STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal No. 2015AP000637 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL DENGSAVANG,

Defendant-Appellant.

ON REVIEW OF A JUDGMENT OF CONVICTION AND A DENIAL OF A MOTION FOR POST-CONVICTION RELIEF IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE REBECCA DALLET AND STEPHANIE ROTHSTEIN PRESIDING, RESPECTIVELY.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT, MICHAEL DENGSAVANG

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ISSUES PRESENTED

1. Was trial counsel ineffective for opening the door to double hearsay testimony on the excluded shoeprint report and failing expose exculpatory discrepancies in descriptions of the shooter?

   In the post-conviction context, the Circuit Court presumed trial counsel had a strategy for opening the door to the excluded shoeprint evidence, even though trial counsel did not recall such a strategy. The court never addressed whether trial counsel should have objected on evidentiary grounds or drawn attention to exculpatory descriptions of the shooter.

2. Did the Circuit Court err when it limited the scope of questioning at the ***Machner*** hearing, refusing to permit trial counsel testimony on legitimate and still-outstanding arguments alleging ineffective assistance?

   The Circuit Court found it was only required to permit testimony on the issue noted in the Court of Appeals' April 29, 2014, first remand order – trial counsel's strategy for opening the door to testimony on the contents of the shoeprint report – despite the fact that the limiting language was removed via the Court of Appeals' May 23, 2014, erratum order on reconsideration.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Dengsavang welcomes oral argument to clarify any questions this Court may have. Publication is not warranted since the case can be decided on existing precedent.

STATEMENT OF THE CASE

After a jury trial, the Hon. Judge Dallet presiding, Michael Dengsavang was convicted of one count of "1st Degree Intentional Homicide" in violation of Wis. Stat. §940.01(1)(a), one count of "Armed Robbery with Use of Force" in violation of Wis. Stat. §943.32(1)(a), and one count of "Burglary-Building or Dwelling" in violation of Wis. Stat. §943.10(1m)(a). (R. 71 at 6:5-16.) The Complaint and evidence at trial tended to show that, in one evening, a Happy Wok restaurant and its owners' residential apartment were robbed, and a police officer was shot. (R. 3:3-4; R. 63:35-40.) Dengsavang's defense was that police found him in the wrong place at the wrong time, and he was not involved in any of the crimes. (R. 63 at 46:21-47:1.)

Six days before trial, the State produced an expert report that analyzed digital images of various shoeprints found in the snow near the three crime scenes. (R. 61 at 6:3-13 (shoeprint report provided to defense on June 1, 2010); R. 62 (trial began on June 7, 2010); R. 47 at Exh. D (expert report).) The circumstances surrounding the admission at trial of this report and its findings are at issue on appeal.

The State presented three principal pieces of evidence at trial: (1) pictures of shoeprints in the snow that the State argued connected him to the three crime scenes; (2) the testimony of several witnesses, none of whom identified Dengsavang as the perpetrator of a crime; and (3) DNA evidence on a winter mask and gloves found near where Dengsavang was arrested. (R. 70 at 44-45 (as to shoeprints); *Id*. at 38-40 and 44:4-12, (as to witness testimony), *Id.* at 46:4-13 (as to DNA evidence).)

I. Overview of evidence and the crime

On December 13, 2009, and in the early morning hours of December 14, 2009, three separate incidents occurred. (R. 3 at ¶1-4.) First, two armed and masked men robbed a Happy Wok at 2332 North 124th Street, Wauwatosa, Milwaukee County, around 10:15 p.m. (*Id*. at ¶1-2.) Second, at approximately 10:35 p.m., two armed and masked men robbed the restaurant owners' residential apartment, approximately .35 miles from the Happy Wok. (*Id.* at ¶3.) Third, a masked man shot a police officer through the window of her squad car in the apartment's parking lot between 10:38 p.m. and 10:42 p.m. (R. 66 at 51-53.)

After the shooting, police officers found Dengsavang under a tree across the street from the apartment complex. (R. 63 at 41:11-16.) Detective Daniel Collins testified that he and other officers found several pairs of gloves, winter masks, and hats in the snow between the location where the apartment robbery and shooting took place and the location where Dengsavang was found. (R. 68 at 34:20-21, 36-37.) Dengsavang's DNA was only found on two black gloves and a winter mask that were found near where Dengsavang was arrested. (R. 47 at Exh. A:3-5.)

At trial, the State alleged that Michael Dengsavang, along with codefendants Paul Phonisay and Thongsavahn Rodthong, worked together to commit the three crimes. (*See, e.g.* R. 63 at 45:12-14.) The State connected Dengsavang to the Happy Wok robbery based on shoeprints observed outside of the back of the Happy Wok that "seem[] to match to the naked eye" the soles of Dengsavang's Nike Air sneakers. (*Id*. at 43:7-18.) The State connected Dengsavang to the apartment robbery based on a statement by C.D., the son of the Happy Wok owners who was at the apartment when the robbery

occurred, that one of the men who entered the apartment was wearing red shoes. (*Id*. at 41:3-10.) On arrest, Dengsavang was wearing red and black Nike Air sneakers. (R. 66 at 8:12-15.)

Dengsavang argued that the police arrested the wrong man; he was simply in the wrong place at the wrong time. (R. 63 at 46:25, 47:1.) Counsel noted that no one identified Dengsavang as the perpetrator of any of these crimes. (*Id*. at 47:16-21.)

There was also notable exculpatory evidence that tended to show Dengsavang was not responsible for any of the three crimes. First, he was specifically excluded as a possible source of the DNA on the gun that shot A.P. (R. 47 at Ex. A:5.) Further, Happy Wok owner Y.D. testified that the men who robbed the Happy Wok were speaking Spanish; Dengsavang does not speak Spanish. (R. 63 at 81:2-4 (Y.D.'s testimony); R. 47 at Ex. C:¶6 (Dengsavang's assertion that he does not speak Spanish.) Y.D.'s wife X.Z. testified that she knew Dengsavang because he was a frequent customer of the Happy Wok. (R. 64 at 23:4-7.) She further testified that she did not recognize Dengsavang visually as one of the armed men in the Happy Wok and that neither of the armed men in the Happy Wok sounded, vocally, like Dengsavang. (*Id*. at 23:16-19 (failure to identify Dengsavang visually); 22:20-23 (failure to identify Dengsavang vocally.) All of this was presented at trial but not clearly argued to the jury.

Further, not a single description of the shooter offered at the trial matched Dengsavang's physical description at the time of the shooting. (R. 66 at 36:10-20 (victim A.P.'s description of the two suspects at trial); R. 47 at Exh. B (victim A.P.'s initial description of the suspect); *Id*. at Exh. G (Dengsavang's physical description), *Id*. at Exh. H (description of Dengsavang's clothing at the time of

his arrest.) In total, A.P. offered three suspect descriptions: (1) the original recording wherein a police officer conveyed A.P.'s description of the shooter to dispatch, stating that the shooter was a "black male, five eight, or unknown race, all black clothing, hood up, five foot eight, thin," (2) A.P.'s description of the first of two suspects she saw before being shot, who was "wearing all black, and black pants, a black hooded sweatshirt," and (3) A.P.'s description of the second of two suspects she saw before being shot, who was wearing "dark pants, [with] a white or light-colored hooded sweatshirt, and it had some sort of dark or black-colored design throughout it." (R. 47 at Exh. B (A.P.'s description of the shooter to dispatch); R. 66 at 36:10-20 (A.P.'s description of both suspects at trial.)

