STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 15-AP-2605-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

DAVID L. JOHNSON
A/K/A DAVID ALI SHABAZZ,

Defendant-Appellant.

ON APPEAL FROM JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HONORABLE DAVID L. BOROWSKI AND THE HONORABLE JOSEPH M. DONALD, PRESIDING

BRIEF OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

I. Was Shabazz entitled to an evidentiary hearing on his claims of ineffective assistance of counsel where his postconviction motion alleged in detail his trial counsel's failure to obtain and present exculpatory evidence to the jury and to present an adequate defense on the counts on which he was convicted, and where the trial court looked beyond the allegations contained within four corners of the motion and required Shabazz to prove his allegations without affording him an opportunity to do so?

The trial court answered no.

II. Were two DNA analysis surcharges, which were expressly imposed by the sentencing court with the stated purpose and effect of "punishment," unconstitutional under the *ex post facto* clauses of the United States and Wisconsin constitutions?

The trial court answered no, in part, vacating only one DNA analysis surcharge.

III. Was Shabazz entitled to resentencing following an evidentiary hearing to correct errors in the presentence investigation report (PSI) where his postconviction motion showed that the sentencing court relied on inaccurate information in imposing sentence?

The trial court answered no.

IV. Should the judgment of conviction and order denying postconviction relief be reversed and a new trial ordered pursuant to this Court's broad power of

discretionary reversal because the real controversy in this case has not been fully tried and because justice has been miscarried?

The trial court did not address this argument.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The central issues raised by this appeal involve application of established law to the facts of this case, and therefore, publication is not likely necessary. The issues raised in this appeal are likely to be adequately addressed in the briefs submitted by the parties to this action. Therefore, oral argument is not requested.

STATEMENT OF THE CASE

Following a four-day jury trial on charges of first-degree sexual assault, aggravated battery, false imprisonment, and strangulation/suffocation during which defense counsel called no witnesses, the jury acquitted Defendant-Appellant David Ali Shabazz[1] of sexual assault and strangulation/ suffocation after deliberating for approximately three hours. (R.109, App. 265 at 3:11, R.48; R.51). The jury convicted Shabazz of aggravated battery and false imprisonment. (R.49; R.50; R.60, App. 103).

[1] Defendant-Appellant's name was changed from David L. Johnson to David Ali Shabazz on or about December 11, 2003. *See In re Name Change of David Lee Johnson*, 2003-CV-7175 (Milwaukee County).

For all the reasons that follow, the trial court[2] erred when it denied Shabazz's postconviction motion for a new trial without a hearing based on the failure of his trial counsel to obtain and present exculpatory evidence and failing to present an adequate defense with respect to the charges of aggravated battery and false imprisonment. These failures prevented the jury from considering key evidence that Shabazz was not the source of the alleged victim's injuries and did not restrain the alleged victim, thereby depriving Shabazz of his constitutionally guaranteed right to the effective assistance of counsel.

The trial court further erred in declining to vacate both DNA analysis surcharges imposed on Shabazz in the judgment of conviction and again erred when it denied his request for resentencing following a hearing to address errors in the presentence investigation.

As shown in detail throughout, the real controversy in this case—that Shabazz did not restrain the alleged victim and that he was not the source of her injuries—has not been fully tried. In light of the failures by trial counsel described herein, it is highly probable that a different result would obtain upon retrial. For these additional reasons, this Court should exercise its broad power of discretionary reversal in the interest of justice.

[2] The Honorable David L. Borowski presided over the trial and entered the judgment of conviction. The Honorable Joseph M. Donald denied the postconviction motion.

A. Shabazz's Trial Resulted In His Acquittal On Two Counts And His Conviction On Two Counts.

The State charged Shabazz with four felonies in this case: (1) first-degree sexual assault (by use of a dangerous weapon), contrary to Wis. Stat. § 940.225(1)(b); (2) aggravated battery contrary to Wis. Stat. § 940.19(4); (3) false imprisonment contrary to Wis. Stat. § 940.30; and (4) strangulation and suffocation contrary to Wis. Stat. § 940.235(1). (R.2). Following lengthy pretrial proceedings, the case was tried to a jury beginning May 19, 2014. (R.103).

The focus of Shabazz's trial concerned allegations that arose from a meeting between Shabazz and K.M. (the alleged victim) on September 27, 2012. The State's case against Shabazz was based on testimony from K.M, K.M's husband, Dorothy Nolden (a neighbor of Shabazz), several officers, an emergency room nurse, as well as certain DNA and physical evidence. Although there were seven witnesses on Shabazz's amended defense witness list (R.41), trial counsel called no witnesses and rested immediately after the presentation of the State's case. (R.110, App. 273 at 43:11-13).

From the outset of the case, defense counsel's admonition to the jury was to "remember one thing and one thing only…[t]he truth lies in the evidence and not the explanations of the [alleged victim and her husband]." (R.104, App. 181 at 82:2-3).

1. Shabazz's trial highlights inconsistent testimony of the alleged victim and other witnesses.

The State called K.M. to testify in support of its case in chief. (R.105, App. 183). K.M. testified that she first met Shabazz while she was walking from her home to a CVS pharmacy. (R. 105, App. 184 at 7:15-19). According to her testimony, Shabazz was in a car with his dog. (*Id.*, App. 185 at 8:11-15). K.M. testified that Shabazz indicated that he was moving, and that she agreed to go to his apartment to help him pack. (*Id*., App. 187 at 10:4-6). K.M. claimed that she visited Shabazz's apartment only twice—once on Tuesday, September 25, 2012 and again on Thursday, September 27, 2012. (*Id*., App. 207 at 55:5-9, App. 209 at 60:4-12).

K.M's husband, however, contradicted her testimony, stating that K.M. had gone to Shabazz's apartment *three* times, not two. (R.106, App. 222-23 at 14:8-15:9). Officer Deborah Kranz, who interviewed K.M. at the hospital, also testified that K.M. claimed that she went to Shabazz's apartment the day before the alleged assault (for a total of three, not two, visits). (R.108, App. 254-55 at 34:9-35:7).

K.M. testified that on Thursday, September 27, 2012, she went to Shabazz's apartment at approximately 8:00 p.m., arriving between 8:30 and 8:45 p.m. (R.105, App. 209 at 60:15-16; and R.82, App. 177 at 15:12-14). According to K.M., after arriving at Shabazz's apartment, she cooked him dinner. (R.105, App. 188-89 at 14:15-15:17). K.M. also admitted that she was under the influence of alcohol and crack cocaine at the time and that she shared drugs with Shabazz. (*Id*., App. 190 at 23:21-23; App. 210 at 66:14-16).

According to K.M., approximately 45 minutes after she arrived at Shabazz's apartment (roughly 9:15 – 9:30 p.m.), (R.82, App. 177 at 15:5-7), Shabazz "snapped," his mood allegedly changed, and he purportedly dragged her into the bedroom by her hair, with her feet dragging on the floor. (R.105, App. 192 at 25:1-19; App. 193 at 26:24-27:2; App. 213 at 69:5-7). K.M. claimed that once they were in his bedroom, Shabazz hit her repeatedly with the back of his hand, choked her with his hands and a belt, and threatened to kill her. (*Id*., App. 194 at 27:7-24; App. 196 at 29:6-8).

