, hearing all of the evidence, would have a reasonable doubt as to the defendant's guilt. ***State v. Edmunds***, 2008 WI App 33, ¶ 18, 308 Wis. 2d 374, 746 N.W.2d 590. In making this latter determination, the circuit court does not weigh the evidence. ***Id.*** An appellate court reviews for clear error the circuit court's finding as to the credibility of a witness. ***Terrance J.W.***, 202 Wis. 2d at 501.

C. Exercise Of Discretion.

> The term "discretion" contemplates a process of reasoning which depends on facts in the record or reasonably derived by inference from the record that yield a conclusion based on logic and founded on proper legal standards. The record on appeal must reflect the circuit court's reasoned application of the appropriate legal standard to the relevant facts of the case.

State v. Delgado, 223 Wis. 2d 270, 280-81, 588 N.W.2d 1 (1999) (citations omitted).

> Under this standard, the circuit court's determination will be upheld on appeal if it is a reasonable conclusion, based upon a consideration of the appropriate law and facts of record. . . . While the basis for an exercise of discretion should be set forth in the record, it will be upheld if the appellate court can

> find facts of record which would support the circuit court's decision.

Peplinski v. Fobe's Roofing, Inc., 193 Wis. 2d 6, 20, 531 N.W.2d 597 (1995) (citations omitted).

D. Harmless Error.

> The harmless error rule . . . is an injunction on the courts, which, if applicable, the courts are required to address regardless of whether the parties do. *See* Wis. Stat. § 805.18(2) (specifying that no judgment shall be reversed unless the court determines, after examining the entire record, that the error complained of has affected the substantial rights of a party).

State v. Harvey, 2002 WI 93, ¶ 47 n.12, 254 Wis. 2d 442, 647 N.W.2d 189. *See* Wis. Stat. § 805.18 (harmless-error rule, made applicable to criminal proceedings by Wis. Stat. § 972.11(1)); ***Harvey***, 254 Wis. 2d 442, ¶ 48 n.14 (harmless-error test); *see also* ***State v. Martin***, 2012 WI 96, ¶¶ 42-46, 343 Wis. 2d 278, 816 N.W.2d 270 (reviewing harmless-error principles and factors); ***State v. Stuart***, 2005 WI 47, ¶ 40 n.10, 279 Wis. 2d 659, 695 N.W.2d 259 (various formulations of harmless-error test reflect "alternative wording").

"Wisconsin's harmless error rule is codified in Wis. Stat. § 805.18 and is made applicable to criminal proceedings by Wis. Stat. § 972.11(1)." ***State v. Sherman***, 2008 WI App 57, ¶ 8, 310 Wis. 2d 248, 750 N.W.2d 500 (citing *Harvey*, 254 Wis. 2d 442, ¶ 39) (footnote omitted). *See also, e.g.*, ***State v. Felton***, 2012 WI App 114, ¶ 1 n.1, 344 Wis. 2d 483, ___ N.W.2d ___ (codified version of harmless-error rule made applicable to appellate procedures

by Wis. Stat. § (Rule) 809.84); ***State v. Louis***, 152 Wis. 2d 200, 448 N.W.2d 244 (Ct. App. 1989) (same). "[I]n order to conclude that an error 'did not contribute to the verdict' within the meaning of *Chapman*,[3] a court must be able to conclude 'beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ***Harvey***, 254 Wis. 2d 442, ¶ 48 n.14 (quoting *Neder v. United States,* 527 U.S. 1, 18 (1999)) (footnote added). *See also* ***Stuart***, 279 Wis. 2d 659, ¶ 40 n.10 (various formulations of harmless-error test reflect "alternative wording," citing *Neder*, 527 U.S. at 2-3; *State v. Weed*, 2003 WI 85, ¶ 29, 263 Wis. 2d 434, 666 N.W.2d 485; *Harvey*, 254 Wis. 2d 442, ¶ 48, n.14). "The standard for evaluating harmless error is the same whether the error is constitutional, statutory, or otherwise." ***Sherman***, 310 Wis. 2d 248, ¶ 8 (citing *Harvey*, 254 Wis. 2d 442, ¶ 40). "The defendant has the initial burden of proving an error occurred, after which the State must prove the error was harmless." ***Id.*** (citing *State v. Tiepelman,* 2006 WI 66, ¶ 3, 291 Wis. 2d 179, 717 N.W.2d 1).

ARGUMENT

This appeal[4] arises from Jordon's conviction by a Milwaukee County jury for five felonies (44:1,

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[3] ***Chapman v. California,*** 386 U.S. 18 (1967).

[4] Jordan's notice of appeal (143) specifies an appeal from only the Milwaukee County Circuit Court's order denying the motion for reconsideration (138, R-Ap. 103). Based on Jordan's appellate brief, the State assumes Jordan intended to appeal from the circuit court's initial order

(*footnote continues on next page*)

R-Ap. 129), including first-degree reckless homicide for killing David A. Robinson (4:1, R-Ap. 121 (Count 1); 29, R-Ap. 124 (jury verdict)).

I. JORDAN'S CONTENTION THAT THE CIRCUIT COURT ADOPTED THE STATE'S BRIEF WHOLESALE WHEN DECIDING THE NEWLY-DISCOVERED-EVIDENCE CLAIM LACKS ANY MERIT.

Jordan asserts that "the circuit court erroneously exercised its discretion by adopting the State's brief wholesale and without explanation as supplemental reasons for denying defendant's motion." Jordan's Brief at 3 (capitalization and font weight modified). *See generally id.* at 3-10.[5]

If the circuit court had adopted the State's brief wholesale, Jordan might — but only might — have a point.[6] The circuit court, however, did not adopt

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as well (126, R-Ap. 101-02) and has written this brief accordingly.

[5] Jordan's argument strikes the State as disorganized and confusing. Nonetheless, to facilitate correlating the State's response with Jordan's contentions, the State follows Jordan's arrangement.

[6] ***State v. McDermott***, 2012 WI App 14, ¶ 9 n.2, 339 Wis. 2d 316, 810 N.W.2d 237. *See also* ***Trieschmann v. Trieschmann***, 178 Wis. 2d 538, 541-44, 504 N.W.2d 433 (Ct. App. 1993); ***State v. Orengo***, 2012 WI App 40, 340 Wis. 2d 497, 812 N.W.2d 539 (slip op. ¶ 13) (table) (unpublished authored opinion) (Fine, J.) (reprinted at R-Ap. 378-81) (same); *but see* ***State v. Crenshaw***, 2011 WI App 136, 337 Wis. 2d 428, 805 N.W.2d 735 (slip op. ¶ 47) (table)

(*footnote continues on next page*)

the State's brief. Moreover, even if the circuit court had adopted the State's brief, the court would not have committed any error.

Jordan presents his argument in the context of the circuit court's denial of the claim that newly discovered evidence warranted a new trial. Jordan's Brief at 3-10. Jordan describes the evidence this way:

> The newly discovered evidence in this case consist of (1) a sworn affidavit by Quincy [Grant] in which Quincy admitted that he (not Jordan) committed the shootings; (2) testimony from Lionne [Lonnie] Davis that Quincy confessed to him that he committed the shooting; (3) testimony from Charley [Grant] that Quincy confessed to him that he committed the shootings and that minutes before the shooting Charley observed that Jordan was not in the car which was involved in the shooting; and (4) testimony from Deyon Lee and Jason Hohnstein consistent with that.

Jordan's Brief at 4. Jordan appears to contend that the circuit court adopted the State's brief in addressing each of the items of newly discovered evidence.

(*footnote continues from previous page*)

(unpublished authored opinion) (Brennan, J.) (reprinted at R-Ap. 382-93).

A. Review Of Jordan's Claims Regarding The Circuit Court's Alleged Adoption Of The State's Brief In Connection With Newly Discovered Evidence.

Jordan presents five complaints about the circuit court's ruling on his claim of newly discovered evidence. Jordan's Brief at 3-10.

1. "The Trial Court Abused its Discretion when it Adopted the State's Position Without Explaining the Factors upon Which its Decision is based" (Jordan's Brief at 4)

Jordan asserts that the circuit court erred by denying his motion "without explaining the facts or the appropriate legal standards upon which its decision is based." Jordan's Brief at 4. The court, however, specifically confirmed that its ruling rested on its determination that "[n]o reasonable probability a jury hearing all the evidence, the trial evidence and newly discovered evidence, would have a reasonable doubt as to the defendant's guilt" (154:20, R-Ap. 371). In addition, the court made clear that it did not believe the written affidavits, describing them as "appear[ing] to be contrived and put together by the same person" (154:16-17, R-Ap. 367-68; *see also* 154:17-18, R-Ap. 368-69 (court expressing "deep concern as to the truth and veracity of any of that" information in the affidavits)).