In contrast to these descriptions, Dengsavang is a 5'10" Asian man who weighed approximately 180 pounds at the time of the incident. (R. 47 at Exh. C (as to height), G (as to weight.) Additionally, at the time he was arrested, Dengsavang was wearing red and black Nike Air sneakers, blue jeans, and a black hooded sweatshirt underneath a black down coat. (*Id.* at Exh. H.) Therefore, Dengsavang's actual physical description and clothing do not match any of the suspect descriptions offered by A.P.

Despite this exculpatory evidence, and a lack of solid incriminating evidence, the jury convicted Dengsavang of robbery, burglary, and homicide. This conviction was ostensibly based on shoeprint testimony, the majority of which was double-hearsay and the remainder of which was expert opinion presented by a lay witness.

II. Facts as to the shoeprint evidence

At a May 14, 2010, pre-trial hearing, the Circuit Court ordered that it would not allow any discovery past May 21, 2010. (R. 60 at 22:2-6.) The court ruled, "Absent something happening, next Friday [May 21, 2010 is the deadline] for all discovery to be turned over." (*Id.* at 22:9-11.)

On June 2, 2010, five days before trial, a hearing was held to discuss still-awaited discovery from the State. (R. 61 at 2:23-25, 3:1-2.) At this hearing, Attorney Daniel Rieck appeared for Michael Dengsavang, standing in for Dengsavang's trial counsel Robert D'Arruda. (*Id.* at 2:14-16.)

During the hearing, Attorney Anne Bowe, counsel for co-defendant Rodthong, informed the Circuit Court that, the day before, the State provided her with an expert shoeprint report dated May 26, 2010. (R. 61 at 6:10-13 (date of production), R. 47 at Exh. B (date of report).) The State had not moved the court to extend the discovery deadline before disclosing this report. (*See generally* R. 61.) At the hearing, the Circuit Court did not inquire on why the State failed to comply with the discovery deadline, then waited another week to disclose the report. (*Id.*)

The two-page shoeprint expert report at issue was prepared in the Milwaukee Crime Lab by footwear and tire track specialist Anthony R. Spadafora. (R. 47 at Exh. D.) Spadafora examined digital photographs of footwear impressions in the snow in public spaces near the three crime scenes, as well as 15 pairs of shoes that had been submitted[1] to the Milwaukee Crime Lab for examination. (*Id.*) One pair of shoes examined, identified as "Item CO," was designated as

[1] Anthony Spadafora's report did not specify where the shoes came from, only that they were "submitted." (R. 47 at Exh. D.)

the pair worn by Dengsavang when he was arrested. (*Id*.) Concerning this pair, the report indicated as follows:

- "Three suitable footwear impressions observed on files 6202, 6373 and #1 walking could have been made by either of the four Left Nike Air Air Force 1 and Nike Air Jordan shoes of items CO, CV, CW and CZ based on similarity of tread patterns design, size and wear characteristics."

  TRANSLATION: Two shoeprints in the snow near the apartment complex[2] and one shoeprint in the snow near the Happy Wok[3] "could have been made" by the left shoe recovered from Dengsavang, or from three of the other left shoes collected as evidence.

- "Two suitable footwear impressions observed on files 6206 and 6351 could have been made by the either of the Right Nike Air Air Force 1 and Nike Air Jordan shoes of items CN, CO, CT, CV, CW, CX, CY AND CZ based on similarity of tread pattern design and wear."

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[2] The shoeprint report lists the digital images by file name, however it does not indicate where the digital images were taken. To determine where the digital images were taken, undersigned counsel located images of shoeprints with the same file name within the electronic discovery file provided by the State. All digital images discussed herein were discovered in a State discovery file labeled, "By Det [sic] Hudson of Rob [sic] & Shooting Scenes," ostensibly taken near the Normandy Village Apartments, site of the robbery and shooting.

[3] The full name of the digital image within the State's discovery that this image corresponds to is, "#1 walking to Happy Wok from sidewalk."

TRANSLATION: Two shoeprints in the snow near the apartment complex "could have been made" by the right shoe recovered from Dengsavang, or from seven of the other right shoes collected as evidence.

- "One suitable footwear impression observed in file 6347 could have been made by the Left Nike Air Air Force 1 and Nike Air Jordan shoes of items CN, CO, CV, CW, CX, CY and CZ based on similarity of tread pattern design and wear characteristics.

  TRANSLATION: One shoeprint in the snow near the apartment complex "could have been made" by the left shoe recovered from Dengsavang, or from six of the other left shoes collected as evidence.

(R. 47 at Exh. D.) The State did not call Anthony Spadafora to testify at trial. (*See generally*, R. 62-71.)

At the hearing held on June 2, 2010, Attorney Bowe effectively argued that the State should not be able to present evidence of the expert shoeprint report on the grounds that the report was provided to defense eleven days after the May 21, 2010, deadline for evidentiary disclosures and a mere six days before trial. (R. 61 at 10:10-11.) Attorney Bowe argued it would be unfair for the State to present the expert shoeprint report at trial, because defendants did not have time to procure an expert to inform their interpretations of the report and effectively rebut the States' representations of it. (*Id.* at 6:5-13.) In her argument, Attorney Bowe stated:

> If [the State is] going to use [the shoeprint report] I have a problem. I need to get an expert then because it is not – it's new information to me and it is information that arguably is susceptible to interpretations. I need to have the opportunity to strengthen my interpretation of that case.

(*Id.* at 5-10.) The Circuit Court agreed with Attorney Bowe, noting, "I think [each defendant] would have a right to [his] own expert to bolster [his] position which is that it's exculpatory." (*Id.* at 12:9-11.) The Circuit Court ruled that the State could only introduce the shoeprint report at trial if defense opened the door first:

> . . . the experts –the opinion –the opinion –this four-page report and the person that offered it, that's all we're talking about here. There'll be all kinds of arguments about shoes and prints because that stuff you have, Miss Bowe. This is the only new thing which is this analysis by this expert. I'm going to order the State can't use it in its case in chief. If for some reason the defense put on somebody or questioned somebody who talks about analyzing shoes or says something to the effect of well, you could have analyzed them, why didn't you analyze them . . . those would be the kind of situations I will entertain an opening-the-door type issue . . .

(*Id.* at 10:4-17.) By virtue of this oral ruling, the State was not permitted to introduce evidence of the shoeprint report, unless trial counsel first opened the door by soliciting testimony related to analyzing the shoeprints. (*Id.*)

Attorney D'Arruda represented Dengsavang at trial. D'Arruda was not present at the June 2, 2010, hearing and, therefore, would have needed to be apprised of the court's ruling excluding evidence of the shoeprint report. (R. 61 at 2:14-16.) His performance at trial indicated that he was likely unaware of the Circuit Court's order pertaining to the shoeprint report. During his cross-examination of Detective Hudson, he asked, "Were you aware that impressions were sent to the crime lab or those photos and shoes were sent to the crime lab?" (R. 68 at 17:5-7.) After he concluded his questioning, the State walked Detective Hudson through its interpretation of the findings of the shoeprint report. (*Id.* at 22-24.) During this questioning, the expert findings of the shoeprint report came in through Detective Hudson's testimony.

> Williams: And the crime lab, as they're scientists, right, they're not guys on the street, they're actual trained scientists?
>
> Hudson: They're experts, correct.
>
> Williams: And they said we cannot say that these shoes made that mark is that correct?
>
> Hudson: Correct, without saying similar size.
>
> Williams: But what they did say is that these shoes could have made those marks, right?
>
> Hudson: Correct.

(R. 68 at 22:24-25, 23:1-8.)

> Williams: But they said that these shoes could have made those marks?
>
> Hudson: They could have made those marks.

(*Id.* at 23:25, 24:1-2.)