At the preliminary hearing, K.M. had initially testified that Shabazz sexually assaulted her by forcing her to perform mouth-to-penis sexual intercourse, but conceded that Shabazz was not able to perform penis-to-vagina intercourse. (R.82, App. 173 at 11:10-17; App. 175 at 13:3-8). At trial, however, K.M. changed her testimony to claim that Shabazz *did* "force his penis into [her] vagina," but was not able to perform anal sex. (R.105, App. 197 at 32:3-10). In yet another inconsistency, K.M. had previously claimed to law enforcement that she had been anally penetrated. (R.106, App. 235 at 62:5-14; R.108, App. 259 at 39:22-24).

K.M. also testified inconsistently regarding Shabazz's purported use of a belt. For example, she first testified that Shabazz *choked* her with a belt while she was in bed with him in the bedroom, (R.105, App. 197 at 32:15-18), but later claimed that Shabazz only used the belt while she was in a kneeling position attempting to perform oral sex, and *not* on the bed. (*Id*., App. 214 at 76:11-15).

The State also relied on the testimony of Dorothy Nolden, a neighbor of Shabazz, who claimed to hear multiple screams from approximately 1:30 a.m. to 2:00 a.m. in the

early morning hours of September 28, 2012. (R.106, App. 225-27 at 22:23-24:3), although she conceded she initially thought the scream was a cat. (*Id*., App. 226 at 23:5-6). Officer Waldenmeyer, who first interviewed Ms. Nolden, testified that Ms. Nolden initially reported that she heard only a *single* scream (not multiple screams), and that she thought the scream had *not* come from Shabazz's apartment. (*Id.*, App. 231-32 at 48:24-49:2; App. 233-34 at 56:22-57:5).

Officer Kranz testified that K.M. had admitted that she had gone to Shabazz's apartment the day before the alleged assault because K.M. had received a phone call from a person by the name of "John" whom she had known for several years and saw at various places such as Wal-Mart and other stores. (R.108, App. 254-55 at 34:9-35:7). According to Officer Kranz's testimony, K.M. claimed that John needed to call Shabazz about going to his apartment. (*Id*.). At trial, K.M. denied making those statements, (R.105, App. 208 at 59:12-17), and no information was obtained to confirm John's identity. (R.108, App. 255 at 35:8-14).

Following the alleged assault, K.M. claimed that she had passed out from the belt, and when she woke up, she grabbed a shirt, went to look at herself in the mirror, and left through the front door. (R.105, App. 201-03 at 36:7-38:6). K.M. claimed that she ran through a cemetery to get to her house, arriving home between 3:30 a.m. and 4:00 a.m. on September 28, 2012. (*Id*., App. 203 at 38:8-16; R.106, App. 217 at 6:16-23). Rather than calling the police, K.M.'s husband got in his car with K.M. and armed himself with a crowbar. (R.106, App. 218 at 7:10-21; App. 221 at 13:7-12). K.M. showed her husband the way back to Shabazz's apartment, and the two returned to the parking lot of Shabazz's apartment complex. (*Id*.) After K.M. pointed out Shabazz's car, K.M's husband "used a crowbar and smashed

[Shabazz's] car back window." (*Id*., App. 219-20 at 8:8-9:7.) K.M.'s husband claimed that he damaged Shabazz's car and broke the car's window because he was "worried" about his wife. (*Id*., App. 219 at 8:8-12).

2. Physical evidence and other trial testimony undermines the alleged victim's claims.

DNA evidence, physical evidence, and other witness testimony also significantly undermined K.M's claims. First, the semen found in K.M.'s underwear was that of her husband, not of Shabazz. (R.107, App. 244-45 at 53:18-54:20). Second—and notwithstanding K.M.'s claims of a brutal sexual assault—there was no DNA evidence of Shabazz in or around K.M's mouth, vagina, or anus. (*Id*., App. 240-44 at 49:16-53:4). Third, Officer Kranz testified that K.M. had told her that Shabazz purportedly *pushed* her in the back towards the bedroom, rather than *dragged* her into the bedroom by her hair as K.M. testified at trial. (R.108, App. 257 at 37:17-25).

Officer Kranz also stated that she expected more marks on K.M. had she been strangled as she testified. (*Id*., App. 258-59 at 38:11-39:13). Further, Geve Meyer, the emergency room nurse who examined K.M., corroborated that she could not make a medical determination that the so-called *petechiae* (*i.e.*, small red dots and discoloration around the eyes) resulted from strangulation, rather than crying or rubbing with tissue. (*Id*., App. 260-61 at 67:20-68:23).

With respect to the charge of aggravated battery, the State introduced photographs of injuries sustained by K.M., which injuries were described by the alleged victim and other witnesses. (R.105, App. 204-06 at 46:22-48:21; R.107, App. 246-49 at 59:15-62:25). Although the DNA laboratory

analyst stated that K.M. was the "source of the foreign DNA on the left palm swabs" taken from Shabazz, (R.107, App. 238-39 at 39:17-40:7), no blood or biological evidence was found in the apartment. (R.110, App. 268 at 24:19-23; App. 269 at 34:16-35:6). Nor were there injuries documented on Shabazz suggestive that he had repeatedly struck K.M., as she had claimed. (*Id.*, App. 282-83 at 89:24-90:6).

With respect to the charge of false imprisonment, the State relied essentially on this same evidence, including an officer's testimony that Shabazz's bedroom was "in a disarray" and not "very tidy." (R.108, App. 262 at 90:18-22). To argue that Shabazz confined K.M. without consent, the State again relied on testimony from Dorothy Nolden, who testified she heard multiple screams—though her testimony was contradicted by her previous report of a single scream she claimed did not come from Shabazz's apartment. (R.110, App. 277 at 77:18-24; R.106, App. 231-32 at 48:24-49:2; App. 233-34 at 56:22-57:5).

B. Trial Counsel Rests Without Calling Any Witnesses Or Presenting A Defense Case.

Defense counsel rested immediately after the State concluded its case, and trial counsel did not call a single witness—even though seven witnesses appeared on the amended defense witness list. (R.43, App. 113; R.110, App. 273 at 43:11-13). As alleged in Shabazz's postconviction motion, trial counsel did not obtain Shabazz's agreement to rest the case at that time. (R.70, App. 120).

During closing arguments, defense counsel argued that the encounter between Shabazz and K.M. was a "drug date." (R.110, App. 279-80 at 83:24-84:1), arguing once again that it was "the physical evidence and not the explanation of

[K.M.]" that showed what truly happened. (*Id*., App. 278 at 82:15-16). Trial counsel specifically mentioned and argued against the counts relating to sexual assault and strangulation. (*Id.*, App. 281 at 87:4-88:12). Indeed, in closing arguments to the jury, trial counsel summarized: "[s]o when you start adding these things up, do you really have this strangulation and this supposed rape when you don't have DNA evidence to support [K.M.'s] statement…." (*Id*., App. 283 at 89:20-23) (emphasis added).