The record provides ample justification for the circuit court's view. Jason Hohnstein testified to the fraudulence of his unnotarized "affidavit"

(150:32-45; *see also* 158:Ex. 10, R-Ap. 317 (Hohnstein unnotarized affidavit annotated with Hohnstein's handwritten declaration describing affidavit as "all bullshit")). He said he did not know from where he got the affidavit (150:36) and that "I don't know nothing about none of this. I was not there at the time nowhere" (150:38).

Charley Grant acknowledged that he did not actually sign his affidavit in front of a notary and agreed with the prosecutor's characterization of the affidavit as a "forgery" (150:19-20). Three "affidavits" — Hohnstein's (158:Ex. 10, R-Ap. 315-17) and both of Charley Grant's (158:Ex. 8, R-Ap. 311-12; 158:Ex. 9, R-Ap. 313-14) — used nearly identical language to misidentify the victims' 1984 Dodge Aries automobile as "the red New Yorker" (158:Ex. 8, R-Ap. 311 (Grant); 158:Ex. 9, R-Ap. 313 (Grant)) and "a 2 door New Yorker, reddish or Maroon in color car" (158:Ex. 10, R-Ap. 315 (Hohnstein)) — an especially curious similarity in light of Hohnstein's acknowledgment that he did not know anything about the crime and "was not there at the time nowhere."

Repeatedly invoking his Fifth Amendment privilege against self-incrimination, Quincy Grant refused to confirm that he had signed the affidavit he purportedly executed (147:11-12; *see also* 158:Ex. 1, R-Ap. 305-08), refused to confirm that he had asserted in the affidavit that he had committed the crime for which a jury convicted Jordan (147:12), refused to confirm that he "[shot] and kill[ed] somebody at the corner of Humboldt and Keefe Street in June of 2002" (147:8), refused to confirm his presence in the automobile from which Jordan fired the fatal shots (147:8-9, 10) — in

short, refused to answer any question that either inculpated him or exonerated (or even cast any doubt on the guilt of) Jordan. Grant's refusal repudiated his declaration in his affidavit that "I am willing to testify in any proceeding on behalf of Joseph Jordan any of those hearings subjecting myself to the penalties of perjury" (158:Ex. 1, R-Ap. 308). In addition, Grant's attorney (105, R-Ap. 181) subsequently confirmed that Grant would not testify at a new trial and "that to any question that he would be asked in regard to this matter, he would assert his Fifth Amendment right" (149:5).

The prosecutor's detailed post-hearing analysis of the alleged newly discovered evidence (121:11-19, R-Ap. 223-31) highlights other contradictions in the affidavits and testimony that reinforce the view that Jordan's newly discovered evidence (in the prosecutor's words) "reeks of fabrication" (121:19, R-Ap. 231).

2. "Analyzing the circuit court's ruling of Jordan being uncooperative pretrial with trial counsel" (Jordan's Brief at 5)

Jordan contends that the circuit court's view of him as uncooperative with trial counsel "was simply a paraphrase of the state's argument" and "is not supported by the record." Jordan's Brief at 5. *See also id.* at 6-7.[7] But whether Jordan cooper-

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[7] In footnote 3 in his brief, Jordan refers to material appearing in document number 69 (jury-trial transcript).

(*footnote continues on next page*)

ated or failed to cooperate with trial counsel Russell D. Bohach does not have anything to do with his newly-discovered-evidence claim, which focuses on the character of the evidence, the timing of its acquisition, and whether a defendant acts negligently in seeking out the evidence. Jordan's brief does not explain any connection between (on one hand) the court's view of his relationship with his trial lawyer and (on the other hand) his burden of proving that the alleged newly discovered evidence warranted a new trial.

In any event, the record supports the circuit court's view that Jordan did not cooperate with his trial lawyer. At the motion hearing, Bohach testified about Jordan's lack of cooperation (148:19, 20). In its oral ruling denying Jordan's motion (154:14-23, R-Ap. 365-74), the court stated that in the wake of several days of testimony and the presentation of affidavits, "This is my take on everything that went on" (154:14, R-Ap. 365). The court accredited defense counsel's testimony "that Mr. Jordan was not cooperative throughout the course of the preparation for this trial until the very end" (154:14, R-Ap. 365). The court continued: "My view on this whole thing is that Mr. Jordan was kind of making this up as he went. And being obstructionist over the period of time for Mr. Bohach to properly prepare for this matter doesn't in any way entitle him to a new trial" (154:15, R-Ap. 366).

(*footnote continues from previous page*)

That material actually appears in document number 70 (jury-trial transcript).

In addition, the trial judge contemporaneously commented on Jordan's uncooperative conduct (64:8-9, 18-19, 20), further confirming the circuit court's view. During a hearing that resulted in the adjournment of the jury trial (64), Bohach referred to witnesses who "may be the witnesses that my client over a course of time has been somewhat reluctant to discuss with me" (64:3-4).[8] The trial judge expressed concerns about Jordan's lack of cooperation (64:9, 20, 21-22) and declared that Jordan's "dissatisfactions here are not reasonable and are not well-placed" (64:18): The trial judge continued:

> . . . Mr. Bohach has met with the defendant on a number of occasions here. And maybe in an ideal world he would have been up to Green Bay the day after the first court date and spent hours talking to the defendant, but this isn't the perfect world. I'm satisfied that Mr. Bohach did not simply refuse to talk to the defendant or refused to consider issues related to the merits of the case, that he sought to pursue this and that the defendant decided he wasn't getting enough attention and wasn't getting it soon enough and the defendant decided not to cooperate with his attorney.
>
> There were at least two and, I believe, three dates down here. There was the February 12 meeting in Green Bay. There may well have been plenty of time at that point to prepare for trial if the de-

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[8] In the course of the discussion that in part concerned Jordan's lack of cooperation, Bohach explained that the delay in hiring an investigator resulted from the "need to give [the State Public Defender's office] concrete information in order for them to approve [hiring an investigator], given their method of operation. *I have that now*" (64:7-8 (emphasis added)).

> fendant had cooperated. But apparently [Jordan] decided by then he wasn't getting enough time and attention from his attorney and chose not to cooperate. But I'm satisfied that Mr. Bohach sought information and either just wasn't available or the defendant chose not to disclose it until the 11th hour.

(64:18-19.)[9]

Jordan obviously does not like the circuit court's characterization of him as uncooperative with defense counsel, but the record does support Jordan's objection.

3. "Circuit court ruling on Charley Grant" (Jordan's Brief at 7)

Jordan writes that "[t]he circuit court ruled that there was a significant dispute that trial counsel knew of Charley [Grant] and that Jordan had not proved otherwise." Jordan's Brief at 7. He asserts that "the circuit court's ruling is not supported record" [*sic*]. *Id.* (citing "R65; 5-6" and "app 31-bottom right hand corner").

Jordan mischaracterizes the court's comments, which occurred during argument by Jordan's post-conviction lawyer (154:9, R-Ap. 360), not during the court's ruling (154:14-23, R-Ap. 365-74), and did not constitute a ruling. Even so, based on the testimony and affidavits at trial, a dispute existed. Bohach testified that he did not recall whether he

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[9] *See also* 64:24 (trial judge advising Jordan of his "obligation to work with Mr. Bohach and pursue whatever reasonable and lawful defenses there are here and to be prepared for trial on the scheduled date").

had any information about Charley Grant before or at trial (148:30, 48-49, 56-57). Jordan testified that Bohach knew about Charley Grant and that Bohach referred to Grant in a transcript (152:9-13).

In addition, the court's reference to the failure of proof did not refer to a failure to prove Bohach's knowledge about Charley Grant. In seeking to clarify the issues during postconviction counsel's argument, the court stated, "Charley Grant, that's up in the air as to whether he knew about it or not. I don't think there's any proof he knew about it, and that's the burden that's placed on the defendant" (154:9, R-Ap. 360). When viewed in the context of the court's ensuing remarks about Deyon Lee and Jason Hohnstein, the "it" in the court's comment refers not to Bohach's knowledge about Charley Grant, but to Grant's knowledge about the homicide.[10]

Elsewhere in the record, though, Jordan accurately noted that Bohach knew about Charley Grant. In an unsworn statement (100)[11] submitted

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[10] The circuit court had good reason to doubt Grant's knowledge. At the hearing, Grant testified emphatically that the homicide occurred during "daytime" (150:6). All the evidence at trial (as well as Grant's unsworn statements) put the shooting as occurring around 10:30 p.m. (*e.g.*, 71:39; 72:68).