The State also questioned Detective Hudson concerning her personal opinion of whether the shoeprints found near the three crime scenes matched the shoes Dengsavang was wearing:

> Williams: This [shoeprint] matched Exhibit No. 137, the shoes that Mr. Dengsavang was wearing?
>
> Hudson: That's correct.
>
> (R. 67 at 92:15-16.)
>
> Williams: And [the] footprint[4] appears to match footprints, or the consistency of the footprints that was found on the shoe of Mr. Dengsavang there; is that correct?
>
> Hudson: That's correct

(*Id.* at 97:2-5.)

The State stressed the importance of the shoeprints

[4] At various times during the trial, the parties refer to "footprints." No footprints were recovered during the investigation of this case. The word "footprints" appears to be a mis-speak, and Dengsavang reads the transcript as though the speaker used the term "shoeprints."

in its closing argument as follows:

> **The footprints are probably the key to the whole case**, or part of the case. So there were distinctive footprints that were found at the restaurant. The ones with the circle. And you can see the circle, the two circles; one here and one there . . . these footprints are in the back, outside of the restaurant. These are also right outside of the Dong home. These same footprints . . . and then police followed the circle footprints. And remember, Officer Hudson told you that the next time she saw the footprints were right around – right before the crossing of 124th Street. She [Detective Hudson] saw the circle footprints . . . and the footprints finally led to under a tree [where Dengsavang was seen and arrested], which was on the limit – outer limits of the Tomlin property.

(R. 70 at 44:16-25, 45:7-11, 22-24 *emphasis supplied*.)

III. Post-Conviction proceedings

On October 23, 2012, Dengsavang filed a motion for post-conviction discovery. (R. 38.) The motion pointed out that, although the State used a gunshot residue kit to swab Dengsavang's hands shortly after the shooting, the kit was never tested. (*Id.* at 1-2.) Dengsavang requested post-conviction discovery of the kit so he could have it independently tested. (*Id.* at 5.) In an order dated December 17, 2012, the Circuit Court denied Dengsavang's request, finding that "a negative kit would not be conclusive evidence of innocence." (R. 44 at 2.)

On April 17, 2013, Dengsavang timely filed a post-conviction motion with the Circuit Court alleging ineffective assistance of counsel. (R. 47.) He argued that trial counsel performed deficiently by failing to object to Detective Hudson's improper testimony on the excluded shoeprint evidence and report, and failing to draw attention to the descriptions of the shooter offered at trial that all but excluded Dengsavang as a possible subject. (*Id.* at 1.)

In response to Dengsavang's argument that trial counsel failed to object to Detective Hudson's improper testimony on the excluded shoeprint evidence and report, the State argued:

> The argument about the crime lab examining footprints was brought up by the defense. The State elicited on redirect questioning basically the same evidence defense counsel had opened the door to on cross examination.

(R. 51 at 20.) Dengsavang explained that, to the extent that the defense opened the door to allowing the State's presentation of the otherwise excluded shoeprint evidence, trial counsel rendered ineffective assistance. (R. 52 at 2.)

In an order dated June 24, 2013, the Circuit Court denied Dengsavang's post-conviction motion. (R. 53 at 5.) It adopted the State's view that trial counsel opened the door to allowing Detective Hudson to testify concerning the shoeprint evidence, explaining:

> At a hearing on June 2, 2010, the court precluded the State from using its footwear expert or his report during its case-in-chief unless the defendant "opened the door" about the analysis of the shoes. This is exactly what happened

> during the trial. The *defense* made first mention of the State Crime Lab findings during its cross-examination of Detective Hudson . . . It was only on redirect, *after the defense had opened the door to the issue*, that the State questioned Detective Hudson about the crime lab's findings . . . The defense opened the door to questioning about crime lab findings.

(*Id*. at 2-3) (*citations omitted*.) Nonetheless, the Circuit Court found that trial counsel's performance did not prejudice Dengsavang by opening the door to allow the admission of the testimony concerning the expert shoeprint report because, even if the testimony had not been permitted, "There is no reasonable probability that the outcome of the trial would have been different given the compelling circumstantial evidence of guilt." (*Id*. at 3.) The Circuit Court did not identify any of this "compelling circumstantial evidence of guilt." (*Id*.)

The Circuit Court did not schedule or hold a hearing on the issues before entering its June 24, 2013, order denying Dengsavang's claims. (R. 53 at 5.) Dengsavang appealed this order on October 7, 2013. (*See Generally,* Brief of Appellant, Oct. 7, 2013.) In an order dated April 29, 2014, the Court of Appeals remanded for a ***Machner***[5] Hearing. (R. 74 at ¶17.) The court concluded, "Speculation and theorizing – by either party – cannot substitute for testimony from Dengsavang's trial counsel at a ***Machner*** hearing." (*Id*.)

On May 13, 2014, the State filed a motion for reconsideration. (Mot. for Reconsideration, May 13, 2014.) In its order dated May 23, 2014, the Court of Appeals edited paragraphs ¶17 and ¶18 of its April

[5] ***State v. Machner***, 101 Wis.2d 79, 303 N.W.2d 633 (1981).

29, 2014, order as follows:

> - The court omitted the following language from ¶17: "Consequently, we remand for a hearing on this specific issue [of whether the trial counsel had a strategic reason for opening the door to evidence of the shoeprint report]"
> - The court removed the language of ¶18 that declined to address Dengsavang's argument that trial counsel further prejudiced Dengsavang by failing to object to Detective Hudson's testimony concerning the shoeprints as within the purview of an expert. The edited language of ¶18 now states, "because Dengsavang's motion alleged sufficient facts that, if true, would entitled [sic] him to relief on his claim of ineffective assistance of counsel, we reverse and remand for an evidentiary hearing."

(R. 79 at 2.)

The Circuit Court held a ***Machner*** hearing in two parts: the first on January 9, 2015, and the second on March 5, 2015. (R. 91; 92.) At the first hearing, Attorney D'Arruda was asked about his questioning which opened the door to the delinquently disclosed shoeprint report. (R. 91 at 13:8-21.) Trial counsel testified, "um, you know, looking back on it, I really – you know, I don't – it seems to me looking back on it, if I had known about the court's order then I should have objected to everything. Yet I'm the one that started opening the door in the first place. So unfortunately at this time I can't recall. I don't know if that was a strategic purpose or not. (*Id*. at 13:13-21.) Trial counsel additionally testified, "Thinking

back on it now, can I say it was strategic? No. I can't really tell you what my motive was for asking the questions that I did about the footprints." (*Id.* at 9:8-11.)

Attorney D'Arruda was also asked why he failed to object to Detective Hudson's testimony as to the shoeprints on the basis that she was a lay witness and that analyzing shoeprints was outside of her scope of expertise. (R. 91 at 11:16-18.) Trial counsel testified, "I suppose that's another issue I could have objected on but I didn't." (*Id.* at 11:19-20.) When asked if he had a strategic basis for failing to object, trial counsel testified "I did not think at the time to object on that ground." (*Id.* at 11:21-25, 12:1-4.)

Finally, Attorney D'Arruda was asked whether he had a strategic basis for not objecting on double hearsay grounds, to which he replied, "Obviously that is hearsay. I didn't object." (*Id.* at 12:11-12, 23-24.)

When defense counsel attempted to question Attorney D'Arruda concerning his failure to draw attention to the multiple descriptions of the shooter that excluded Dengsavang as a possible suspect, the State objected that the line of questioning was "not what the Court of Appeals authorized." (*Id.* at 14:8-22.) The court sustained this objection, reciting the omitted language from the Court of Appeals' initial order that it would "remand for a hearing on this specific issue [the questioning that opened the door to allowing the otherwise excluded evidence]." (*Id.* at 17:1-15.)