Defense counsel did not, however, reference the counts for aggravated battery and false imprisonment during closing arguments. Although trial counsel mentioned the lack of evidence showing injury to Shabazz's hands, (*id*., App. 283-84 at 89:23-90:6; App. 285 at 93:8-11), no substantive mention was made during closing of the elements required to sustain a charge of aggravated battery or false imprisonment, even though the State clearly had referenced those very counts and elements. (*Id*., App. 274-77 at 74:24-77:24). The only such comment by defense counsel was a passing reference that the State had not proven that Shabazz "hung, confined or strangled the alleged victim." (*Id*., App. 286-87 at 94:24-95:5).

The jury unanimously rejected the State's theory of first-degree sexual assault and strangulation and suffocation, and acquitted Shabazz of those charges. (R.48; R.51). The jury convicted Shabazz on the counts of aggravated battery and false imprisonment. (R.49; R.50).

C. Important Exculpatory Evidence Is Not Obtained Or Presented To The Jury During The Trial.

Notwithstanding trial counsel's central theme to the jury that they were to remember only one thing only—that "[t]he truth lies in the evidence and not the explanations of the [alleged victim and her husband]," (R.104, App. 181 at 82:2-3), key evidence that would have undermined the State's case regarding aggravated battery and false imprisonment was neither obtained nor presented to the jury.

During the preparation of his case for trial, Shabazz shared with trial counsel[3] his own theory of what happened on the night of September 27, 2012. In Shabazz's view, John—whose existence K.M. acknowledged to Officer Kranz, but later denied at trial—was a friend of the victim and her husband. In Shabazz's view, John was involved in a plan to steal belongings from Shabazz. Shabazz also advised his trial counsel that K.M. had left his apartment much earlier in the evening of September 27th than she claimed at trial, and that her friend John may have picked up the alleged victim from his apartment shortly after 9:53 p.m. on September 27th.

In Shabazz's view, therefore, K.M.'s injuries would have been sustained *after* she left Shabazz's apartment, not as part of any interaction with Shabazz. And, according to Shabazz, K.M.'s and her husband's return to Shabazz's apartment after 4:00 a.m. on September 28th to break the

[3] Shabazz was represented at trial by counsel appointed by the State Public Defender. There were five attorneys who represented Shabazz at different times during trial proceedings. Shabazz's claims of ineffective assistance of counsel related only to trial counsel, Attorney Robert Webb and predecessor counsel, Richard Poulson.

window of his car was in furtherance of a plan to steal valuables from Shabazz, not as revenge for an alleged assault.

In order to support his view of the case, Shabazz provided information to trial counsel and predecessor counsel regarding certain cellular telephone communications that took place during or near the time of the alleged assault. (R.70, App. 121-23). Shabazz even provided a detailed, written outline of the times of those calls to his trial counsel (R.76, Ex. B, App. 170). Based on Shabazz's recollection and his own cellular telephone, he advised his trial attorneys that the following telephone calls had taken place:

> **September 27 – 9:31 p.m.** – Jesse McSwain, friend and power of attorney of Shabazz, telephoned Shabazz;
>
> **September 27 – 9:53 p.m.** – K.M.'s friend, John, called Shabazz's telephone;
>
> **September 27 – 11:39 p.m.** – Carolyn Johnson (Shabazz's former wife) telephoned Shabazz and spoke with him for several minutes. Carolyn Johnson heard no other voices or sounds in the background (other than Shabazz's voice on the telephone), nor did she hear any noises or sounds of a struggle, nor was she aware of the presence of anyone other than Shabazz in Shabazz's apartment. (R.76, Ex. A, App. 167-68 at ¶¶ 4-9);
>
> **September 28 – 4:21 a.m**. – A call was placed to Shabazz's telephone from the home telephone of K.M. and her husband;

> **September 28 – 4:26 a.m.** – A call was placed to Shabazz's telephone from the home telephone of K.M. and her husband;
>
> **September 28 – 4:27 a.m.** – K.M. called Shabazz's telephone from K.M.'s telephone.

(*See generally* R.76, Ex. B, App. 170; R.70, App. 121-23).

Additionally, Shabazz advised his trial counsel of two calls from K.M. to Shabazz on Wednesday, September 26, 2012 at 7:38 p.m. and 11:58 p.m. Shabazz also advised his counsel of calls from K.M. to his phone at 2:32 a.m. and 11:42 a.m. in the morning of Thursday, September 27, 2012. (R.76, Ex. B, App. 170). Yet, these records were not obtained by trial counsel or predecessor counsel, nor was this evidence ever presented to the jury.

Furthermore, although Mr. McSwain, Ms. Johnson, and representatives from Samsung and U.S. Cellular had been originally included on the defense witness list, (R.28, App. 112), trial counsel removed those witnesses (with the exception of Mr. McSwain) from the amended witness list. (R.43, App. 113). No witnesses were called at trial, and no defense case was presented. (R.110, App. 273 at 43:11-13).

D. The Sentencing Court Imposes The Maximum Sentence And Expressly Orders The Defendant To Pay Two DNA Surcharges As "Punishment."

Following Shabazz's conviction, the sentencing court ordered a presentence investigation (PSI). (R.52). During the sentencing hearing, defense counsel objected to the PSI, briefly noted several inaccuracies on the record, and requested a hearing in order to address those items more fully. (R.113, App. 290-91 at 3:23-4:13). The sentencing court declined to grant a hearing to review the inaccuracies in the PSI, although it did permit counsel to note various issues briefly on the record. (*Id*., App. 291-93 at 4:14-6:20).

The sentencing court imposed the maximum sentence of six years (with three years confinement and three years extended supervision) for aggravated battery and for false imprisonment, consecutive to each other and any other sentence. (*Id*., App. 296 at 37:13-23). The sentencing court also ordered Shabazz to pay two mandatory DNA surcharges of $250.00, for a total of $500.00. (*Id*., App. 298 at 39:15-18). The sentencing court expressly held that, although the surcharge was mandatory, "it's also in this case *punishment*…." (*Id*., App. 298 at 39:16-17) (emphasis added).

E. Shabazz Brings A Postconviction Motion For A New Trial Which The Court Denies Without A Hearing.

On September 11, 2015, Shabazz filed a timely postconviction motion for a new trial under Wis. Stat. § 809.30. (R.70, App. 114). In his postconviction motion, Shabazz alleged that actions of his trial counsel in failing to obtain and present the exculpatory evidence detailed above

(*see, supra*, at C) and failing to present an adequate defense with respect to the charges of aggravated battery and false imprisonment deprived him of his constitutionally guaranteed right to the effective assistance of counsel. Accordingly, Shabazz requested an evidentiary hearing under *State v. Machner*, 92 Wis. 2d 797, 803-04, 285 N.W.2d 905 (Ct. App. 1979) (R.70, App. 133). In the alternative, Shabazz argued that both DNA analysis surcharges imposed in the judgment of conviction should be vacated as unconstitutional and that he should be entitled to resentencing following a hearing to address errors in the PSI. (*Id*.)