[11] Jordan appears to believe that declaring a written statement as made "pursuant to 28 U.S.C. 1746" (100:1; *see also* 84:24) enhances the significance of the statement to the equivalent of an affidavit. Section 1746 applies in federal courts, not in State courts (unless authorized by a

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in support of a motion to call witnesses at the postconviction-motion hearing (99), Jordan admits that "Charley Grant['s] name didn't come up until 3/20/03,[12] and Mr. Bohach stressed to the courts the importance of contacting Charley Grant and Regina Young.[ ]See;ex#3/30/03, Page#8" (100:1, ¶ 5 (footnote added); *see* 65:8 (transcript of Bohach's comments)). Jordan's unsworn statement omits, however, the context in which Grant's name arose: Grant's efforts to intimidate and bribe Kolett Walker into not testifying against Jordan (65:5-8 (transcript of Bohach's comments)). As the pretrial-hearing transcript makes clear, Bohach

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State's law), and does not add any weight to a statement in Wisconsin courts. *Cf.* ***Commonwealth v. Tedford***, 960 A.2d 1, 18 n.10 (Pa. 2008) (noting "significant distinction between an affidavit and an unsworn declaration"); ***Commonwealth v. Brown***, 872 A.2d 1139, 1169 (Pa. 2005) (Castille, J., concurring) ("What makes an affidavit distinct from any other out of court statement, rumor, innuendo or falsehood is the oath and the certification. These elements are not mere formalities. . . . Absent such assurances, out of court witness 'declarations' have little to distinguish them from other hearsay or irrelevant chatter. If the witness's statement is indeed an account that the witness will be willing to stand behind under oath in a court of law[,] . . . it is a simple matter to remove the statement from the realm of rumor by having it sworn-to and certified before an appropriate officer. The fact that a witness would refuse or decline to so certify his account and subject the witness to sanctions may say volumes about its reliability."). Wisconsin does not have a statute authorizing the use of unsworn declarations of the sort preferred by Jordan.

[12] Jordan's trial began eleven days later, on March 31, with a *Miranda/Goodchild* hearing (67).

needed to contact Charley Grant in order to prepare to deal at trial with the reported attempts by Grant to intimidate[13] and bribe Walker (100:5), not because Bohach believed (or had reason to believe) Grant had any personal knowledge about the homicide.

4. "Analyzing circuit court ruling on Deyon Lee" (Jordan's Brief at 7)

Jordan's complaint about the circuit court's ruling on Deyon Lee, *see* Jordan's Brief at 7-8, does not concern the circuit court's ruling on newly discovered evidence (154:20, R-Ap. 371). At the references Jordan cites in his brief, the court addressed the ineffective-assistance claim relating to Bohach's alleged failure to locate and interview Lee and to call Lee as a witness at trial (154:15-18, R-Ap. 366-69). Because Jordan has miscategorized the circuit court's ruling as relating to the standards for assessing newly discovered evidence, the State will not address the court's ruling at this point. Instead, as necessary, the State will address the ruling later in this brief when responding to Jordan's ineffective-assistance claims against Bohach.

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[13] Walker told police that "she did not trust Charlie, and was afraid that he was going to harm her" (100:5).

5. "Analyzing circuit court ruling regarding trial counsels failure to present a complete defense of Jordan's defense" (Jordan's Brief at 8)

As with Jordan's complaint about the circuit court's ruling on Deyon Lee, Jordan's complaint about Bohach's alleged failure to present a complete defense, *see* Jordan's Brief at 8-9, does not concern the circuit court's ruling on newly discovered evidence (154:20, R-Ap. 371). Again, because Jordan has miscategorized the circuit court's ruling (154:21-22, R-Ap. 372-73) as relating to the standards for assessing newly discovered evidence, the State will not address the court's ruling at this point. Instead, as necessary, the State will address the ruling later in this brief when responding to Jordan's ineffective-assistance claims against Bohach.

B. The Circuit Court Correctly Held That Jordan's Newly Discovered Evidence Did Not Merit A New Trial.

In denying Jordan's postconviction motion, the circuit court rested its newly-discovered-evidence ruling on the ground that "there is no reasonable probability that exists that a different result would be reached in trial" (154:20, R-Ap. 371). The record at the postconviction-motion hearing amply supports that conclusion.[14]

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[14] ***State v. Martwick,*** 2000 WI 5, ¶ 31, 231 Wis. 2d 801, 604 N.W.2d 552 ("if a circuit court fails to make a finding that exists in the record, an appellate court can assume

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Jordan identified five items of supposedly newly discovered evidence. Jordan's Brief at 4. Whether viewed individually or collectively, the evidence would not have changed anything about the jury's verdict.

- Jason Hohnstein's evidence. In a stunning disconnect from reality, Jordan relies on Jason Hohnstein's testimony as consistent with his contention that he did not shoot David Robinson and "that minutes before the shooting[,] . . . Jordan was not in the car which was involved in the shooting." Jordan's Brief at 4. First, although Jordan presented Hohnstein's unsworn statement as support for his postconviction motion (84:31-32; 158:Ex. 10, R-Ap. 315-17), Jordan's postconviction lawyer did not call Hohnstein as a witness. Rather, the prosecutor called Hohnstein (150:32). In his testimony (150:32-45), Hohnstein said he had known Jordan "[a]ll his life" (150:33). Hohnstein testified about his so-called affidavit (150:33-37) — actually an unnotarized statement (158:Exh. 10, R-Ap. 315-17). He declared unequivocally that "I don't know who gave [the document] to me" (150:36), that "I was drunk when I signed it. . . . I was intoxicated when I signed this thing" (150:36), and that "I did not write this myself. I don't know how I got it, I was messed

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that the circuit court determined the fact in a manner that supports the circuit court's ultimate decision".

up and I signed it and that's it" (150:37). He said he had signed the statement because "I was just trying to help someone out, I known him all his life, you know" (150:36). He asserted that "I don't know nothing about this case" (150:37) and confirmed his handwritten declaration on the statement that "it's all bullshit" (150:37; *see also* 158:Ex. 10, R-Ap. 317 (handwritten declaration)). During cross-examination by Jordan's postconviction lawyer (150:44-45), Hohnstein again declared his absence from the scene of the shooting and his lack of any knowledge about the crime (150:45). *Cf.* 152:51-56 (testimony of Milwaukee Police Detective James Hutchinson about interview of Hohnstein); 158:Ex 16, R-Ap. 325-27 (Milwaukee Police Department report of Hohnstein interview).

If anything, Hohnstein's evidence at a new trial would enhance the State's case by providing an opportunity to show Jordan's willingness to proffer fabricated evidence, which would serve as (if nothing else) evidence of Jordan's consciousness of guilt. Hohnstein's evidence does not establish any probability — much less a reasonable probability — of a different result at a new trial.

- Deyon Lee's evidence. Jordan links Lee's evidence to Hohnstein's as "consistent with" Jordan's assertion that Jordan was not in the car which was involved in the shooting. Jordan's Brief at 4. Like Hohnstein's evidence, Lee's evidence does not establish any probability — much less a reasonable probability — of a different result at a new trial.

In his unsworn statement (158:Ex. 12, R-Ap. 318-19),[15] Lee asserted "personal knowledge of the incident" resulting in the homicide (158:Ex. 12, p.1, R-Ap. 318). He derived his knowledge "from meeting Michael Blake Jones right after the incident" (158:Ex. 12, p.1, R-Ap. 318).[16] Lee averred that he saw Jones, "Prescott Smith in the passenger seat, along with two other males in the backseat" (158:Ex. 12, p.1, R-Ap. 318) and that "[a]t this tim[e] there was no Tashanda Washington in the car or Mr. [Jordan]" (158:Ex. 12, p.1, R-Ap. 318). Lee asserted that "I told Mr. Jordan's mother to tell his lawyer to contact me[ ]because I had information that Mr. Jordan was innocent of these charges, and I told her this at the beginning of 2003 before Mr. Jordan's trial" (158:Ex. 12, p.1, R-Ap. 318).

At the motion hearing, Lee identified one of the other males in the automobile that night as "Q" or "Q Ball," also known as Quincy Grant (151:7, 14-15), who Lee said held a gun Jones wanted Lee to hold (151:8, 15). Lee said the meeting with Jones occurred at 9:30 p.m. (151:15). Lee acknowledged that he had the purportedly exonerating information around July 2002 but didn't sign the unsworn statement until May 13,

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[15] Like Jordan, Lee invoked 28 U.S.C. § 1746 (158:Ex. 12, p.1, R-Ap. 318). *See supra* note 11.