In response to the Circuit Court's decision to limit the testimony at the ***Machner*** hearing, undersigned counsel filed an affidavit and offer of proof on March 2, 2015, and March 16, 2015, respectively. (R. 85 (affidavit), R. 87 (offer of proof).) The affidavit made a record of undersigned counsel's unsuccessful

attempts to procure the trial file from Attorney D'Arruda, as well as the full appellate file from the previous appellate attorney. (R. 85 at ¶1-14, 16.) Attorney D'Arruda's failure to provide his file to appellate counsel was a violation of S.C.R. 20:1.16(d). *See, e.g.* ***In re Disciplinary Proceedings Against D'Arruda***, 2013 WI 90, ¶8, 351 Wis. 2d 227, 839 N.W.2d 575, 577 (Wis. 2013) (publicly reprimanding Attorney D'Arruda for misconduct that included failure to turn over a client's file to appellate counsel in violation of SCR 20:1.16(d)). The Affidavit stated that Attorney D'Arruda indicated to undersigned counsel that "in any way in which he failed to impeach A.P. regarding her description of the shooter, or failed to highlight discrepancies in her varying descriptions for the jury, he had no strategic basis for doing so, and that it would have been consistent with his trial strategy to do both." (R. 85 at ¶15.) Undersigned counsel additionally filed an offer of proof as to the testimony that would have been solicited had she been permitted to question Attorney D'Arruda at the ***Machner*** hearing on subjects outside the scope of the shoeprint testimony and report. (R. 87.) Importantly, undersigned counsel would have confirmed that Attorney D'Arruda had no strategic basis for failing to call attention to exculpatory discrepancies in descriptions of the shooter offered at trial. (*Id*. at 1.)

At the second post-conviction hearing on March 5, 2015, the State called Attorney Rieck, who attended the June 2, 2010, hearing in place of Attorney D'Arruda. (R. 92 at 6:13-16, 7:16-21.) Importantly, it was at this hearing that the Circuit Court ruled the expert shoeprint report would be excluded unless counsel opened the door. (R. 61 at 10:4-21.) As to whether Attorney Rieck spoke with Attorney D'Arruda following the hearing, Rieck testified, "I recall calling him that day, the 2nd. I don't recall if I ever actually spoke to him or if I just left a

voicemail." (R. 92 at 16:3-5.) Attorney Rieck additionally testified that the law firm was having problems at that time:

> [The law firm] was in disarray. There was some personal issues that Mr. D'Arruda was having that was [sic] having an effect on the business itself. [The other partner] Mr. Forrestal left the firm, I believe, shortly thereafter . . . There was some financial problems . . . [the firm] was not functioning properly."

(*Id.* at 11:9-17.)

On March 11, 2015, the Milwaukee County Circuit Court denied Dengsavang's motion for post-conviction relief. (R. 86 at 10.) Despite trial counsel's not remembering whether he had a strategic reason for any of his challenged actions, the Circuit Court concluded that trial counsel's questioning of Detective Hudson was "clearly . . . a credible defense strategy calculated to attempt to raise reasonable doubt as to whether his client committed the crimes of which he was accused." (*Id.* at 8.) The court concluded, even if trial counsel was ineffective for opening the door to the testimony concerning the shoeprint report, "That error was not of such magnitude to affect the integrity of the entire trial." (*Id.* at 9.) The court concluded that there was "ample evidence" to support Dengsavang's conviction because there was "a total of thirty seven witnesses . . . [and] over 300 exhibits." (*Id.*) The court did not discuss the nature of these witnesses and exhibits, or consider whether they strengthened or undermined the case against Dengsavang. (*Id.*) Notably, the court did not consider that none of the suspect descriptions offered at trial by victims A.P. and Y.D. matched Dengsavang's description. (R. 63 at 81-82 (victim Y.D.'s description of the suspect); R. 66 at 36:10-20 (A.P.'s description of

the two suspects at trial); R. 47 at Exh. B (A.P.'s initial description of the suspect who shot her); *Id.* at Exh. G (Dengsavang's physical description); *Id.* at Exh. H (the description of Dengsavang's clothing at the time of his arrest).)

Dengsavang herein appeals.

ARGUMENT

Via the errors discussed below, the Circuit Court infringed on Dengsavang's right to the effective assistance of counsel, guaranteed under Article I, Section 7 of the Wisconsin Constitution, and the Sixth Amendment of the United States Constitution, made applicable to the states via the Fourteenth Amendment. WI CONST. art. I, §7; U.S. CONST. amend. VI; U.S. CONST. amend. XIV; *see* ***State v. Starks***, 2013 WI 69, ¶54, 349 Wis.2d 274, 833 N.W.2d 146, 161 (Wis. 2013).

First, the Circuit Court erred when it found that trial counsel performed effectively. Trial counsel (1) opened the door for the State to present the findings of the otherwise excluded shoeprint report through witness testimony at trial, (2) failed to object to Detective Hudson's testimony concerning the shoeprints as outside the scope of lay witness testimony as well as double hearsay, and (3) failed to expose exculpatory discrepancies in descriptions of the shooter.

Second, the Circuit Court erred when it refused to allow testimony on issues beyond the one highlighted in the Court of Appeals' original remand, and omitted in the Court of Appeals' order issued May 23, 2014. Dengsavang's post-conviction motion alleged specific instances of deficient performance and the arguments have never been meaningfully considered either at the circuit or appellate level. Dengsavang's right to a

Machner hearing arises independently of the Court of Appeals' remand that insisted one be held. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50, 53 (1996) ("If the motion on its face alleges facts which would entitle the defendant to relief, the Circuit Court has no discretion and must hold an evidentiary hearing.") The Circuit Court unreasonably refused to allow testimony at the ***Machner*** hearing on legitimate and pending arguments of ineffectiveness.

Trial counsel's performance did not meet the standard of objective reasonableness, and this deficiency prejudiced Dengsavang. Consequently, this Court should remand the cause to the Circuit Court for a new trial. *See, e.g.* ***State v. Jenkins***, 2014 WI 59, ¶ 8-9, 355 Wis.2d 180, 848 N.W.2d 786, 790 (Wis. 2014) (remanding for a new trial where the defendant met both prongs of the ***Strickland***[6] test for ineffective assistance of counsel.)

I. The Circuit Court erred when it found trial counsel effective despite cumulative errors of (1) opening the door to testimony on the excluded shoeprint report, (2) failing to object to shoeprint testimony on evidentiary grounds, and (3) failing to expose exculpatory discrepancies in descriptions of the shooter

A defendant claiming ineffective assistance of counsel must establish: (1) trial counsel was deficient, and (2) defendant suffered prejudice as a result of the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To meet the first requirement, the defendant must "show that 'counsel's representation fell below an objective standard of reasonableness.'" ***State v. Johnson***, 133 Wis.2d 207, 217, 395 N.W.2d 176, 181 (1986), quoting

[6] ***Strickland v. Washington***, 466 U.S. 688 (1984).

Strickland, 466 U.S. at 688. Errors made as the result of oversight rather than a reasoned defense strategy are deficient. ***Wiggins v. Smith***, 539 U.S. 510, 534 (2003) (finding trial counsel's performance deficient where his incomplete investigation into defendant's background was the result of inattention); ***State v. Moffett***, 147 Wis.2d 343, 353, 433 N.W.2d 572, 576 (Wis. 1989) (finding trial counsel's performance deficient where his failure to impeach a witness was the result of unintentional oversight). In conducting this analysis, a reviewing court should not construct strategic defenses which counsel does not offer. ***Kimmelman v. Morrison***, 477 U.S. 365, 386 (1986). A defendant must finally show that, but for these errors, there exists a reasonable probability of a different result in the case. ***Strickland***, 466 U.S. at 694.