Following briefing of the motion (R.70, App. 114; R.74, App. 137; R.75, App. 155), the postconviction court denied Shabazz's motion without a hearing. The trial court concluded that, "[a]lthough [Shabazz's] theories are interesting, they are undeveloped and completely unsupported by anything other than the defendant's self-serving statements and rank speculation." (R.77, App. 108). The trial court further concluded that Shabazz had "submitted nothing other than his own prepared list of phone calls to factually support his arguments." (*Id*.). The trial court further criticized Shabazz for failing to "provide[] any objective documentation" in support of his allegations. (R. 77, App. at 109).

With respect to Shabazz's arguments about resentencing, the postconviction court also concluded that it was "satisfied that [the sentencing court] relied primarily on the defendant's extensive record with respect to *prior convictions – 25 of them* – in determining that the defendant required substantial punishment and prison time." (R.77, App. 111) (emphasis in original). The trial court therefore denied Shabazz's request for resentencing.

The postconviction court vacated one, but not both, of the DNA analysis surcharges, relying on the Court of Appeals' decisions in *State v. Radaj*, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758 and *State v. Scruggs*, 2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 146, *review granted* ___ WI ___, ___ Wis. 2d ___, ___ N.W.2d ___, 2016 Wisc. LEXIS 117 (Mar. 7, 2016). (R.77, App. 111)

This appeal followed. (R.78).

ARGUMENT

I. The Circuit Court Erred In Denying Shabazz's Postconviction Motion Without A Hearing Because Shabazz Alleged Sufficient Material Facts Entitling Him To Relief On His Claim Of Ineffective Assistance Of Counsel.

A. Standard Of Review

Whether a defendant's postconviction motion alleges sufficient facts to entitle him to a hearing for the relief requested presents a mixed standard of review. *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433. Whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief is a question of law this Court reviews *de novo*. *Id*. *See also State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). Under *de novo* review, the decision of the circuit court is entitled to no deference. *State v. Vanmanivong*, 2003 WI 41, ¶ 17, 261 Wis. 2d 202, 661 N.W.2d 76.

If the postconviction motion on its face does not allege sufficient facts, "the circuit court has the discretion to grant or deny a hearing." *Allen*, 2004 WI 106 at ¶ 9. Such a decision

is reviewed under the "erroneous exercise of discretion standard." *Id.*

B. The Circuit Court Misapplied The Standard In Allen/Bentley By Looking Outside The Four Corners Of The Postconviction Motion And Requiring Shabazz To Prove His Allegations Without Affording Him An Evidentiary Hearing To Do So.

Under the Supreme Court's *Allen/Bentley* standard, a trial court considering a defendant's postconviction motion must determine whether "the movant states sufficient material fact that, if true, would entitle the defendant to relief." *Allen*, 2004 WI 106 at ¶ 14. To make that determination, the postconviction court looks "within the *four corners of the document itself*" to determine whether sufficient factual allegations have been made. *Id*. at ¶ 23 (emphasis added).

In order to satisfy this standard, the Supreme Court recommends that postconviction motions allege "the five 'w's and one 'h;'' that is, who, what, where, when, why and how." *Allen*, 2004 WI 106 at ¶ 23 (internal punctuation omitted). While these allegations cannot be conclusory, *see id.,* at ¶ 9, a motion that alleges the five 'w's and one 'h' "within the four corners of the document itself…will necessarily include sufficient material facts for reviewing courts to meaningfully assess a defendant's claim." *Id*., at ¶ 23. The postconviction court must make this determination based on the allegations in "the motion *on its face*…" *Bentley*, 201 Wis. 2d at 310 (emphasis added). *See also Allen*, 2004 WI 106 at ¶ 9 (examining "the motion *on its face*") (emphasis added).

Stated differently, under the *Allen/Bentley* test, the postconviction court does not first determine whether a defendant has already *proven* the allegations in the

postconviction motion before determining whether to grant an evidentiary hearing. Rather, *Allen/Bentley* governs whether a postconviction motion has been adequately *pleaded*, not whether it has been adequately proven. It is for this very reason that the Supreme Court requires the circuit court to assume all allegations in the motion to be factually true. *Id*. at ¶ 12 (postconviction court may deny a hearing only if "facts *alleged* in the motion, *assuming them to be true*, do not entitle the movant to relief) (emphases added).

When sufficient facts are alleged, "the circuit court has no discretion and *must* hold an evidentiary hearing." *Bentley*, 201 Wis. 2d at 310. *See also Allen,* 2004 WI 106 at ¶ 9. Even "[i]f the facts in the motion are assumed to be true, yet seem to be questionable in their believability, the circuit court must hold a hearing." *Allen*, 2004 WI 106 ¶ 12 n.6, *citing State v. Leitner*, 2001 WI App 172, ¶ 34, 247 Wis. 2d 195, 633 N.W.2d 207 (noting that where credibility is an issue, such issues are best resolved by live testimony).

Measured against this standard, the postconviction court's error is plain. The circuit court did not assume Shabazz's allegations to be true—as it was required to do under *Allen/Bentley*. To the contrary, the lower court assumed the allegations *not* to be true because Shabazz presented (in its view) insufficient proof "to factually support his arguments." (R.77, App. 108). Similarly, the lower court faulted Shabazz for "not provid[ing] any objective documentation" to prove his allegations. (*Id*., App. 109).

This approach is contrary to the Supreme Court's requirement that a postconviction court examine only "the four corners of the document itself", *see Allen*, 2004 WI 106 at ¶ 23. *See also Bentley*, 201 Wis. 2d at 310 (examining what "the motion *on its face* alleges") (emphasis added).

Rather than *assuming* Shabazz's allegations to be true, as the postconviction court was required to do under *Allen/Bentley*, the lower court assumed them *not* to be true and required Shabazz to prove those allegations—while at the same time denying him the opportunity to do so in an evidentiary hearing.

When measured against the correct *Allen/Bentley* standard, it is clear that Shabazz was entitled to an evidentiary hearing.

C. Shabazz's Postconviction Motion Alleged Sufficient Facts To Require An Evidentiary Hearing.

The U.S. Constitution and the Wisconsin Constitution guarantee criminal defendants the right to effective assistance of counsel. *State v. Shata*, 2015 WI 74, ¶ 32, 364 Wis. 2d 63, 868 N.W.2d 93, *citing Strickland v. Washington*, 466 U.S. 668 (1984). *See also* U.S. Const. Amend VI, Wis. Const. Art. I § 7. A defendant establishes that he received ineffective assistance of counsel by showing that (1) his trial attorney performed deficiently, and (2) the deficient performance caused prejudice to his defense. *Shata*, 2015 WI 74 at ¶ 33.

Deficient performance is performance that falls "below an objective standard of reasonableness considering all the circumstances." *State v. Jenkins*, 2014 WI 59, ¶ 36, 355 Wis. 2d 180, 848 N.W.2d 786. Deficient performance is prejudicial if there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. ¶ 37. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id*.