[16] The timeline in the statement, however, would put the meeting at roughly a half-hour or more before the shooting (158:Ex. 12, p.1, R-Ap. 318).

2008 (151:15). Lee testified that he had identified "Q or Q Ball" in a photo shown him by police (151:21; *see also* 158:Ex. 11).

Milwaukee Police Detective Jeremiah Jacks later testified that Lee "positively identified the subject of the photograph as person who he knows as Cue or Cue Ball. He also stated that this was the guy that he observed on the back seat of the car . . . [w]ith a gun when he saw him with Michael Jones" (153:8). Detective Jacks said that the photo actually depicted Lonnie Davis, a person continuously in prison since 1997 (153:9-10; *see also* 147:14 (Davis testifying to his incarceration at Green Bay Correctional Institution since late 1997); 158:Ex. 17, R-Ap. 329 (report of photo array at Deyon Lee interview)).

- Lonnie Davis's evidence. In his affidavit dated January 15, 2008 (158:Ex. 2, R-Ap. 309-10),[17] Davis reported that on January 19, 2007, Quincy Grant confessed to him that he (Quincy) committed the homicide for which a jury convicted Jordan. Lee declared that "sometime in March '07" (158:Ex. 2, p.2, R-Ap. 310), he wrote to Jordan about the situation.[18]

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[17] Although Davis had his statement notarized (158:Ex. 2, R-Ap. 310), he also invoked 28 U.S.C. § 1746 (158:Ex. 2, R-Ap. 309). *See supra* note 11.

[18] Thus, in executing his affidavit, Davis waited a year after supposedly receiving the information from Quincy and waited nine months after supposedly contacting Jordan. Then, after Davis executed the affidavit and provided it to

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Davis testified at the motion hearing (147:14-42). He essentially repeated his account of Quincy's purported confession. He admitted telling Milwaukee police detectives that the threat of perjury did not mean anything to him (147:38; *see also* 158:Ex. 15, p.2, R-Ap. 324 (report of Lonnie Davis interview)), but asserted that "I was jokin'" (147:38).

Davis's evidence consists not of personal knowledge about the homicide, but of hearsay (*i.e.*, what Quincy told Davis) inadmissible at trial. Moreover, as the prosecutor noted in the State's post-hearing brief, Davis's story did not make any sense (121:13, R-Ap. 225) and suffered from other significant deficiencies (121:14, R-Ap. 226). In short, Davis's evidence does not establish any probability — much less a reasonable probability — of a different result at a new trial.

- Charley Grant's evidence. In a similar vein, Jordan's reliance on evidence from Charley Grant at a new trial would have the same effect on verdict as Hohnstein's: at best (for Jordan), no impact; at worst, reinforcement of the State's case and evidence of Jordan's consciousness of guilt. At the postconviction-motion hearing, Grant agreed when the prosecutor characterized Grant's supposedly notarized affidavit as "a forgery" (150:20):

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Jordan, Jordan waited another year to file his postconviction motion (84:1, R-Ap. 148) — hardly an example of diligence or urgency.

Grant had not signed the document or sworn to it (150:19).

At the hearing, Grant claimed that sometime between April and June 2003, Quincy Grant (no relation to Charley (150:5)) told Charley that he (Quincy) committed the homicide, not Jordan (150:13). But in an unnotarized statement dated in August 2003 (158:Ex. 8, R-Ap. 311-12) and intended to exonerate Jordan, Grant inexplicably omitted any reference to Quincy (150:17). Rather, Grant claimed "I do know the individual Joseph Jordan was not the shooter" and "I get my facts from witnessing Michael B. Jones leave the gas station with three other males" shortly before the shooting (158:Ex. 8, p.1, R-Ap. 311). At the hearing, however, Grant shifted position and claimed that "what Quincy told me" (150:13) led him to believe Jordan had not fired the shots. Grant also asserted that Jones's car had three people, not four, in it, and not all male: "Michael Jones, a female, and a dude" (150:21).

Beyond the impact of Charley Grant's contradictory testimony, calling Grant as a witness at a new trial would open the door to evidence about his efforts to intimidate and bribe Kolett Walker not to testify against Jordan. Essentially, Grant's evidence at a new trial would enhance the State's case by providing an opportunity to link Jordan to Grant's intimidation and bribery efforts, thus serving as (if nothing else) evidence of Jordan's consciousness of guilt. Grant's evidence does not establish any probability — much less a reasonable

probability — of a different result at a new trial.

- Quincy Grant's evidence. In an affidavit (158:Ex. 1, R-Ap. 305-08), Quincy Grant claimed responsibility for the Robinson homicide and stated "I am willing to testify in any proceeding on behalf of Joseph Jordan any of those hearings subjecting myself to the penalties of perjury" (158:Ex. 1, p.4, R-Ap. 308).

  Grant testified — sort of — at the hearing (147:5-13). He repeatedly invoked his Fifth Amendment privilege (147:6-12), refusing to confirm that he had signed the affidavit he purportedly executed (147:11-12; *see also* 158:Ex. 1, R-Ap. 305-08), refusing to confirm that he asserted in the affidavit that he committed the crime for which a jury convicted Jordan (147:12), refusing to confirm that he "[shot] and kill[ed] somebody at the corner of Humboldt and Keefe Street in June of 2002" (147:8), refusing to confirm his presence in the automobile from which he supposedly fired the fatal shots (147:8-9, 10) — in short, refusing to answer any question that either inculpated him or exonerated (or even cast any doubt on the guilt of) Jordan.

  Grant's performance at the hearing precludes any finding that a jury would hear this evidence at a new trial. Even a promise to testify would lack credibility in light of Grant's repudiation of his promise "to testify in any proceeding on behalf of Joseph Jordan" (158:Ex. 1, R-Ap. 308). Indeed, Grant's attorney (105, R-Ap. 181) subsequently confirmed that Grant would not testify at a new

> trial and "that to any question that he would be asked in regard to this matter, he would assert his Fifth Amendment right" (149:5).
>
> Grant's evidence does not establish any probability — much less a reasonable probability — of a different result at a new trial: invocations of the Fifth Amendment privilege do not — cannot — produce evidence that satisfies the "reasonable probability of a different result" criterion. If anything, the lack of Grant's evidence ensures an identical rather than different outcome.

Whether viewed individually or collectively, the evidence offered by Jordan fails to qualify as newly discovered evidence meriting a new trial: if nothing else, the evidence does not establish a reasonable probability of a different result at a new trial. The witnesses' evidence contained numerous irreconcilable inconsistencies, both internally (within a specific witness's written and oral evidence) and externally (across the witnesses' accounts). The interlocking friendships and opportunities for collaboration and fabrication (all reflected throughout the witnesses' affidavits and, especially, the witnesses' testimony)[19] demolish any likelihood of this evidence yielding a different result in a new trial. Jordan's own participation in a "newly discovered evidence" scam on behalf of a

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[19] In this case, Hohnstein's fabricated unsworn statement provides the most blatant example of cooperative affidavit fraud among inmates within the Wisconsin prison system.

fellow inmate (158:Ex. 13)[20] underscores the fundamental dishonesty and fraudulence of Jordan's effort here and the fact that Jordan knew the ropes for executing his scheme. Presenting the new evidence at a new trial would expose those fatal deficiencies (and perhaps more), not only ensuring no reasonable probability of a result different from that at the original trial but ensuring a reasonable probability of an even quicker conviction the second time around (75:270 (jurors exit at 5:00 p.m. to begin deliberations); (76:2 (jurors return with verdicts at 10:24 a.m. the next day)).

C. The Circuit Court Did Not Adopt The State's Brief Wholesale.

Jordan's claim that the circuit court adopted the State's brief wholesale lacks any merit. *See* Jordan's Brief at 4-5. In its oral ruling (154:14-23, R-Ap. 365-74), the circuit court did not adopt the State's brief either explicitly or implicitly. Likewise, neither the circuit court's written order denying Jordan's postconviction motion (126, R-Ap. 101-02) nor the circuit court's order denying Jordan's motion for reconsideration (138, R-Ap. 103) adopted the State's brief either explicitly or implicitly. *Compare* circuit court's rulings and orders *with* State's brief (121; *see also* 121:1-57, 71-79, R-Ap. 213-78 (State's brief and selected exhib-

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[20] *See* 158:Ex. 13 (excerpt from transcript in *State v. James Lipscomb*, No. 2002CF635 (Milwaukee County Cr. Ct.)). In *State v. Lipscomb*, Appeal No. 2009AP2657, this court affirmed the denial of the postconviction motion that Jordan testified in support of.

its)). By denying Jordan's motions, the circuit court certainly rejected Jordan's claims. But denying Jordan's claims does not translate into a wholesale adoption of the State's brief. The record does not provide any support for Jordan's contention.