A. Trial counsel had no reasonable strategy for opening the door to testimony on the contents of the excluded shoeprint report

At the June 2, 2010, pretrial hearing, the Circuit Court ruled that the State could only introduce the contents of the shoeprint report at trial if defense opened the door first, which there is no dispute that he did. (R. 61 at 10:10-21 (the court's order); R. 51 at 20 (the State's concession that trial counsel opened the door); R. 53 at 2-3 (the Circuit Court's conclusion that trial counsel opened the door.) The State went on to rely heavily on the shoeprints at trial, which it described as "the key to the whole case," connecting Dengsavang to the three crimes of which he was accused. (R. 70 at 44:16-25, 45:1-25.)

The testimony at the ***Machner*** hearing leaves it doubtful at best that trial counsel was ever even aware of the pretrial ruling at issue. Attorney Rieck, who attended the pretrial hearing, testified, "I don't

recall if I ever actually spoke to [D'Arruda, following the pretrial hearing] or if I just left a voicemail." (R. 92 at 16:3-5.) While trial counsel at one point surmised, "I'm sure [Attorney Rieck] must have told me about the court's ruling" he also admitted, "I don't remember what he had told me about the court's ruling." (R. 91 at 8:16-23.) Despite at one point testifying that he was "sure" he knew about the Circuit Court's ruling, he also testified, "If I had known about the court's order than I should have objected to everything . . . I don't know if that was a strategic purpose or not." (*Id*. at 8:16-18 (trial counsel's testimony that he was "sure" he knew about the ruling); *Id*. at 13:19-21 (trial counsel's testimony that he didn't know whether there was a strategic purpose.)

The Circuit Court nonetheless concluded, "Associate counsel's testimony support[ed] the proposition that trial counsel was aware of the court's ruling," basing this mainly on his testimony of his normal procedures for discussing the outcomes of hearings with attorneys he covered for. (R. 86 at 8.) But he also testified that their law firm, at that time, was "in disarray" and "not functioning properly" based on "issues that Mr. D'Arruda was having." (R. 92 at 11:9-17.) Given the lack of either recollection or record admitted by both trial counsel and his associate at the ***Machner*** hearings, it was improper for the Circuit Court to **speculate** as to what information the two attorneys might have shared off the record. ***State v. Howell***, 2007 WI 75, ¶48, 301 Wis. 2d 350, 734 N.W.2d 48, 61, (Wis., 2007) ("This court cannot and should not speculate about what information [the parties] may have shared off the record.").

The testimony at the ***Machner*** hearing failed to reveal any potentially strategic reason for opening the door to testimony on the contents of the shoeprint

report. When trial counsel was asked about his opening the door to the delinquently disclosed shoeprint report he answered, "Thinking back on it now, can I say it was strategic? No. I can't really tell you what my motive was for asking the questions that I did about the footprints." (R. 91 at 9:8-11.) He later testified, "Looking back on it, as I said, I probably should have objected to that whole line of questioning based on the court's ruling but I didn't." (*Id.* at 13:4-7.)

In ***State v. Carter***, the Wisconsin Supreme Court explained, "Strategic decisions made after less than complete investigation of law and facts may still be adjudged reasonable," however, counsel must either fully investigate the law and facts or make a reasonable strategic decision that makes any further investigation unnecessary. ***State v. Carter***, 2010 WI 40, ¶23, 324 Wis.2d 640, 782 N.W.2d 695, 704 (Wis. 2010) (quoting ***Strickland***, 466 U.S. at 690-691). It does not appear from his ***Machner*** testimony that trial counsel did either of these things in this case. Rather, he could not say for certain whether he ever saw the court's order excluding the shoeprint report, and could not even surmise a potentially valid strategic reason for opening the door to testimony on the contents of the otherwise inadmissible shoeprint report. (R. 91 at 8:16-23, 9:1-3 (as to whether trial counsel ever saw the shoeprint report); *Id.* at 13:8-21 (as to trial counsel's failure to surmise a strategic reason for opening the door.)

Despite the foregoing, the Circuit Court ruled, "Clearly, defense counsel's line of questioning of Detective Hudson was a credible defense strategy calculated to attempt to raise reasonable doubt as to whether his client committed the crimes of which he was accused." (R. 86 at 8.) Trial counsel did at one point surmise, "Looking back, the only thing I can say now is to try to make the argument that it was an

unreliable – that there was no real identification." (R. 91 at 11:23-24, 12:1.) He further explained:

> The state's whole case was circumstantial. They never had a positive identification of him as being the shooter. There were other people in the area. I think my main reason for, you know, bringing it up would be to argue that you can't simply say because it's a Nike that he was the one that left the footprint. But I don't simply [sic] remember if I knew about the court's ruling. I mean, I just – I'm sorry. I just simply don't remember.

(*Id.* at 23:21-25, 24:1-6.) Importantly, however, logic dictates that if the existence of the report had never been disclosed to the jury, there would have been no need to refute it with protests of inconclusiveness. Without the double hearsay testimony on the contents of the shoeprint report, there *were* no shoeprints insofar as the jury was concerned. There is, accordingly, no discernable and rational strategic basis on record for opening the door to testimony on the contents of the shoeprint report, and this leaves the Circuit Court's ruling of a "clear strategy" as speculative at best.

Although "a court must indulge a strong presumption that trial counsel's conduct falls within the wide range of reasonable professional assistance," a defendant can overcome this presumption by "identify[ing] the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." ***Strickland***, 466 U.S. at 669, 690. Because trial counsel's testimony was more indicative of oversight than reason, the Circuit Court erred when it determined that trial counsel performed effectively despite opening the door to testimony on the contents of the otherwise excluded

shoeprint report. *See* ***Moffett***, 147 Wis.2d at 353. (explaining that performance is deficient where it is the result of oversight rather than a reasoned, deliberate defense strategy); ***State v. Thiel***, 2003 WI 111, ¶37, 264 Wis. 2d 571, 594, 665 N.W.2d 305 (Wis. 2003) (counsel's failure to review all discovery in a felony cases constituted deficient performance as a matter of law.)

B. Trial counsel had no reasonable strategy for failing to object to Detective Hudson's shoeprint testimony on evidentiary grounds

In his post-conviction motion, Dengsavang argued that trial counsel rendered ineffective assistance by failing to object to Detective Hudson's testimony concerning the shoeprints on evidentiary grounds. (R. 47 at 1.) Her testimony on the contents of the delinquently disclosed shoeprint report was double-hearsay, inadmissible under WIS. STAT. §908.05. *See* ***State v. Kreuser***, 91 Wis.2d 242, 249, 280 N.W.2d 270, 273 (1979). Further, her testimony on her personal opinion of what the shoeprints showed was outside the scope of permissible lay witness testimony.

Double Hearsay

The expert shoeprint report itself was hearsay because it was an out-of-court statement offered for the truth of the matter asserted (i.e. that the prints connecting the crime scenes could have been made by Dengsavang). WIS. STAT. §908.01(3); *See* ***State v. Hilleshiem***, 172 Wis.2d 1, 19, 492 N.W.2d 381, 388-89 (Ct. App. 1992). The second layer of hearsay was added when Detective Hudson, who had no part in the creation of the report, testified as to its contents. (R. 68 at 22-24.)