Trial counsel's failure to investigate pertinent facts can constitute ineffective assistance of counsel. *State v. Thiel*, 2003 WI 111, ¶ 50, 264 Wis. 2d 571, 665 N.W.2d 305. Similarly, trial counsel's failure to present exculpatory or mitigating evidence to a jury can render counsel's assistance ineffective. *Jenkins*, 2014 WI 59 (new trial should have been granted where defense counsel failed to present potentially exculpatory evidence that someone else committed murder); *Williams v. Taylor*, 529 U.S. 362 (2000) (failure to investigate and present mitigating evidence to the jury constituted ineffective assistance of counsel). Prejudice can be manifest in cases where witness credibility is a central issue "upon which a reasonable doubt turned." *Thiel*, 2003 WI 111, ¶ 79.

Although trial counsel may perform effectively in some aspects of a case, a failure to use available evidence to undermine the State's case may constitute ineffective assistance of counsel. *Thiel*, 2003 WI 111, ¶ 4 ("trial counsel often performed effectively," although "counsel's performance was deficient in several respects," and such deficiencies prejudiced the defense).

1. Shabazz's motion sufficiently alleged a claim of ineffective assistance of counsel based on trial counsel's failure to obtain relevant telephone records.

Shabazz's postconviction motion alleged in detail that important evidence in the form of telephone records from Shabazz, Mr. McSwain, Ms. Johnson, and K.M. was neither obtained nor presented to the jury. (R.70, App. 121-23, 125-27; R.75, App. 157-61). Shabazz alleged that he discussed this evidence with trial counsel, but trial counsel did not obtain or present this evidence at trial. (R.70, App. 125).

As Shabazz alleged in his motion, this evidence was highly relevant because it would help to establish a timeline that undermined K.M.'s claims regarding aggravated battery and false imprisonment. It would also support Shabazz's alternative theory that what happened at Shabazz's apartment was not an assault—as K.M. claimed—but rather part of a plan to steal from Shabazz. It would also have supported Shabazz's argument that K.M. left Shabazz's apartment much earlier than she claimed at trial, and that someone else was the source of her injuries.

Shabazz alleged in his postconviction motion that he provided trial counsel an outline of telephone calls placed and received during the period of Wednesday, September 26, 2012 through Friday, September 28, 2012. (R.70, App. 122). Six of these telephone calls were placed to Shabazz's telephone during the critical timeline of the events of September 27-28, 2012 (between 9:00 p.m. and 4:30 a.m.) that the jury was asked to consider in this case. Shabazz clearly alleged in his postconviction motion (R.70, App. 125-29) that the failure to obtain and use these records not only constituted deficient performance, but it also prejudiced Shabazz's case in several important respects.

First, evidence of a call between K.M.'s friend, John (whose existence K.M. acknowledged to Officer Kranz, but later denied on the stand at trial), and Shabazz's telephone would have not only established the identity of this individual, but would have further undermined K.M's credibility to the jury by contradicting her denials of his existence at trial. It would also support Shabazz's own theory that John was part of a plan to steal from Shabazz, and that John had picked up K.M. from Shabazz's apartment before she sustained her injuries.

Second, evidence that telephone calls at 9:31 p.m., 9:53 p.m., and 11:39 p.m. were placed to Shabazz would have undermined claims by K.M. that she was assaulted and/or confined against her will by Shabazz. Testimony from Mr. McSwain and/or Ms. Johnson who placed those calls to Shabazz could have established (1) whether, and how long they spoke with Shabazz, (2) whether they were aware of the presence of K.M. on the premises, (3) whether they were aware that a struggle was going on during or in the background of the call, and (4) the demeanor of Shabazz. Indeed, as alleged by Shabazz in his postconviction motion, testimony by Mr. McSwain or Ms. Johnson that they were unaware that anyone else was in Shabazz's apartment as of 9:31 p.m. or 11:39 p.m. would have supported the defense theory that K.M. left Shabazz's apartment much earlier than the 3:30 – 4:00 a.m. time frame she claimed at trial. (R.105, App. 203 at 38:8-16). If the jury believed that testimony, it would have cast substantial doubt over K.M.'s testimony regarding the events of September 27-28, 2012. Indeed, Shabazz alleged that Ms. Johnson would give precisely such testimony at the evidentiary hearing to which Shabazz was entitled. (R.76, Ex. A, App. 167-68).

Third, evidence that multiple telephone calls were placed to Shabazz from K.M.'s telephone between 4:21 a.m. and 4:27 a.m.—around the time K.M. and her husband returned to Shabazz's apartment to smash the window of Shabazz's car and just before law enforcement arrived on the scene—would have given defense counsel further ability to undermine K.M.'s version of the events by underscoring defense counsel's theme that the testimony of K.M. and her husband should not be believed—testimony on which the State relied extensively at trial. *See, e.g., State v. White*,

2004 WI App 78, ¶¶ 20-21, 271 Wis. 2d 742, 680 N.W.2d 362, *rev. denied*, 2004 WI 114 (trial counsel's performance was deficient for failing to present evidence that "went to the core of [the] defense"). Such evidence would be used to question the likelihood that K.M.—who claimed she had just been assaulted by Shabazz—would call him on the telephone not once, but three times, at or around the time they returned to his apartment to break the window of his car.

Finally, evidence that K.M. placed calls to Shabazz on Wednesday, September 26th would have further undermined her testimony at trial that she did not go to his apartment on that date.

These allegations are all contained within the four corners of Shabazz's postconviction motion. They are concrete and specific and answer the key questions of "who, what, where, when, why and how" the Supreme Court requires be alleged. *See Allen*, 2004 WI 106 at ¶ 23. Contrary to the lower court's conclusion, these allegations are sufficiently specific to require a *Machner* hearing. Shabazz's motion succinctly alleges (R.70, App. 121-23, 125-27) the "who" (*e.g.*, the individuals who placed and received the calls), "what" (*e.g.*, the fact that calls were placed and what they show), "where" (*e.g.*, the numbers involved and where the parties were—or were not), "when" (*e.g.*, the times the calls were placed), "why" (*e.g.*, why the calls are relevant to the defense), and "how" (*e.g.*, how that evidence—had it been presented—would have cast sufficient doubt on the State's case to undermine confidence in the outcome). *See Allen*, 2004 WI 106 at ¶ 23.

2. Shabazz's postconviction motion sufficiently alleged a claim of ineffective assistance of counsel based on the failure of trial counsel to present an adequate defense on counts of aggravated battery and false imprisonment.

Although trial counsel argued to the jury that evidence other than the testimony of K.M. and her husband would exonerate his client, the defense rested immediately after the State called its witnesses, and no defense witnesses were called whatsoever. (R.110, App. 273 at 43:11-13).

Failing to present a defense or to call witnesses may constitute deficient performance, particularly where those witnesses could bring in evidence to allow the defense to argue that the defendant did not commit crime in question. *Jenkins*, 2014 WI 59, ¶ 42. *See also State v. White*, 2004 WI App 78, ¶¶ 20-21, 271 Wis. 2d 742, 680 N.W.2d 362 (performance was deficient for failing to call witnesses who would bring in evidence that went to the core of the case); *Goodman v. Bertrand*, 467 F.3d 1022, 1030 (7th Cir. 2006) (deficient performance to fail to call witness who could corroborate defendant's account of facts).