D. Even If The Circuit Court Had Adopted The State's Brief *In Toto*, The Court Would Have Properly Exercised Discretion.

The circuit court would not have erred even if it had adopted the State's brief wholesale. Although this court prefers that a circuit court provide its own reasons for a decision, a circuit court's adoption of a party's brief as the court's decision does not necessarily amount to error. This court's decision in ***Trieschmann***, 178 Wis. 2d 538, found error because the circuit court adopted a brief that itself did not provide reasoning suitable for a judicial decision. ***Id.*** at 542-44. This court, however, rejected a blanket prohibition on adopting a party's brief:

> [W]e do not hold that a trial court may never accept the rationale and conclusions contained in one party's brief to the court. If the court chooses to do so, however, it must indicate the factors which it relied on in making its decision and state those on the record.

Id. at 544. In a citable unpublished opinion, this court, distinguishing ***Trieschmann***, found a proper exercise of discretion when the circuit court adopted the State's brief *in toto*. ***Crenshaw***, 337 Wis. 2d 428 (slip op. ¶¶ 45-47), R-Ap. 392-93.

Here, the State provided a brief containing an extensive recitation of the issues raised by Jordan's postconviction motion, a summary of the applicable law, a detailed statement review of facts, and a thorough analysis of the law and facts (121; *see also* 121:1-57, 71-79, R-Ap. 213-78 (State's brief and selected exhibits)). If (as Jordan contends) the circuit court had adopted the State's brief, the court would not have erroneously exercised discretion.

II. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION WHEN THE COURT REFUSED TO ALLOW JORDAN TO REPRESENT HIMSELF DURING THE SECTION 974.06 PROCEEDINGS.

Jordan contends that the circuit court erroneously denied him "a meaningful oppo[r]tunity to be heard when it refused to allow him to represent himself through the 974.04 proceedings."[21] Jor-

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[21] The Wisconsin Constitution confers a right of self-representation in civil cases: "In any court of this state, any suitor may prosecute or defend his suit either in his own proper person or by an attorney of the suitor's choice." WIS. CONST. art. I, § 21(2). *See* ***S.Y. v. Eau Claire County***, 162 Wis. 2d 320, 330, 469 N.W.2d 836 (1991). Although "[a] motion for . . . relief [under section 974.06] is a part of the original criminal action, is not a separate proceeding and may be made at any time," Wis. Stat. § 974.06(2), "[p]roceedings under this section shall be considered civil in nature, and the burden of proof shall be upon the person," Wis. Stat. § 974.06(6).

A separate section confers a right of self-representation in criminal cases. WIS. CONST. art. I, § 7. "While a defendant has a constitutional right to be represented at trial, he has no constitutional right to concurrent self-representation

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dan's Brief at 10 (capitalization and font weight modified). *See generally id.* at 10-13.

In two separate hearings (148:3-14; 149:6-10), the circuit court rejected Jordan's requests to proceed *pro se*. By the time of the first hearing on October 30, 2009, Jordan had requested appointment of counsel (85; 88; 89) and obtained a volunteer *pro bono* lawyer from Quarles & Brady (93; 104:1, R-Ap. 179). At that hearing, postconviction counsel advised the court that "Joseph Jordan would like to proceed in this hearing pro se" and that Jordan wanted her to consider serving as standby counsel (148:3). The court engaged in a colloquy with Jordan (148:10-14), finding that Jordan had an eighth-grade education (148:14). The court also learned that Jordan had not represented himself in a criminal case except for his direct appeal from his conviction (148:5-6) but had requested appointment of attorneys in State and federal court

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and representation by counsel." ***State v. Wanta***, 224 Wis. 2d 679, 699, 592 N.W.2d 645 (Ct. App. 1999).

Under the United States Constitution, a person does not have a right to self-representation in a direct appeal from a criminal conviction, ***Martinez v. Court of Appeal of California***, 528 U.S. 152, 163 (2000) ("neither the holding nor the reasoning in *Faretta* requires [a State] to recognize a constitutional right to self-representation on direct appeal from a criminal conviction"), or to self-representation in civil cases, ***Andrews v. Bechtel Power Corp.***, 780 F.2d 124, 137 (1st Cir. 1985) ("there is no [federal] constitutional right to self-representation in civil cases" (citing *O'Reilly v. New York Times*, 692 F.2d 863, 867 (2d Cir. 1982)). In addition, "[t]here is little doubt that there is no constitutional right to appointed counsel in a civil case." ***Caruth v. Pinkney***, 683 F.2d 1044, 1048 (7th Cir. 1982).

afterwards (148:6, 8, 9). The court denied Jordan's request:

> THE COURT: The Court is going to make a finding that the defendant is not competent to represent himself in this matter. He's had an opportunity to do so in the past and once he did that he sought advice and representation by counsel in the continuation of the appeal of this matter.
>
> The Court believes that the defendant has a limited education. That doesn't necessarily mean that he is not a bright person but that he has limited education and that it would not be in his best interests to proceed pro se under all of the circumstances and their request to proceed pro se is denied. All right. Let's continue on.

(148:14.)

After the postconviction-motion hearings began, counsel sought to withdraw (101, R-Ap. 174-75; 102, R-Ap. 176-77). The motion cited Jordan's lack of good-faith cooperation with counsel (101:2, R-Ap. 175; 102:2, R-Ap. 177). About the same time, Jordan filed a motion to proceed *pro se* (98, R-Ap. 169-73), which included a request for appointment of counsel if the court denied his request to proceed *pro se* (98:5, R-Ap. 173). The circuit court granted counsel's motion to withdraw (149:10) and denied the motion to proceed *pro se* (149:10). After the State Public Defender declined to appoint counsel (104), the circuit court appointed attorney Richard Hart to represent Jordan (107).

In December 2010, Jordan moved the circuit court "to appoint new counsel or let petitioner proceed pro se" (112:1). The circuit court denied Jor-

dan's motion to proceed *pro se* and declined to discharge Hart (116; *see also* 119). Hart continued to represent Jordan until the circuit court denied the postconviction motion and discharged Hart from further representation of Jordan (126:2).

In the State's view, the circuit court did not erroneously exercise discretion when denying Jordan's motions to proceed *pro se*. "[A] defendant does not have a constitutional right to appointed counsel in a Wis. Stat. § 974.06 postconviction proceeding." ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 650, 579 N.W.2d 698 (1998). Under the Wisconsin constitution, however, Jordan had a right in his civil-in-nature section 974.06 proceeding either to represent himself or to representation by paid counsel of his choice.[22] Wis. Const. art. I, § 21(2).

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[22] "The 'right to counsel of choice does not extend to defendants who require counsel to be appointed for them.'" ***United States v. Bender***, 539 F.3d 449, 454 (7th Cir. 2008). Thus, a party's right to counsel of choice means, essentially, a right to retain private counsel out of the party's private resources and up to the limit of those resources, free of government interference. *See* ***United States v. Gonzalez-Lopez***, 548 U.S. 140, 143-44 (2006); ***United States v. Sellers***, 645 F.3d 830, 834 (7th Cir. 2011); ***United States v. Burton***, 584 F.2d 485, 488-89 (D.C. Cir. 1978); ***United States v. Inman***, 483 F.2d 738, 739-40 (4th Cir. 1973). *See also* ***State v. Jones***, 2010 WI 72, ¶¶ 38-40, 326 Wis. 2d 380, 797 N.W.2d 378; ***State v. Boyd***, 2011 WI App 25, ¶ 8, 331 Wis. 2d 697, 797 N.W.2d 546 ("Although, with exceptions not material here, persons have the right to retain counsel of choice, indigent defendants in criminal cases may not select the lawyers who represent them." (citing *Jones*)).

Although a presumption of nonwaiver of counsel arises in criminal proceedings, *see, e.g.,* ***State v. Imani***, 2010 WI 66, ¶ 22, 326 Wis. 2d 179, 786 N.W.2d 40 ("'So important is the right to attorney representation in a criminal proceeding that nonwaiver is presumed.'" (quoted source omitted)), the State has not located any Wisconsin cases deciding whether a similar presumption arises when a person seeks to proceed *pro se* in a civil case — *i.e.*, whether, when a person does not have a right to appointed counsel but does have a right to either self-representation or to representation by retained counsel, and when the person cannot afford to retain counsel, a presumption against waiver of self-representation arises and, if so, by what standards a court can override that presumption.