Double hearsay is only permissible where each prong of the statement conforms with an exception to the hearsay rule. *See* WIS. STAT. §908.05; ***Kreuser***, 91 Wis.2d at 249. Importantly, the report itself is inadmissible under any hearsay exception because it was prepared for the purpose of prosecuting Dengsavang. ***State v. Williams***, 2002 WI 58, ¶38, 49, 253 Wis.2d 99, 121, 123, 644 N.W.2d 919 (Wis. 2002) (holding a state crime lab report was erroneously admitted under the business record exception because the report was prepared for the purpose of the defendant's prosecution.) However, trial counsel's failure to object meant that Detective Hudson's double hearsay testimony about the contents of the excluded shoeprint report were admitted, when a correctly argued objection would have kept her statements from the jury.

At the ***Machner*** hearing, when asked if he had a strategic reason for not objecting to Detective Hudson's testimony on the shoeprint report on double hearsay grounds, trial counsel answered, succinctly, "Obviously, that is hearsay. I didn't object." (R. 91 at 12:23-24.) Pressed, trial counsel explained he "probably should have objected to that whole line of questioning based on the court's ruling but [he] didn't." (*Id.* at 13:4-7.) By failing to object to "obvious hearsay" without adequate reason, trial counsel performed deficiently. *See* ***State v. Domke***, 2011 WI 95, ¶41, 337 Wis.2d 268, 291, 805 N.W.2d 364, 375 (Wis. 2011) (trial counsel performed deficiently by failing to object to hearsay testimony where he did not research whether there was an applicable hearsay exception, and had no strategic reason for allowing the testimony.)

The admission of the delinquently disclosed shoeprint report through double hearsay testimony by Detective Hudson resulted in a violation of Dengsavang's state and federal constitutional right to

confront the witnesses against him. *See* WIS. STAT. §908.02 (mandating hearsay is generally not admissible); ***Crawford v. Washington***, 541 U.S. 36, 68 (2004) (holding that admission of testimonial hearsay evidence necessarily implicates a defendant's Sixth Amendment confrontation rights.) In discussing the resulting prejudice of the violation of a defendant's right to confrontation through double hearsay, Wisconsin Supreme Court Chief Justice Shirley Abrahamson has explained:

> In cases… in which the prosecution relies on double or triple hearsay for which the defendants' cross-examination of the State's witnesses is meaningless, the plausibility of the State's case cannot be tested without allowing the defendant to call witnesses – either the hearsay declarant or an individual with personal knowledge of the hearsay statement.

State v. O'Brien, 2014 WI 54, ¶88, 354 Wis.2d 753, 850 N.W.2d 8, 27 (Wis. 2014) (Abrahamson, C.J., dissenting). Indeed, Dengsavang could not sufficiently cross-examine Detective Hudson concerning the shoeprint report because she had no part in its creation.

Although Dengsavang argued this issue in the post-conviction context, and elicited corresponding testimony at the ***Machner*** hearing, the Circuit Court's order following the ***Machner*** hearing did not address or rule on this argument, and it remains unresolved.

As a lay-witness, Detective Hudson was not qualified to testify concerning whether Dengsavang's shoes matched the prints taken near the crime scenes. (R. 47 at 9-14); *See* ***York v. State***, 45 Wis. 2d 550, 558-560, 173 N.W.2d 693, 698 (1970) (allowable fact witness opinion testimony is generally limited to descriptions of persons or things, but stops short of analysis.) Only expert witnesses can testify as to their opinions about matters that require specialized and technical knowledge. WIS. STAT. §907.02(3).

Analyzing shoeprints in a homicide case requires specialized expertise, as demonstrated by the fact that the State asked a shoeprint expert to analyze and report the findings. (R. 47 at Exh. D.) The State's expert, Anthony R. Spadafora, analyzed the shoeprints found at the scenes of the three crimes in comparison to the athletic shoes taken from the suspects. (*Id.*) He was tasked with generating the shoeprint report based on his status as an expert. The court acknowledged the prejudice that allowing this expert to testify would have caused, stating, "If they're going to go into the report in any way . . . I think [defendants] would have a right to their own expert," then ruling that "the expert that created [the shoeprint report]" could not testify as to the report's contents." (R. 61 at 12:7-11, 10:4-11.)

Federal courts have acknowledged that analyzing shoeprints in homicide cases requires specialized expertise. *See, e.g.* ***United States v. Smith***, 697 F.3d 625, 634 (7th Cir, 2012) (discussing an FBI examiner's testimony that "all shoes differ and that they have features which an average layperson, without training and experience, would not be able to distinguish adequately"); ***United States v. Ford***, 481 F.3d 215, 218 (3rd Cir. 2007) (allowing expert shoeprint testimony because it was "based on valid

specialized knowledge"); ***United States v. Mahone***, 453 F.3d 68, 71 (1st Cir. 2006) (reasoning expert witness was qualified to offer footwear impression testimony because "she is a trained forensic professional with a specialty in impressions.")

In contrast to the expert witnesses in ***Smith***, ***Ford,*** and ***Mahone,*** Detective Hudson revealed no specialized training in shoeprint analysis. Rather, she is a crime scene investigator. (R. 67 at 84:18.) Her job responsibilities are making sure that photographs are taken and that evidence is collected and preserved. (*Id*. at 85:4-10.) She had no training in analyzing impressions. (*Id*. at 84:21-25, 85:1-2.) Therefore, her opinion testimony as to the shoeprints was inadmissible as improper fact witness testimony. WIS. STAT. §907.02(1).

Additionally, allowing Detective Hudson to testify as to the contents of the shoeprint report rather than author Anthony Spadafora violated Dengsavang's Sixth Amendment right to cross-examine the witnesses against him. *See* ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305, 329 (2009). In ***Melendez-Diaz***, the United States Supreme Court explained that "the Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits," which is what Spadafora provided. ***Id***.

When asked whether he "consider[ed] objecting on the basis of [Detective Hudson's] lack of expertise," trial counsel explained, "I suppose that's another issue I could have objected on but I didn't." (R. 91 at 11:16-20.) When asked if he had a strategic basis for failing to object, trial counsel continued, "No, I did not think at the time to object on that ground." (*Id.* at 12:3-4.)

Although Dengsavang argued this issue in the post-conviction context, and elicited corresponding testimony at the ***Machner*** hearing, the Circuit Court's order following the ***Machner*** hearing did not address or make any finding on whether trial counsel had a reasonable strategy for failing to object to the testimony of Detective Hudson on evidentiary grounds of (1) double-hearsay as to the contents of the report and (2) impermissible lay witness testimony as to Hudson's personal lay witness analysis of the shoeprints.

C. Trial Counsel had no reasonable strategy for failing to point out exculpatory discrepancies in descriptions of the shooter

At the ***Machner*** hearing, trial counsel testified that his trial strategy was to show that "the officer had identified the wrong person. Mr. Dengsavang was in the wrong place at the wrong time and had nothing to do with this shooting." (R. 91 at 7:8-14.) Therefore, trial counsel's failure to call attention to exculpatory discrepancies in descriptions of the shooter was inconsistent with his trial strategy.

In response to the Circuit Court's ruling prohibiting undersigned counsel from soliciting testimony from Attorney D'Arruda concerning this failure, undersigned counsel submitted an affidavit in which she indicated that Attorney D'Arruda informed her that "in any way in which he failed to impeach A.P. regarding her description of the shooter, or failed to highlight discrepancies in her varying descriptions for the jury, he had no strategic basis for doing so, and that it would have been consistent with his trial strategy to do both." (R. 85 at ¶15.)