In this case, a central defense theme was that there was no assault in Shabazz's apartment—a theory the jury accepted at least in part by acquitting Shabazz of two counts, including the most serious felony of sexual assault. Defense counsel argued at trial that what happened on the night in question was a "drug date." Shabazz's postconviction motion alleged that he discussed with his attorneys was that what happened on September 27th was part of an attempt to steal from him, and that K.M. left his apartment before sustaining any injuries. (R.70, App. at 128-29).

In addition to the evidence and witnesses discussed above that were not presented, trial counsel also failed to identify, locate and call John to the stand, even though he had inquired about his identity with Officer Kranz. (R.108, App. 254-55). As Shabazz alleged below, evidence from John would have been central to the defense case by not only establishing his identity, but providing clarity regarding what his relationship was to K.M. Furthermore, he could have testified as to why he placed a call to Shabazz at 9:53 p.m. on the evening of September 27, 2012—right at the very time K.M. claimed the assault was taking place.

Whether taken individually or cumulatively, the effect of these failures undermines "confidence in the outcome of the trial." *Thiel*, 2003 WI 111, ¶ 81. That is particularly so in this case where there was no blood or biological evidence found anywhere in Shabazz's apartment (R.110, App. 268 at 24:19-23; App. 269-70 at 34:16-35:6), no evidence of injury to Shabazz's hands consistent with a brutal assault (*Id.*, App. 283-84 at 89:24-90:7), and where K.M.'s testimony with respect to the alleged sexual assault and strangulation had already been shown to be inconsistent and rejected in large part by the jury.

As alleged in Shabazz's postconviction motion, had the above evidence been presented to the jury and a sufficient defense been made regarding aggravated battery and false imprisonment, there is at very least a "reasonable probability" that the outcome of the trial would have been different. *Jenkins*, 2014 WI 59, ¶ 66; *Thiel*, 2003 WI 111, ¶ 81.

Like the allegations relating to defense counsel's failure to obtain and present the telephone records, these

allegations were succinct, contained within the four corners of Shabazz's postconviction motion, and answer the key "who, what, where, when, why and how" required by the *Allen/Bentley* test. Shabazz's motion alleges the "who" (*e.g.*, the witnesses that should have been called to testify in defense—namely Mr. McSwain, Ms. Johnson, the cellular telephone company representatives, K.M.'s friend John), "what" (*e.g.*, that additional evidence the testimony would have shown the timeline that undermined the alleged victim's claims at trial), "where" (*e.g.*, where the witnesses and/or alleged victim were (or were not) at relevant times, and that the alleged victim was not restrained in Shabazz's apartment, nor was she in his apartment when she received her injuries), "when" (*e.g.*, when during the critical timeline on September 27, 2012 the alleged victim received her injuries, as well as when she was (or was not) present in Shabazz's apartment), "why" (*e.g.*, why this testimony is relevant to the defense—namely that it contradicts the victim's already inconsistent trial testimony regarding how she received her injuries), and "how" (*e.g.*, how that evidence—had it been presented—would undermine confidence in the outcome by refuting and calling into question the testimony of the victim and her husband on which the State heavily relied at trial). *See Allen*, 2004 WI 106 at ¶¶ 3, 23.

3. Shabazz's postconviction motion sufficiently alleged a claim of ineffective assistance of counsel based on predecessor counsel's failure to obtain telephone records.

In addition to the claims directed at trial counsel, Shabazz's postconviction motion further alleged that the failure of predecessor counsel to obtain the relevant telephone records discussed above constituted ineffective assistance of counsel. Shabazz's motion reincorporated the allegations

made regarding the significance of this evidence and why it should have been obtained and presented. (R.70, App. 129-30). Shabazz alleged that predecessor counsel acknowledged the importance of this evidence by including representatives of two telephone companies in the original defense witness list. (R.28, App. 122; R.70, App. 130).

Shabazz alleged that some records from U.S. Cellular would normally be retained for one year (through approximately September 2013). (R.70, App. 129; R.70, Ex. A, App. 136). Because Shabazz alleged that predecessor counsel represented him during this time, Shabazz alleged a claim of ineffective assistance of counsel based on the same reasons and allegations as the claim against trial counsel.

Because the allegations relating to trial counsel were sufficient to entitle Shabazz at very least to an evidentiary hearing, so too were the allegations relating to predecessor counsel. *See, supra,* at Part I(C)(1).

D. This Court Should Reverse The Circuit Court Even Under The Abuse Of Discretion Standard Because The Lower Court Failed To Apply The Correct Legal Test.

Even if the allegations in Shabazz's postconviction were insufficient to require an evidentiary hearing (which they were not), the circuit court nevertheless retained discretion to grant or deny a hearing. *Allen*, 2004 WI 106 at ¶ 9. Even under this more deferential standard, this Court should reverse because the circuit court abused its discretion in denying the hearing by applying an incorrect legal standard.

It is well-settled that a "circuit court's exercise of discretion is not the equivalent of unfettered decision making." *State v. Daniels*, 160 Wis. 2d 85, 100, 465 N.W.2d 633 (1991). Therefore, "[i]f the circuit court applied the wrong legal standard, that is, if the circuit court based its decision on an error of law, [the reviewing court] will reverse the circuit court's decision as an abuse of discretion." *Id*.

As shown above at Part I(B), the circuit court denied Shabazz's evidentiary hearing based on its misapplication of the *Allen/Bentley* test by looking outside the four corners of the document and requiring Shabazz to prove allegations without also giving him a chance to do so at the evidentiary hearing he was prevented from having. The lower court's decision is contrary to the controlling standard, and therefore even if the grant of a hearing were discretionary in this case,[4] the circuit court abused its discretion by failing to apply the correct test. This court should therefore reverse. *Daniels*, 160 Wis. 2d at 100.

II. Both DNA Analysis Surcharges Imposed By The Circuit Court Constitute An Unconstitutional Ex Post Facto Law As Applied To Shabazz.

A. Standard Of Review

The question of "[w]hether a statute is punitive for ex post facto purposes presents a question of law that [the Court of Appeals] review[s] de novo." *State v. Radaj*, 2015 WI App. 50, ¶ 12, 363 Wis. 2d 633, 866 N.W.2d 758., *citing City of South Milwaukee v. Kester*, 2013 WI App 50, ¶ 21, 347

[4] As explained above, Shabazz contends that the circuit court had no discretion and was required to hold a hearing because his postconviction motion alleged sufficient facts under the *Allen/Bentley* standard.

Wis. 2d 334, 830 N.W.2d 710, *rev. denied* 2013 WI 87, 350 Wis. 2d 729, 737 N.W.2d 636.

