STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

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Appeal No. 2016AP260
(Milwaukee County Case No. 2004CF609)

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANNY L. WILBER,

Defendant-Appellant.

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**Appeal From The Final Orders Entered In The Circuit Court For Milwaukee County, The Honorable Jeffrey A. Wagner and Honorable Mary Kuhnmuench Presiding**

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# BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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## ISSUES PRESENTED FOR REVIEW

1. No one at trial testified that they saw Wilber shoot the victim – David Diaz – and the physical evidence showed that Diaz was shot in the back of the head and fell face-first into the kitchen toward where Wilber was standing. Wilber's Wis. Stat. §974.06 motion presented newly discovered evidence that Roberto Gonzalez saw Vidal "Ricky" Muniz (not Wilber) shoot Diaz from behind from the living room and newly discovered evidence from Jonathan Martin that Muniz asked him to get rid of the gun later that night and confessed that he had shot Diaz.[1]

Under these circumstances, did the circuit court err by denying Wilber's newly discovered evidence claim without a hearing?

The circuit court denied the claim without a hearing, finding that Martin's allegations were inadmissible hearsay and that Gonzalez's were less credible than what the court viewed as contrary evidence at trial. In the court's view, there thus was no reasonable probability of a different result.

2. Whether the evidence at trial was sufficient for

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[1] Ricky's last name is spelled variously as Munoz or Muniz in the record. Ricky apparently spelled it as Muniz (R98:Attach.284) and that spelling is used in this brief.

conviction given that no one claimed to have seen Wilber shoot Diaz and the state's theory conflicts with the physical evidence and the laws of nature.

The circuit court summarily denied Wilber's claim that the evidence was insufficient.

3. Whether trial counsel denied Wilber the effective assistance of counsel by:

a. Failing to investigate Roberto Gonzalez and the information he had to provide;

b. Failing to hire an expert to analyze the physical evidence and rebut the state's theory of the offense.

The circuit court denied Wilber's §974.06 motion raising these claims, concluding that there was no reasonable probability of a different result but for counsel's alleged errors.

4. Whether Wilber's post-conviction counsel denied him the effective assistance of counsel by failing to investigate experts to address the impact of the physical evidence and trial counsel's failure to retain such experts.

The circuit court denied Wilber's §974.06 motion raising this claim, concluding that there was no reasonable probability of a different result but for counsel's alleged errors.

5. Whether reversal is appropriate in the interests of justice under Wis. Stat. §752.35 because, given both the evidence at the original trial and that discovered since then, the real controversy was not fully tried and justice has miscarried.

The circuit court did not address whether this Court

should exercise its discretion to reverse in the interests of justice.

6. The state provided Wilber's trial counsel with access to some 141 photographs through pretrial discovery. However, trial counsel either did not obtain copies of those photographs or did not provide them to Wilber once the case was finished. Did the circuit court erroneously exercise its discretion by denying Wilber and his new experts copies of those photographs for purposes of assessing the effectiveness of trial counsel and potential newly discovered evidence?

Following briefing, the circuit court declined to order the state to provide copies of the previously disclosed photographs to Wilber, finding that the photographs would not create a reasonable probability of a different result.

7. Prior to filing his opening brief in this Court, Wilber retained new appellate counsel. Wilber then moved this Court to remand the case to the circuit court pursuant to Wis. Stat. §§808.075(5) & (6) and ***State v. Sutton***, 2012 WI 23, 339 Wis.2d 27, 810 N.W.2d 210 (2012) (remand encouraged to correct perceived pleading defects) so he could correct the supposed defects in his Wis. Stat. §974.06 motion perceived by the circuit court and so he could provide additional factual allegations to correct the mistaken factual assumptions relied upon by the circuit court to deny his motion without a hearing.

Did this Court erroneously exercise its discretion in denying Wilber the opportunity to correct the perceived defects in his §974.06 motion relied upon by the circuit court?

This Court denied Wilber's remand request, erroneously believing that the circuit court's errors could all be addressed on appeal without the need for remand.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case under Wis. Stat. (Rule) 809.22. Appellant's arguments clearly are substantial and do not fall within that class of frivolous or near frivolous arguments concerning which oral argument may be denied under Rule 809.22(2)(a). Argument also should prove helpful to the Court given the confusion regarding controlling law demonstrated by the state's argument below and the circuit court's decision.