Undersigned counsel's subsequent offer of proof demonstrated that, had her questioning at the

Machner hearing not been limited, Dengsavang would have been able to make a record that Attorney D'Arruda had received and reviewed the dispatch recordings and intake report made upon Dengsavang's arrest. (R. 87 at 1.) Then, Dengsavang would have confirmed, on the record, that trial counsel had no reasonable strategy for the following:

(1) failing to point out to the jury that Mr. Dengsavang was not a black male, or 5'10",
(2) failing to bring to the jury's attention that Mr. Dengsavang, bundled up in four layers, could not be mistaken for thin, and
(3) failing to bring to the jury's attention that A.P.'s descriptions of the shooter at trial and at the time of the shooting did not match the clothes that Mr. Dengsavang was arrested in.

(*Id*.) As discussed *supra*, Attorney D'Arruda indicated to undersigned counsel, off the record, that he had no reasonable strategy for the three points listed above. (R. 85 at ¶15.)

There were multiple inconsistencies that trial counsel could have addressed in furtherance of his trial strategy. To start, a contemporaneous description of the shooter described him as a "black male, five eight, or unknown race, all black clothing, hood up, five foot eight, thin." (R. 47 at Exh. B.) Yet:

- Dengsavang is not a black male (R. 47 at Exh. G);
- Dengsavang was not wearing all black clothing (R. 47 at Exh. H (at the time he was arrested, Dengsavang was wearing red and black Nike Air sneakers, blue jeans, and a black hooded sweatshirt under a black coat));
- Dengsavang is not 5'8" (R. 47 at Exh. G); and

- Dengsavang is not "thin," and would never be mistaken for thin is four layers of clothing and a down jacket. (R. 47 at Exh. G; Exh. H (at the time of his arrest, Dengsavang was wearing a white tank top, a brown shirt size 2XL, a black hooded sweatshirt, a black down coat, and blue jeans.))

Even though exposing these discrepancies would have been directly on point with trial counsel's "wrong guy" defense, *none* of these inconsistencies were brought to the attention of the jury.

Similarly, at trial, the victim officer described the physical appearance of the shooter as "wearing all black, and black pants, a black hooded sweatshirt." (R. 66 at 36:10-20.) Again, a reasonable defense attorney pursuing a "wrong guy" defense would have used this testimony to impeach the officer and/or expose to the jury that this was inconsistent with the clothes that Dengsavang was wearing when he was arrested minutes later. (*Id*; R. 47 at Exh. H.)

It is also worth noting that A.P. described the companion suspect who was at the same distance as wearing "a white or light-colored hooded sweatshirt, and it had some sort of dark or black-colored design throughout it," as this indicates she was able to observe a level of detail that decreases the chances of a misapprehension in appearance. (R. 66 at 36:15-20.) Further, even with this great level of detail, in none of the officers' descriptions of the shooter, contemporaneous to the shooting or at trial, was the shooter wearing a coat of any kind, as Dengsavang was when he was found hiding from the shots under a tree. (R. 47 at Exh. B; R. 66 at 36:10-20 (officer descriptions of the suspects); R. 47 at Exh. H (as to Dengsavang wearing a jacket at the time of his arrest).) Again, this exculpatory evidence fit squarely

with the "wrong guy" defense, but was never given to the jury for consideration.

Despite Dengsavang's having clearly articulated this basis for his ineffective assistance of counsel motion, the Circuit Court refused to allow questioning of trial counsel on this claim at the ***Machner*** hearing. (R. 91 at 17:1-15.) Similar, the Circuit Court did not even address this argument in its order denying Dengsavang post-conviction relief. (*See generally* R. 86.) No reason was given, yet the argument has never been ruled on, at any court level.

Although we do not have the benefit of trial counsel's explanation of these failures, there is a clear record of his trial strategy: to prove to the jury that Dengsavang did not commit any of these crimes and was simply in the wrong place at the wrong time. (R. 91 at 7:8-14.) Indeed, in his closing argument, trial counsel argued "the wrong man got caught because he was in the wrong place at the wrong time." (R. 70 at 61:3-7.) Despite arguing that "nobody would take that witness stand – and I don't know how many witnesses we had, we had a lot – but nobody would point over and say that man there, Dengsavang, shot me or shot that officer," trial counsel failed to take the argument further by outlining the shooter descriptions that were given by the witnesses, which excluded Dengsavang as a suspect. (*Id*. at 58:16-24.) This would have strengthened Dengsavang's case and followed trial strategy, and there can be no strategic basis or reason for failing to do so.

D. The cumulative impact of these omissions prejudiced Dengsavang

To succeed on a claim of ineffective assistance, a defendant must show that trial counsel's deficient performance was prejudicial to the defense. The defendant is not required under ***Strickland*** to show

"that counsel's deficient conduct more likely than not altered the outcome of the case." ***Strickland***, 466 U.S. at 693. Rather, the question on review is "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." ***Id***. at 695.

In considering whether trial counsel's performance was deficient, the Circuit Court must consider the totality of the circumstances. ***Id***. at 680. The two prongs of the ***Strickland*** test are reviewed *de novo*. ***State v. Johnson***, 153 Wis.2d 121, 128, 449 N.W.2d 845 (1990). Finally, if this Court finds multiple deficiencies in defense counsel's performance, it need not rely on the prejudicial effect of a single deficiency if, taken together, the deficiencies establish cumulative prejudice. ***Thiel***, 264 Wis.2d 571.

Trial counsel's associate's testimony shows that, during the time surrounding Dengsavang's trial, many of trial counsel's choices were unreasonable. Not only was trial counsel failing to come into to the office for days at a time – even when he had hearings scheduled – but he was so troubled in his personal life that the firm "was not functioning properly." (R. 92 at 11:9-25.) Furthermore, Attorney Rieck characterized Robert D'Arruda as "checked out" at the time. (*Id*. at 11:18-21.) This generalized dysfunction had a prejudicial effect on the representation Dengsavang received.

Trial counsel acknowledged the prejudicial impact of opening the door to testimony on the contents of the excluded shoeprint report at the ***Machner*** hearing, when he testified, "If I had known about the court's order then I should have objected to everything." (R. 91 at 13:15-17.)

In addressing the prejudice prong of the *Strickland* test, the Circuit Court's post-***Machner*** order denying

Dengsavang post-conviction relief explained, "The jury heard ample evidence to enable them to conclude that the defendant was guilty beyond a reasonable doubt." (R. 86 at 9.) However, the court did not detail what any of this "ample evidence" was, and it is not apparent from the record. (*Id*.) The court did not consider the nature or strength of breadth of evidence submitted at trial, instead citing merely to its volume. (*Id*. (the court determined there was "ample evidence" to support Dengsavang's conviction solely because there was "a total of thirty seven witnesses . . . [and] over 300 exhibits."))

Not one eye-witness to any of the three crimes testified that Dengsavang was involved. Rather, each of the State's witnesses gave testimony that would indicate Dengsavang was *not* involved in the crimes. Notably, victim X.Z. testified that she was acquainted with Dengsavang and did not recognize him as one of the suspects either visually or vocally. (R. 64 at 23:16-19 (failure to identify Dengsavang visually); *Id*. at 22:20-23 (failure to identify Dengsavang vocally).) X.Z's husband, also a victim and eyewitness to the Happy Wok robbery, testified that the robbers spoke Spanish – a language Dengsavang does not speak. (R. 63 at 81: 2-4 (testimony that the robbers spoke Spanish); R. 47 at Ex. C: ¶6 (Dengsavang's averment that he does not speak Spanish).) Finally, A.P. described a suspect who was a different race, build, and as wearing different clothes than Dengsavang when he was arrested. (R. 47 at Exh. B, G, H; R. 66 at 36:10-20.) Moreover, DNA analysis *excluded* Dengsavang as the source of the DNA found on the gun that shot A.P. (R. 47 at Exh. A.)