B. The Trial Court Erred By Failing To Vacate Both DNA Surcharges.

Article I § 10 of the U.S. Constitution and Article I § 12 of the Wisconsin Constitution prohibit the retroactive imposition of a law that "inflicts a greater punishment than the law annexed to the crime at the time it was committed." *State v. Thiel*, 188 Wis. 2d 695, 701, 524 N.W.2d 641 (1994) (internal citation omitted). *See also State v. Radaj*, 2015 WI App. 50, ¶ 12, 363 Wis. 2d 633, 866 N.W.2d 758. Wisconsin's mandatory DNA analysis surcharge statute constitutes an unconstitutional *ex post facto* law as applied Shabazz. *Radaj*, 2015 WI App 50. *See also State v. Scruggs*, 2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 146, *review granted* ___ WI ___, ___ Wis. 2d ___, ___ N.W.2d ___ (Mar. 7, 2016); *State v. Elward*, 2015 WI App 51, 363 Wis. 2d 628, 866 N.W.2d 756

Under the law as it existed on September 27, 2012 (the date of the alleged offenses in this case), a person convicted of a felony was subject to a discretionary DNA surcharge in the amount of $250, unless the underlying conviction was for a specified sex crime, in which case the surcharge was mandatory. *Radaj*, 2015 WI App 50, ¶ 8. *See also* Wis. Stat. § 973.046(1g) and (1r) (2011-12). The surcharge amount, if imposed, was $250, "regardless of the number or nature of the convictions." *Radaj*, 2015 WI App 50 at ¶ 8.

On July 1, 2013, the Wisconsin legislature published 2013 Wis. Act 20, which required imposition of a DNA surcharge on all individuals convicted of crimes in Wisconsin. See 2013 Wis. Act 20, § 2355 (codified at Wis.

Stat. § 973.046(1r)). The mandatory surcharge is now $250 for each felony conviction. *Id.* Imposition of this surcharge became mandatory six months after the date of publication—or January 1, 2014. 2013 Wis. Act 20, § 9426(1)(am). The new DNA surcharge statute "is more onerous and applies to all defendants sentenced on or after the effective date of the new statute….even if they…committed their crimes before that date." *Radaj*, 2015 WI App. 50 at ¶ 4. In *Radaj*, the Court of Appeals held that the new DNA surcharge statute had a punitive effect, particularly in light of its imposition of multiple surcharges per felony conviction. *Id*. at ¶ 36.

Radaj left unanswered whether a *single*, mandatory DNA analysis surcharge was also unconstitutional. In *Scruggs*, the Court of Appeals later rejected an *ex post facto* challenge to a single DNA surcharge based on the facts of that case.

In this case, the sentencing court imposed *two* DNA analysis surcharges. Wis. Stat. § 973.046(1r)(a). In light of *Radaj*, the State conceded (and the postconviction court agreed) that one DNA surcharge should be vacated (*i.e.,* the cumulative charge for Shabazz's conviction on count three). (R.77, App. 110-11). However, the postconviction court relied on *Scruggs* to conclude categorically that "the mandatory imposition of a single $250 DNA surcharge does not violate the *ex post facto* clauses of the United States and Wisconsin Constitutions…." (*Id.*, App. 110). The lower court misapplied *Scruggs*.

At issue in *Scruggs* was a defendant who had been convicted before the mandatory DNA surcharge statute went into effect. In rejecting the particular *ex post facto* challenge in that case, the *Scruggs* court applied a two-part "intent-

effects" test to determine whether the new DNA surcharge statute was unconstitutional. *Scruggs*, 2015 WI App 88 at ¶ 7. Under the first part of the inquiry, a court determines whether the legislature "expressly or impliedly indicated a preference that the statute in question be considered civil or criminal." *Id.* If "the legislature's intent was to punish, the law is considered punitive and the inquiry ends there." *Id*. If the legislature's intent was not to punish, a court proceeds to the next step to "determine whether the sanctions imposed by the law are so punitive either in purpose or effect so as to transform what was clearly intended as a civil remedy into a criminal penalty." *Id*.

In *Scruggs*, the Court of Appeals concluded that the legislature's intent in enacting Wis. Stat. § 973.04(1r)(a) was non-punitive. *Id*. at ¶¶ 17-18. In addressing the "effects" inquiry, the Court found that the defendant in that case had not carried her burden because she relied on the same arguments used to show a supposed punitive intent—that the $250 mandatory charge for a felony conviction was higher than the $200 mandatory charge for a misdemeanor conviction, and that it was imposed regardless of whether a sample had been provided in the past. *Id*. at ¶¶ 14, 18.

In this case, Shabazz does not make either argument. Rather, Shabazz showed that even the first DNA surcharge had an expressly punitive effect because the sentencing court specifically ordered that the surcharges were "in this case *punishment*…." (R.113, App. 298 at 39:16-17) (emphasis added). By imposing both surcharges as express punishment, the judge "transform[ed] what was clearly intended as a civil remedy into a criminal penalty." *Scruggs*, 2015 WI App 88 at ¶ 7.

Stated differently, it was the stated purpose and effect of the sentencing court to impose both DNA surcharges as "punishment." As such, both surcharges had a clearly punitive *effect*, even though *Scruggs* concluded that the statute itself had a non-punitive *intent*. Both DNA surcharges are therefore unconstitutional.

III. Shabazz Was Entitled To Resentencing Following A Hearing To Correct Inaccuracies Contained In The Presentence Investigation Report.

A. Standard Of Review

This Court reviews *de novo* whether Shabazz's motion on its face alleges sufficient material facts that, if true, would entitle him to relief. *Allen*, 2004 WI 106 at ¶ 9. *Bentley*, 201 Wis. 2d at 310. *See, supra,* Part I(A).

B. The Trial Court Erred In Denying Shabazz A Hearing To Correct Inaccuracies In The PSI On Which The Sentencing Court Relied.

A defendant has a due process right to be sentenced on the basis of accurate information. *State v. Melton*, 2013 WI 65, ¶ 29, 349 Wis. 2d 48, 834 N.W.2d 345, *citing State v. Tiepelman*, 2006 WI 66, ¶ 9, 291 Wis. 2d 179, 717 N.W.2d 1. The presentence investigation (PSI) report "is the single most important document that influences correctional decision making in Wisconsin." *Melton,* 2013 WI 65 at ¶ 30 (internal punctuation omitted). Accordingly, a defendant "has the right to challenge a PSI that he or she believes is inaccurate or incomplete." *Id*. at ¶ 65 (internal punctuation and citation omitted).

As such, "[i]n the event the defendant wishes to contest any of the factual matters set forth in a PSI, the defendant is entitled to an evidentiary hearing where evidence regarding the issue in controversy may be presented by the State or the defendant." *Id*., *citing State v. Suchocki*, 208 Wis. 2d 509, 515, 561 N.W.2d 332 (Ct. App. 1997).

In this case, trial counsel raised on the record six specific errors and omissions on pages 6-10 of the PSI, and noted Shabazz's general objection to the PSI in its entirety. (R.113, App. 291-93). Most of those errors related to various Milwaukee Police Department reports, which ended either in a dismissal or a decision not to prosecute. Even if Shabazz were not entitled to a new trial (which he is for the reasons set forth above), he is at very least "entitled to an evidentiary hearing where evidence regarding the issue in controversy may be presented by the State or the defendant." *Melton*, 2013 WI 65, ¶ 65.

The State argued, and the circuit court below agreed, that the record did not establish that the sentencing court relied on any inaccurate information—or that the information was even inaccurate. (R.77, App. 111; R.75, App. 152-53). The lower court's conclusion was in error for at least two reasons.