The circuit court had two valid justifications for denying the request for self-representation: Jordan's limited education, and Jordan's oscillations between requesting a lawyer and requesting to represent himself. The oscillations themselves (including the request for standby counsel) reflected ambivalence about Jordan's ability to represent himself. Ambivalence does not warrant allowing an indigent, limited-education defendant to engage in self-representation. Consequently, the circuit court did not erroneously exercise its discretion when the court denied Jordan's request.

If this court disagrees with the State's view, however, this court should remand the case for a new colloquy. In a remand order, this court should specify which presumption applies and the legal standards and factual criteria for overcoming the presumption. The order should direct the circuit court to make specific findings of fact following the

colloquy. If the circuit court concludes that it should grant the request for self-representation, the court should vacate its previous order and hold a new postconviction-motion hearing; otherwise, the court should affirm its previous order denying Jordan's postconviction motion, at which time Jordan can decide whether to pursue a new appeal.

III. BECAUSE JORDAN PURSUED A DIRECT APPEAL IN WHICH HE CLAIMED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, AND BECAUSE JORDAN HAS NOT OFFERED ANY REASON FOR FAILING TO RAISE IN THAT APPEAL HIS CURRENT CLAIMS OF TRIAL COUNSEL'S INEFFECTIVENESS, SECTION 974.06 AND *ESCALONA-NARANJO* BARRED HIS CURRENT CLAIMS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

Jordan asserts that trial counsel provided ineffective assistance in several ways. Jordan's Brief at 13-22.

For two reasons, this court should affirm the circuit court's rejection of this claim. First, Jordan cannot overcome the bar imposed by section 974.06 and ***Escalona-Naranjo***, 185 Wis. 2d 168. Although the circuit court did not rely on this reason, this court can affirm for this or any other reason. "It is well-established that if a trial court reaches the proper result for the wrong reason, it will be affirmed. . . . An appellate court may sustain a lower court's holding on a theory or on reasoning not presented to the lower court." ***State v. Holt***, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985), *superseded on other grounds by* Wis. Stat. § 940.225(7), *as recognized in State v.*

Grunke, 2007 WI App 198, 305 Wis. 2d 312, 738 N.W.2d 137. *See also* ***State v. Robert K.***, 2005 WI 152, ¶ 4 n.6, 286 Wis. 2d 143, 706 N.W.2d 257; ***State v. Horn***, 139 Wis. 2d 473, 490, 407 N.W.2d 854 (1987); ***State v. Trecroci***, 2001 WI App 126, ¶ 45, 246 Wis. 2d 261, 630 N.W.2d 555; ***State v. Benton***, 2001 WI App 81, ¶ 11 n.2, 243 Wis. 2d 54, 625 N.W.2d 923; ***State v. Fosnow***, 2001 WI App 2, ¶ 11, 240 Wis. 2d 699, 624 N.W.2d 883.

Jordan has already pursued a direct appeal of his conviction.[23] Moreover, Jordan represented himself (at his request (45; 46; 47; 48; 49)) both in the postconviction motion (50) and in the appellate courts (79:1, R-Ap. 132; 80, R-Ap. 147).

> [B]ecause the purpose of § 974.06 is to consolidate all claims of error into one motion or appeal, claims that could have been raised in the defendant's direct appeal or in a previous § 974.06 motion are barred from being raised in a subsequent § 974.06 motion absent a showing of a sufficient reason why the claims were not raised on direct appeal or in a previous § 974.06 motion.

Balliette, 336 Wis. 2d 358, ¶ 36.

In his postconviction motion (84, R-Ap. 148-64 (minus exhibits)), Jordan rested his ineffective-assistance claim on one ground: Bohach's failure "to investigate and/or subpoena the testimony of Mr. Jason Hohnstein and Mr. Deyon Lee" (84:13,

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[23] *State v. Joseph J. Jordan*, Appeal No. 2004AP2616-CR.

R-Ap. 160 (capitalization modified)). In the motion, Jordan declared:

> Mr. Jordan, long before trial gave his attorney Mr. Bohach a listing of names of witnesses mentioned in his discovery material that could potentially provide evidence of his innocence of this crime. Two critical witnesses that was on that list was Deyon Lee and Jason Hohnstein . . . . Bohach's failure to investigate these witnesses after he assured his client that he would falls short of the constitutional standard of effectiveness and diligence on an attorney's part.

(84:14, R-Ap. 161; *see also* 84:3, R-Ap. 150.) In a supplement, Jordan added Charley Grant as a critical witness (90:1, R-Ap. 165). In his appellate brief, Jordan has dropped Hohnstein from the claim, focusing now on only Lee and Grant. Jordan's Brief at 16-19. Jordan has also added an ineffective-assistance claim of "failure to present a complete defense by failing to submit evidence that Jordan is right handed." *Id.* at 19 (font weight modified); *see generally id.* at 19-22.

Regardless of whether the scope of the ineffective-assistance-of-trial-counsel claim derives from the postconviction motion or from the appellate brief, this court should affirm the circuit court's denial of the claim on the ground that Jordan has not provided any reason — much less a "sufficient reason" — for failing to assert the claim on direct appeal. As the supreme court declared in ***Balliette***,

> claims that could have been raised in the defendant's direct appeal or in a previous § 974.06 motion are *barred from being raised in a subsequent § 974.06 motion* absent a showing of a sufficient rea-

> son why the claims were not raised on direct appeal or in a previous § 974.06 motion.

Balliette, 336 Wis. 2d 358, ¶ 36 (emphasis added). Unless a defendant presents a sufficient reason, a circuit court cannot consider the claim.

Here, Jordan did not, could not, and cannot now present a sufficient reason. He represented himself (at his own request) in his direct appeal, beginning with the postconviction motion and continuing through the petition for review. Consequently, he cannot blame a postconviction lawyer for failing to raise his ineffective-assistance-of-trial-counsel claim during his direct appeal.

Moreover, Jordan asserted an ineffective-assistance claim against Bohach in the direct appeal, though on the ground that Bohach failed to object to part of the prosecutor's closing argument (50:18-20; 79:2, 13-15, R-Ap. 133, 144-46 (court of appeals decision)). By the time Jordan filed the postconviction motion preceding his direct appeal, however, he knew the basis for the ineffective-assistance claims raised against Bohach in the section 974.06 motion. In the section 974.06 motion, Jordan wrote that he "gave his attorney Russell Bohach a listing of names of critical witnesses mentioned in his discovery material that would provide evidence of his innocence of this crime in support of his defense" (84:3, R-Ap. 150 (identifying Lee and Hohnstein)). Jordan also knew about Charley Grant as a potential witness (100:1, ¶ 5; *see* 65:8 (transcript)). By the time he filed his direct-appeal postconviction motion, Jordan knew that Bohach had not called any of those witnesses at trial. Jordan also had all the information necessary to assert a claim that Bohach failed to pre-

sent evidence about Jordan's right-handedness. Nonetheless, Jordan did not present any of those claims.

In summary, because the circuit court could not properly consider and decide the ineffective-assistance claims Jordan asserted against Bohach in the section 974.06 motion underlying this appeal, this court should reject Jordan's ineffective-assistance-of-trial-counsel claim.

Second, even if the circuit court could consider and decide the claims against Bohach, this court should affirm the circuit court's decision. Earlier in this brief, the State discussed the defects in and import of the evidence Deyon Lee and Charley Grant would supposedly provide at a new trial (pp. 23-23, 26-28, above (Lee); pp. 20-23, 29-31, above (Grant)). The State will not repeat the discussion here. For the reasons set out previously, and for those set out in the State's brief in the circuit court (121:14-15, 16-18, R-Ap. 226-27, 228-30), Lee's and Grant's evidence did not create a reasonable probability of a different result at a new trial. Consequently, even if Bohach performed deficiently by not investigating and calling those potential witnesses, the deficiency did not cause Jordan any prejudice: the jury would still have convicted him.

The record also shows that Bohach neither performed deficiently nor caused Jordan any prejudice by failing to present any direct evidence of Jordan's right-handedness. The State's principal witness — a passenger in the car at the time of the shooting — put the gun in Jordan's right hand at the time of the shooting (73:26-28); Bohach's in-

troduction of additional evidence of Jordan's right-handedness would have enhanced the witness's credibility. In addition, the evidence of Jordan's right-handedness underlay Bohach's closing argument attacking the idea that a right-handed shooter could have committed the crime (75:45-47; *see also* 121:37-38, R-Ap. 249-50 (State's summary of Bohach's closing argument about right-handed shooting)). Moreover, the State had the confession by Jordan that he fired the shots from the passenger's seat by leaning across the driver and shooting with the gun in his right hand (74:31-32; 121:76, R-Ap. 275).[24] In light of the State's evidence pointing to Jordan's right-handedness, Bohach's failure to ask Jordan a direct question did not matter. Jordan's answer would have confirmed the State's evidence and would not have added anything of significance to Bohach's closing argument.