The inculpatory evidence against Dengsavang consisted of:

(1) digital images of shoeprints in the snow that a lay witness testified "visually matched" Dengsavang's Nike Air sneakers (R. 68 at 16:17-22);

(2) testimony that one of the Normandy Village Apartment robbers was wearing red shoes, when Dengsavang was arrested, he was wearing red and black Nike Airs, (R. 64 at 53:3-5 (testimony that one of the robbers was wearing red shoes); R. 47 at Exh. H (as to the shoes Dengsavang was wearing at the time of arrest));

(3) testimony that Dengsavang was found near where the shooting occurred, hiding under cover of a tree as shots rang out (R. 63 at 41:11-16.); and

(4) Dengsavang's DNA on winter clothing lying next to him in the snow when he was seen under the tree (R. 70 at 46:4-13).

This circumstantial evidence, even *if* incriminating, was all presented alongside compelling exculpatory evidence. To say that there is *no reasonable probability* whatsoever that this precarious balance may have been disturbed by the hearsay testimony on the expert shoeprint analysis, a police officer's "visual matching" of Dengsavang's shoes to shoeprints, and exculpatory descriptions of the shooter is implausible. The shoeprint analyses (lay and expert) were the evidence that took Dengsavang from being a panicked passerby driven to cover by the sound of gunshots, to being guilty of homicide beyond any reasonable doubt. The exculpatory descriptions that were never explored for the jury could have, especially cumulatively with the exclusive of the shoeprint evidence, kept Dengsavang from an 85-year sentence.

"The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." ***Strickland***, 466 U.S. at 694. Even if the Circuit Court properly surmised that trial counsel was aware of the Circuit Court's order excluding the shoeprint report and had a strategy for all of his challenged actions, his own lack of certainty regarding the same demonstrates that the process of Dengsavang's trial was unfair, unreliable, and prejudicial.

II. The Circuit Court erred when it limited the scope of questioning at the *Machner* hearing, refusing to hear trial counsel testimony on legitimate and still-pending arguments alleging ineffective assistance

The Circuit Court "has no discretion and must hold an evidentiary hearing" if the Defendant alleges facts that, if true, would entitle him to relief. ***State v.***

Bentley, 201 Wis. 2d 303, 310, 548 N.W.2d 50, 53 (1996); *see* ***State v. Washington***, 176 Wis.2d 205, 215, 500 N.W.2d 331, 336 (Ct. App. 1993) (explaining that if the defendant had "alleged sufficient facts to support his claim that he was denied the effective assistance of counsel, we would have to remand for an evidentiary hearing on the issue.")

A defendant alleges sufficient facts to support a claim of ineffective assistance of counsel where the facts alleged answer the "five 'w's' and one 'h;' that is, who, what, when, where, why, and how." ***State v. Allen***, 2004 WI 106, ¶23, 274 Wis. 2d 568, 585, 682 N.W.2d 433 (Wis. 2004). For example, a defendant who makes an "assertion that trial counsel failed to adequately prepare for trial because counsel did not review all the police reports and one police report contained exculpatory information that counsel did not put into evidence" alleges a sufficient factual basis for defendant's assertion that he received ineffective assistance of counsel. ***Id***. at 584, *citing* ***State v. Saunders***, 196 Wis.2d 45, 51-52, 538 N.W.2d 546 (Wis. App. 1995). If a defendant fails to allege sufficient facts, the Circuit Court has the discretion to deny a post-conviction motion, without a hearing, based on any of the following factors:

> (1) the defendant fails to raise a question of fact;
> (2) the defendant presents only conclusory allegations; or
> (3) the record demonstrates conclusively that the defendant is not entitled to relief

Bentley, 201 Wis.2d at 309-10.

In pertinent part, Dengsavang alleged that trial counsel failed to adequately represent him at trial because counsel did not bring to the jury's attention exculpatory descriptions of the shooter. There is no

reasonable basis from which to surmise this failure was the result of reasoned trial strategy, because doing so would have directly supported counsel's trial strategy of demonstrating that "the officer had identified the wrong person." (R. 91 at 7:8-14.)

Dengsavang alleged sufficient facts to support his claim that he was denied the effective assistance of counsel. Therefore, evidence should have been taken on this issue, or the issue should have been denied based on one of the three factors enumerated above. ***Bentley***, 201 Wis.2d at 309-10. Despite Dengsavang's ineffectiveness arguments now having been considered three times – twice at the Circuit Court level and once in the Court of Appeals – no ruling has been issued on this appropriately argued claim, and testimony that would have been helpful to adjudicating it was refused for no particular reason.

In an order dated April 29, 2014, the Court of Appeals remanded the matter for a ***Machner*** hearing. The order instructed the court to hear testimony on "the questioning that opened the door to allowing the otherwise excluded evidence." (R. 74 at ¶17-18.) The Court of Appeals' order issued May 23, 2014, omitted this language. (R. 79 at 2.) Neither order concluded that Dengsavang was not entitled to relief on any of his claims of ineffectiveness. (*See generally*, R. 79 at 2.) However, based on the later omitted verbiage of the initial remand order, the Circuit Court only allowed testimony at the ***Machner*** hearing as to the specific issue of opening the door to the shoeprint report. (R. 91 at 17:1-15; R. 79 at 2.)

This limitation was in error. Dengsavang had also alleged sufficient facts to entitle him to a ***Machner*** hearing on his claim that trial counsel performed deficiently in failing to call attention to exculpatory descriptions of the shooter at trial. ***Bentley***, 201 Wis.

2d at 309-310; ***Washington***, 176 Wis.2d at 215. The order granting the ***Machner*** hearing did not reject this claim, nor did it determine that any of the three factors outlined in ***Bentley*** were present. Therefore, the Circuit Court should have allowed questioning on this matter.

Had Dengsavang been permitted to question trial counsel concerning this deficiency at the ***Machner*** hearing, it would have likely shown that trial counsel had no strategic reason for failing to call attention to the exculpatory discrepancies. At the ***Machner*** hearing, trial counsel testified that his trial strategy was to prove that "the officer had identified the wrong person. Mr. Dengsavang was in the wrong place at the wrong time and had nothing to do with this shooting." (R. 91 at 7:8-14.) Trial Counsel's failure to draw attention to police descriptions of the shooter that excluded Dengsavang as a possible subject was inconsistent with this trial strategy. Therefore, the prohibited questioning would likely have shown that trial counsel's failure was not the result of a strategic decision, but oversight. Additionally, undersigned counsel's affidavit and offer of proof, submitted after the adverse ruling, argued that trial counsel would have admitted had no strategic basis failing to highlight exculpatory descriptions of the shooter at trial, and that it would have been strategically consistent to have done so. (R. 85 at ¶15 (undersigned counsel's affidavit); R. 87 at 1 (offer of proof.)

Therefore, Dengsavang respectfully requests that this Court reverse his conviction and grant a new trial, or any other relief that this Court deems appropriate.

CONCLUSION

For the foregoing reasons, Michael Dengsavang

respectfully requests that this Court reverse his conviction and grant a new trial, or any other relief that this Court deems appropriate.

Dated this ___ day of September, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 10,739 words. Including the cover, tables, and certifications, the length is 11,733 words.

_____
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ELECTRONIC CERTIFICATION

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

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Kimberly L. Penix
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CERTIFICATION AS TO APPENDICES

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with §809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further 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 so reproduced to preserve confidentiality and with appropriate references to the record.

_____

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TABLE OF APPENDICES