Publication likely is unnecessary under Wis. Stat. (Rule) 809.23. Wilber's entitlement to relief is clear under well-established and controlling legal authority.

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# BRIEF OF DEFENDANT-APPELLANT

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## STATEMENT OF THE CASE

This case involves a dual tragedy: the death of one innocent man and the conviction of another.

During an early morning after-hours party at his home, someone shot David Diaz in the back of the head as he was standing in the doorway between his living room and kitchen. He died immediately and collapsed face-first to the north into the kitchen, his arms under him (R47:49-50; R49:40, 66; R50:44-50; R51:279-80; R108:Exhs 14, 25). Bullet fragments were found under the stove, a few feet directly north and in front of where Diaz's body fell (R47:24-26, 59-60). All witnesses agreed that Wilber was in the kitchen north and in front of where Diaz fell when he was shot (R49:26; R50:102, 106-07, 116; R51:176).

A number of people were in the kitchen at the time. They

agreed that Wilber was drunk, obnoxious, and starting fist-fights (*e.g.*, R47:90-91; R50:122-23), but no eyewitness claimed to have seen Wilber shoot Diaz. Most testified that Wilber was actively involved in a "tussl[e]" with Ricky Torrez ("Vato") and Jeranek Diaz ("Rock") (no relation to David Diaz) at the time David Diaz was shot (R48:47, 134-36; R49:26, 31-33; R50:44-50, 57; R51:144-45)

Wilber nonetheless stands convicted of one count of first degree intentional homicide by use of a dangerous weapon for Diaz's death (R23; R28).[2] The state's theory was that, even though Wilber was in front of Diaz in the kitchen just prior to Diaz's death, a retired detective claimed that a single witness had suggested that Diaz might have been turning to leave the kitchen when he was shot (R55:137-38, 153-54; *see* R51:286, 303, 305-08). To explain the position of Diaz's body facing into the kitchen when he supposedly was shot exiting the kitchen, the state hypothesized that, although no one saw it happen and it presented no expert testifying that it was even possible, the shot somehow spun Diaz around so he fell face-first into the kitchen toward Wilber (R55:183). The state did not explain either the bullet fragments found even further into the kitchen under the stove or the absence of blood and other evidence one would expect to the south of Diaz's body if the state's theory were accurate. For instance, there was no evidence that the bullet ricocheted off of anything in the kitchen as would be necessary for a southbound bullet to end up north of the alleged shooter (R47:30-31; *see* R55:138-39).

The circuit court, Honorable Mary Kuhnmuench presiding, sentenced Wilber to life with eligibility for extended supervision after 40 years. (R28; R58:12-28).

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[2] Wilber rejected an offer of second degree reckless homicide without the weapons enhancer (R41:3-4).

Wilber filed post-conviction motions and a direct appeal, claiming that the circuit court erred by (1) admitting evidence that someone (the state admitted it could not prove who or why (R43:18-19; R55:146)) had burned shoes in a grill at Wilber's sister's home the night Diaz was shot and (2) shackling him during closing arguments (R63; *see* R69). The circuit court denied the motion, concluding that the shoe evidence could have no impact on the verdict and that Wilber's conduct justified the restraints (R65; App. 51-53). This Court affirmed, holding that the trial court had not erroneously exercised its discretion (R69; App. 34-50), and the Supreme Court denied review (R70).

Wilber's subsequent *pro se* Wis. Stat. §974.06 motion sought copies of the photographs from the original discovery (although trial counsel reviewed the photographs before trial (R42:3-4; R78:6), he apparently did not obtain copies and did not provide them to Wilber (*e.g.*, R83:8)), argued *inter alia* that review of the photographs by forensic experts would support Wilber's claim of innocence, and asked that decision on various substantive claims be stayed pending provision of the photographs (R92).

The circuit court, Honorable Jeffrey Wagner presiding, ordered a response limited to the "discovery" issue and stayed the remainder of Wilber's motion (R77).