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[24] Following the evidentiary portion of a ***Miranda/Goodchild*** hearing (67:6-34; 68:3-85; 70:76-99), *see* ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965), the circuit court denied Jordan's motion to suppress the confession (70:104-05).

IV. BECAUSE THE NEWLY DISCOVERED EVIDENCE DID NOT CREATE A REASONABLE PROBABILITY THAT A NEW TRIAL WOULD YIELD DIFFERENT RESULT, THE CIRCUIT COURT CORRECTLY HELD THAT THE EVIDENCE DID NOT ENTITLE JORDAN TO NEW TRIAL.

Jordan contends that his newly discovered evidence merits a new trial. Jordan's Brief at 22-29. Under the standards for deciding whether newly discovered evidence merits a new trial (pp. 8-11, above), this court should reject his contention and affirm the circuit court's ruling.

The State has already addressed Jordan's claim of newly discovered evidence (pp. 24-33, above). The State relies on its previous discussion and will not repeat those arguments here. As that discussion shows, Jordan's newly discovered evidence does not create a reasonable probability of yielding a different result at a new trial, if only because of the fraudulence of some of the evidence, because other evidence amounted to hearsay inadmissible at a new trial, and because Quincy Grant confirmed, through his lawyer (105, R-Ap. 181), "that to any question that he would be asked in regard to this matter, he would assert his Fifth Amendment right" (149:5), making Grant's evidence unavailable at a new trial. Ultimately, the newly discovered evidence failed, by a wide margin, to satisfy the criterion of a reasonable probability of a different result.

V. BECAUSE JORDAN DID NOT HAVE A STATE OR FEDERAL RIGHT TO THE EFFECTIVE ASSISTANCE OF POSTCONVICTION COUNSEL IN A PROCEEDING UNDER WIS. STAT. § 974.06, THIS COURT SHOULD DENY THIS CLAIM.

Jordan contends that he received ineffective assistance from counsel appointed to represent him in pursuing a postconviction motion under Wis. Stat. § 974.06 in the Milwaukee County Circuit Court. *See* Jordan's Brief at 29-37. In his motion for reconsideration (131, R-Ap. 281-91), Jordan made an array of allegations against his postconviction lawyer, Richard Hart.

This court should reject Jordan's claim.

Jordan did not have any federal or State constitutional right to the effective assistance of counsel in a postconviction proceeding under Wis. Stat. § 974.06. The federal right to the effective assistance of counsel derives from the federal constitutional right to counsel; if a defendant does not have a federal constitutional right to counsel, the defendant likewise does not have a federal constitutional right to the effective assistance of counsel. ***Coleman v. Thompson***, 501 U.S. 722, 752 (1991). *See also* ***Wainwright* v. *Torna,*** 455 U.S. 586, 587-88 (1982) (*per curiam*). The Supreme Court has held that a defendant does not have a federal constitutional right to counsel in a postconviction collateral challenge to a criminal conviction:

> We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, and we decline to so hold today. Our cases establish that the right to ap-

> pointed counsel extends to the first appeal of right, and no further. Thus, we have rejected suggestions that we establish a right to counsel on discretionary appeals. We think that since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori*, he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process.

Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (citations omitted). So, in his postconviction collateral challenge under section 974.06, Jordan did not have a federal constitutional right to the assistance of counsel or to the effective assistance of counsel.

Likewise, in Wisconsin, a defendant does not have a State constitutional right to counsel for discretionary postconviction proceedings under section 974.06. ***State ex rel. Warren***, 219 Wis. 2d 615 (citing *Finley*, 481 U.S. at 555). Consequently, under the Wisconsin constitution, Jordan cannot maintain a claim of ineffective assistance of postconviction counsel. *Cf.* ***Coleman***, 501 U.S. at 752 (no constitutional right to the effective assistance of counsel where there does not exist constitutional right to the assistance of counsel).

Thus, as a matter of law, Jordan's constitutional claim of ineffective assistance of postconviction counsel cannot succeed because Jordan did not have a federal or State constitutional right to the assistance of counsel in his section 974.06 proceeding. His remedy lies in a civil claim of legal malpractice, not in a motion for postconviction relief based on a claim of ineffective assistance of postconviction counsel.

Assuming, however, that Jordan's allegations in a motion for reconsideration can qualify as a proper motion under section 974.06 for purposes of asserting ineffective assistance of postconviction counsel, *see* ***State ex rel. Rothering***, 205 Wis. 2d at 681 (*per curiam*) ("[A] claim of ineffective assistance of postconviction counsel should be raised in the trial court either by a petition for habeas corpus or a motion under § 974.06, Stats."),[25] the State does not regard the motion as satisfying the pleading criteria of ***State v. Allen***, 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433, and ***Balliette***, 336 Wis. 2d 358.

In his reconsideration motion, Jordan asserted that Hart "did not argue any of the defendants issues preserved in his motion filed under Wis. Stat. § 974.06. He ***merely*** made an argument regarding ineffective assistance of counsel" (131:3, R-Ap. 283 (emphasis in original)). Jordan then offered a mélange of complaints of Hart's alleged failures:

> A) object to the court's wholesale adopting of the State's brief, B) call/recall witnesses, C) seek an *in camera* review of detective file, D) re- quest for extension to file reply brief and hearing, E) failure to object to the erroneous facts in the State's brief, F) to get all Court orders and transcripts, G) and object to leading questions and insinuations.

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[25] For pleadings and other court documents filed by *pro se* prisoners, Wisconsin courts "look to the facts pleaded, not to the label given the papers filed, to determine whether the party should be granted relief." ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 521, 335 N.W.2d 384 (1983).

(131:3, R-Ap. 283.) Jordan followed with pages of conclusory and incoherent contentions.[26] For example, he asserts, without any specifics, that Bohach did not question the State's witnesses (131:4, R-Ap. 284) and that Hart's ineffectiveness consisted of not questioning Bohach about that omission (131:4, R-Ap. 284). Jordan's complaint seems tied to the long-standing assertion that Bohach did not conduct an adequate pretrial investigation. The record shows that Hart did not represent Jordan during Bohach's testimony (148:1) and that postconviction counsel at that time (Jodi Janecek) questioned Bohach about his investigative efforts (148:16-33, 50-57). Jordan might not like the answers Bohach gave, but Janecek did question his about his investigative efforts. So, Hart could not have provided ineffective assistance, and because Janecek asked

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[26] In the State's view, this court could reject Jordan's ineffective-assistance-of-postconviction-counsel claim on grounds of incoherence alone. Jordan's motion for reconsideration put the circuit court, and puts this court and the State, in the position of the well-known "performing bear," ***State v. Waste Management of Wisconsin, Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal."), except that Jordan's motion attempts to make the performing bears dance to a tune played by someone who cannot operate the instrument.

In addition, the incoherence of Jordan's reconsideration motion confirms the circuit court's decision not to allow Jordan to represent himself during the postconviction-motion proceedings. The motion more than hints at the likely chaos the court would have confronted during the evidentiary portion of the proceeding.

Bohach about his investigation, she did not provide ineffective assistance.

Jordan makes wholly conclusory (and thus inadequate) allegations about Hart's failure to object to the circuit court's supposed wholesale adoption of the State's brief (131:2-3, R-Ap. 282-83). But even assuming Hart performed deficiently, Jordan did not incur any prejudice. As already discussed in this brief, the record refutes any contention that the circuit court adopted the State's brief wholesale (pp. 33-34, above). Moreover, even if the circuit court had adopted the State's brief, the court did not erroneously exercise discretion in doing so (pp. 34-35, above). Jordan has not shown any way in which an argument made by Hart would have made any difference.

Hart's failure to argue about the "reasonable probability" criterion regarding newly discovered evidence (131:4-5) cannot cause Jordan any prejudice. The "reasonable probability" criterion presents a question of law, ***Plude***, 310 Wis. 2d 28, ¶ 33, which this court reviews *de novo*, regardless of the circuit court's decision or any argument Hart might have made.

Jordan has offered inadequate allegations regarding Hart's alleged failure to request an "extension to file reply brief and hearing" (131:3, R-Ap. 283; *see* 132:2, R-Ap. 293). His allegations amount to laments that Hart did not follow his instructions. The allegations, however, do not show how Jordan actually suffered any prejudice from not seeking an extension to file a reply brief in the circuit court.