First, as the State conceded below, the sentencing court imposed sentence based in part on Shabazz's criminal record and what it deemed "his total lack of character…" (R.74, App. 142; R.113, App. 295 at 36:15-20). Indeed, the very purpose of the presentence investigation report is "to assist the sentencing court in determining the appropriate sentence for that defendant and the public." *State v. Crowell*, 149 Wis. 2d 859, 868, 440 N.W.2d 352 (1989). It is for this

reason that a presentence investigation reports address a defendant's criminal record as well as his family and personal history. *Melton*, 2013 WI 65 at ¶ 28.

In this case, the fact that the sentencing court specifically imposed sentence based on Shabazz's criminal record and character—both of which were addressed in the PSI—shows that the sentencing court relied on the information contained in the PSI. The sentencing court observed that it would disregard some earlier items in the PSI and "start with the things in the '80s and '90s and then this past decade…" (R.113, App. 294 at 29:7-15). Shabazz contended that some of this very information was inaccurate. In this case, because the PSI contained inaccurate information relating to Shabazz's criminal history and background, and because the sentencing court imposed sentence at least in part because of Shabazz's history and character, reliance is shown.

Second, Shabazz's attorney at the sentencing hearing briefly summarized the reasons the information was inaccurate. (*Id.* at 4-6). Shabazz contends, however, that a hearing was required in order more fully to explain and correct the inaccuracies. *See, e.g.*, *State v. Anderson*, 222 Wis. 2d 403, 410, 588 N.W.2d 75 (Ct. App. 1998) (having disputed portions of the PSI on the record, the accuracy of such matters should have been "fully resolved" by a proper hearing).

For these reasons, it was error for the circuit court to deny Shabazz's request for resentencing following a hearing to correct the inaccuracies in the PSI.

IV. This Court Should Exercise Its Broad Authority Of Discretionary Reversal Because The Real Controversy Has Not Been Fully Tried And Because Justice Has Miscarried.

This Court possesses a broad power of discretionary reversal under Wis. Stat. § 732.35 which provides:

> 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…or remit the case to the trial court for entry of the proper judgment or for a new trial….

See also State v. Davis, 2011 WI App 147, ¶ 16, 337 Wis. 2d 688, 808 N.W.2d 130.[5] As such, "a new trial may be ordered in either of two ways: (1) whenever the real controversy has not been fully tried; or (2) whenever it is probable that justice has for any reason miscarried." *State v. Hicks*, 202 Wis. 2d 150, 159-60, 549 N.W.2d 435 (1996). *See also State v. Maloney*, 2006 WI 15, ¶ 14 n.4, 288 Wis. 2d 551, 709 N.W.2d 436 (separate grounds for discretionary reversal are distinctive).

The real controversy has not been fully tried "if the jury was not given the opportunity to hear and examine evidence that bears on a significant issue in the case…." *Davis*, 2011 WI App 147, ¶ 16, *citing Maloney*, 2006 WI 15, ¶ 14 n.4. In order to grant a discretionary reversal because it

[5] While this Court and the Supreme Court "may set aside a conviction through the use of [its] discretionary reversal powers…the circuit court does not have such discretionary powers." *State v. Avery*, 2013 WI 13, ¶ 38, 345 Wis. 2d 407, 826 N.W.2d 60. Accordingly, the court below did not address (nor could it) Shabazz's argument in this regard.

is probable that justice has for any reason miscarried, "there must be a substantial probability of a different result on retrial."[6] *Maloney*, 2006 WI 15, ¶ 14 n.4.

Although this Court's power of discretion is used judiciously and only in exceptional cases, *see State v. Avery*, 2013 WI 13, ¶ 38, 345 Wis. 2d 407, 826 N.W.2d 60, this power is nonetheless designed "to achieve justice in individual cases." *Davis*, 2011 WI App 147 at ¶ 16. *See also Vollmer v. Leuty*, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990) ("[t]his broad statutory authority provides the court of appeals with power to achieve justice in its discretion in the individual case.")

This is such an exceptional case, and the Court should reverse the lower court and order a new trial for this additional and independent reason.

A. The Real Controversy In This Case Was Not Fully Tried Because The Jury Was Prevented From Considering Critical Evidence Showing That Shabazz Was Not The Source Of The Alleged Victim's Injuries.

This Court has exercised its discretionary reversal power where a jury was deprived of the opportunity to consider evidence regarding whether the defendant participated in the crime. *See, e.g., Davis*, 2011 WI App 147 at ¶ 35 ("[t]he cumulative effect of the evidence the jury did not hear, but should have, leads us to conclude that the real controversy of whether Davis participated [in the crime] has

[6] The Court "may exercise [its] power of discretionary reversal…without finding the probability of a different result on retrial [if it concludes] that the real controversy has not been fully tried." *Davis*, 2011 WI App 147 at ¶ 16 (citation omitted).

not been fully tried."). *Accord Hicks*, 202 Wis. 2d at 159 (reversing conviction where the real controversy of identification had not been fully tried in case where certain evidence disproved a key portion of the case upon which the State had relied at trial).

As shown in detail above, because of trial counsel's failure to obtain and present critical evidence tending to show that Shabazz was not the source of the alleged victim's injuries in this case, the real controversy in this case was not fully tried. As in *Davis*, telephone records and witness testimony that were not—but should have been—presented to the jury would have shown that Shabazz was not the source of K.M.'s injuries. Such evidence would have established a timeline that showed that what occurred at Shabazz's apartment was not an assault—as the victim claimed—but rather part of a plan to steal from Shabazz. *See, supra,* at Part I(C).

B. Justice Has Miscarried In This Case Because There Is A Probability Of A Different Result On Retrial.

For many of the same reasons discussed above, this Court should also reverse for a miscarriage of justice because there is a probability of a different result on retrial. The critical evidence that should have been (but was never) shown to the jury makes it probable that a different result would obtain upon retrial.

The probability of Shabazz's acquittal on retrial is even greater in this case where the State's case against Shabazz was already demonstrably weak—as shown by the jury's acquittal of Shabazz on the sexual assault and strangulation charges. Furthermore, the alleged victim's

testimony was repeatedly shown to be inconsistent at trial, and there was no blood or biological evidence found anywhere in Shabazz's apartment, and no evidence of injury to Shabazz's hands existed consistent with a brutal assault. *See, supra at* Part I(C)(1)-(2). Under these circumstances, this Court should reverse. *See, e.g., State v. Murdock*, 238 Wis. 2d 301, 325, 617 N.W.2d 175 (Ct. App. 2000) (reversing under miscarriage of justice standard where, *inter alia*, evidence as a whole predominated heavily on the defendant's side on key issues).

CONCLUSION

For all of the reasons herein, this Court should reverse and remand this case to the trial court with instructions to hold a *Machner* hearing on Shabazz's claims of ineffective assistance of counsel. Shabazz has also shown his entitlement to reversal in the interest of justice. Alternatively, this Court should vacate the remaining DNA analysis surcharge and remand for resentencing following a hearing to address errors in the presentence investigation report.

Dated this 11th day of April, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: 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 and maximum of 60 characters per line of body text. The length of the brief is 9,584 words.

Dated this 11th day of April, 2016.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

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

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

Dated this 11th day of April, 2016.

Signed:

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