As for Hart's alleged ineffectiveness regarding "seek[ing] an *in camera* review of detective file" (131:3, R-Ap. 283), the point of the claim remains mysterious. Jordan had previously filed a *pro se* motion for postconviction discovery of two detectives' personnel files (114). The motion cited an inapplicable statute[27] and did not come close to satisfying the standards of ***State v. O'Brien***, 223 Wis. 2d 303, 588 N.W.2d 8 (1999). The circuit court denied the motion (116). Jordan's reconsideration motion asserts that the circuit erroneously exercised its discretion when denying the motion (131:2, R-Ap. 282). Jordan apparently complains that Hart did not file the motion (132:5-6, R-Ap. 296-97), but so far as the State can tell, Jordan does explain how or why Hart would have prevailed or how the detectives' personnel files would have proved relevant and helpful in relation to the issue that concerned Jordan (132:5-6, R-Ap. 296-97).

The reference "to get all Court orders and transcripts"[28] apparently concerns a motion Jordan filed *pro se* with the circuit court in March 2011 (132:3, R-Ap. 292). In that month, Jordan filed a document containing research (123) but nothing seeking any documents. In April and May 2011, Jordan filed motions requesting specific docu-

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[27] The cited sections — Wis. Stat. § 971.23(1)(e) — applies to pretrial discovery, not to postconviction discovery.

[28] So far as the State can tell, the only substantive reference to a lack of transcripts attributes the problem to the circuit court, not to Hart (131:2, R-Ap. 282). As to orders, the State cannot find a substantive reference in the motion.

ments (129; 136; 140). The circuit court granted the April motion (139) and most of the May motions, denying only a single request the court described as "completely vague and lack[ing] specificity" (141). Jordan apparently received the documents he requested, but he did not clarify in his postconviction motion the scope of the request the court denied (132:1-2, R-Ap. 292-93). So far as the State can tell, Jordan does not explain how or why Hart could have provided a clearer request when Jordan himself did not do so even after the court pointed out the defect.

The State cannot figure out what Jordan means regarding Hart's alleged failure to "object to leading questions and insinuations."[29] Again, Jordan does not sufficiently plead his claim.

As for "call/recall witnesses," the complaint appears to concern a failure by Hart to call Orlando Smith (132:4, R-Ap. 295), Alex Patterson (132:4, R-Ap. 295), and Susan Schmechiel (131:9, R-Ap. 289), who notarized Quincy Grant's and Lonnie Grant's affidavits (158:Ex. 1, R-Ap. 308; 158:Ex. 2, R-Ap. 310). Aside from asserting that Schmechiel testimony "would have given some light on the circumstances of how affidavits are signed and notarized" (131:9, R-Ap. 289; *see also* 132:3-4, R-Ap. 294-95), Jordan does not provide even a hint about how this testimony would actually help him. Likewise for Smith and Patterson, about both of whom Jordan offers perfunctory and conclusory

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[29] *See, e.g.*, 152:45 (Hart objecting to leading question); 153:5 (same).

assertions that do not provide any indication of the actual testimony they would have offered and how that testimony would have actually helped him.

Finally, the State cannot determine to which specific "erroneous facts in the State's brief" Hart failed to object. As best the State can figure, Jordan appears to believe that the State's brief consisted entirely of "erroneous facts" (132:6-7, R-Ap. 297-98). Even if the State's brief contained identifiable factual errors, Jordan (in the State's view) has not satisfied the ***Allen*** and ***Balliette*** pleading standards for establishing even a *prima facie* case that Hart provided ineffective assistance in this regard.

The State recognizes that Wisconsin courts accord *pro se* litigants leeway in their filings. Jordan's reconsideration motion, however, tortures the principle and exemplifies the term "incoherent." The circuit court correctly — even necessarily — denied Jordan's motion without a hearing. This court should affirm that decision.

VI. THIS CASE DOES NOT MERIT DISCRETIONARY REVERSAL FOR A NEW TRIAL IN THE INTEREST OF JUSTICE.

Jordan offers a word-salad argument that all his claims of error collectively merit a new trial in the interest of justice. Jordan's Brief at 37-50.

Section 752.35 of the Wisconsin Statutes provides the authority for this court to grant a discre-

tionary reversal in the interest of justice.[30] In ***Vollmer v. Luety***, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990), the supreme court wrote that under section 752.35,

> the court of appeals, like this court, has broad power of discretionary reversal. This broad statutory authority provides the court of appeals with power to achieve justice in its discretion in the individual case. The first category of cases arises when the real controversy has not been fully tried. Under this first category, it is unnecessary for an appellate court to first conclude that the outcome would be different on retrial. The second class of cases is where for any reason the court concludes that there has been a miscarriage of justice. Under this second category . . . , an appellate court must first make a finding of substantial probability of a different result on retrial.

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[30] Section 752.35 of the Wisconsin Statutes confers on this court discretionary authority to grant a new trial in the interest of justice:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

Wis. Stat. § 752.35.

Id. at 19. To grant discretionary reversal on the ground "that it is probable that justice has for any reason miscarried," this court "must be convinced, viewing the record as a whole, that there has been a probable miscarriage of justice . . . ." ***Rohl v. State***, 65 Wis. 2d 683, 703, 223 N.W.2d 567 (1974) (interpreting predecessor statute to Wis. Stat. § 752.35). *See also* ***Lofton v. State***, 83 Wis. 2d 472, 489-90, 266 N.W.2d 576 (1978); ***State v. Bergenthal***, 47 Wis. 2d 668, 688-89, 178 N.W.2d 16 (1970) ("'we would at least have to be convinced that the defendant should not have been found guilty and that justice demands the defendant be given another trial'"). An appellate court should grant discretionary reversals under section 752.35 "infrequently and judiciously." ***State v. Ray***, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992).

For four reasons, this court should refuse Jordan's request for a new trial in the interest of justice. First, under section 752.35, this court does not have authority, in an appeal from an order under section 974.06, to reverse a conviction in the interest of justice. ***State v. Allen***, 159 Wis. 2d 53, 55, 464 N.W.2d 426 (Ct. App. 1990).

Second, much of Jordan's contention rests on his claim of ineffective assistance of postconviction counsel. As already noted (pp. 47-49, above), Jordan does not have a federal or State right to the effective assistance of counsel in a section 974.06 proceeding and, in any event, has not sufficiently pleaded such a claim. Consequently, that ineffective-assistance claim cannot support a reversal in the interest of justice.

Third, the newly discovered evidence includes at least one fabricated affidavit and a purported alternative perpetrator who, by invoking his Fifth Amendment privilege and refusing to answer any questions (either at the postconviction-motion hearing or, prospectively, at a new trial) about the homicide, essentially repudiated his promise to testify in support of Jordan's claim of innocence. The proffered newly discovered evidence certainly does not move this case in the direction of demonstrating that Jordan suffered a miscarriage of justice.

Fourth, the contentions for discretionary reversal amount to a rehash of the arguments advanced elsewhere in Jordan's brief. If this court agrees with Jordan's arguments, then this court will presumably reverse the circuit court's orders and remand for further postconviction proceedings or, perhaps, a new trial, thus granting Jordan the relief he seeks. On the other hand, if this court disagrees with Jordan's arguments, then the court will not have any reason to reverse and remand for further postconviction proceedings or a new trial: Jordan will have already received a fair trial in which the jury heard and tried the real controversy.

CONCLUSION

For the reasons offered in this brief, this court should affirm the circuit court's order denying Jordan's motion for postconviction relief under Wis. Stat. § 974.06 and should affirm the circuit court's decision and order denying Jordan's motion for reconsideration.

Date: January 25, 2013.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(8): FORM AND LENGTH REQUIREMENTS

In accord with Wis. Stat. § (Rule) 809.19(8)(d), I certify that this brief satisfies the form and length requirements for a brief and appendix prepared using a proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per line, and a length of 10,998 words.

CHRISTOPHER G. WREN

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

In accord with Wis. Stat. § (Rule) 809.19(12)(f), I certify that I have submitted an electronic copy of this brief (excluding the appendix, if any) via the Wisconsin Appellate Courts' eFiling System and that the electronic copy complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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.

CHRISTOPHER G. WREN

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(2)(a): SUPPLEMENTAL APPENDIX

In accord with Wis. Stat. § (Rule) 809.19(3)(b), I certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the confidentiality provisions of Wis. Stat. § (Rule) 809.19(2)(a). I certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

CHRISTOPHER G. WREN