Although the state had granted Wilber's trial counsel, Michael Chernin, access to the photographs prior to trial (*see* R78:6), it vehemently objected to providing copies of those same photos to forensic experts who might question the trial outcome (R78). While Wilber noted the standard for post-conviction "discovery" under ***State v. O'Brien***, 223 Wis. 2d 303, 588 N.W.2d 8 (1999), did not really fit this situation (R83:8-9), the circuit court nonetheless applied that analysis, concluding that, regardless of

what the photographs may have shown, there was no reasonable probability that the jury would have acquitted Wilber given the testimony of the witnesses (R86:4-12; App. 23-31). For the same reasons, the court denied Wilber's claim that trial counsel was ineffective for not retaining experts to address the physical evidence (R86:12 n.5; App. 31).

With the circuit court's permission (R86:12-13; App. 31-32), Wilber withdrew his remaining substantive claims contingent upon his attorney filing a new §974.06 motion raising, *inter alia*, the substantive claims raised here (R87). Prior counsel subsequently filed that motion (R98). The circuit court, Honorable Mary M. Kuhnmuench presiding, denied that motion without a hearing on November 25, 2015 (R99; App. 1-19).

Wilber timely filed his notice of appeal (R100). Following a string of extension requests, Wilber retained new counsel who sought remand to correct perceived technical defects in Wilber's §974.06 motion. The Court denied that motion on October 3, 2017 (App. 54-55). The Court subsequently ordered correction of the appeal record, with Wilber's opening brief due 14 days thereafter, or by November 28, 2017.

## TRIAL EVIDENCE

No one disputes that, on the night of January 31 to February 1, 2004, a large group of people went to the home of David Diaz ("Diaz") for an after hours party (*e.g.*, R47:77-78, 86; R48:94-96, 107; R51:229-30). Danny Wilber ("Slim") was among the guests (*e.g.*, R48:15; R51:230).

Diaz's home had a small kitchen. A doorway on the east end of the south wall led immediately into a short hallway/landing for the stairs up to the second floor and then the living room to the south. (*E.g.*, R47:23-24).

Although there were several other guests in the living room, including Vidal "Ricky" Muniz (R51:137, 232-33, 277; R52:30-31; R108:Exh.51), the state's case and the trial focused on the guests and actions in the kitchen.

Unfortunately, Wilber had too much to drink that night and became obnoxious and combative (*E.g.*, R47:90-91; R50:122-23; 135; R51:230). After getting into an argument with Oscar Niles ("Jay"), and grabbing Niles' neck chain (R47:94-96; R48:128-29; R50:32-36; R51:235), Wilber got into a "tussle" with Diaz's friends, Ricky Torres ("Vato") and Jeranek Diaz ("Rock;" no relation to David Diaz). (*E.g.*, R47:97-100; R48:134-36; R49:26; R50:44-46, 56; R51:132-33, 137-38, 238-40, 245-46).

Also in the crowded kitchen were Antonia West (Wilber's sister) and Donald Jennings (their cousin) (R47:66-67, 91-92; R48:88). Diaz was near the doorway into the living room watching the "tussle" in the kitchen but not involved in it (R50:47-50, 54-55; R51:151, 172).

At some point, either during the "tussle" (R48:47, 134-36; R50:57; R51:144-45) or immediately afterwards, Diaz was shot in the back of the head (R47:105-06; R51:138-39). The Medical Examiner testified that Diaz would have died immediately, with the shot severing his spinal chord (R49:66), and that the shot was fired from 2-3 inches away (*id.*:57).

The bullet passed in a straight line through Diaz's head, entering the back left, 1.5 inches below the top of the head and exiting four inches lower through his right cheek (R49:54, 57-61). The bullet fragments would have exited in a straight line, along with "biological spray," although the bullets could ricochet later (*id.*:70-72).

Diaz fell face-first to the north into the kitchen (*e.g.*,

R47:49-50), i.e., toward Wilber. Police found the fragments of the fatal bullet under the stove directly north of the top of his head (*id.*:25, 29-30, 52, 59).[3] That bullet was shot from a a Ruger, Taurus, or Smith and Wesson .38 or .357 caliber revolver (*id.*:56; R49:84-88, 98).

The police found no bullet strikes (i.e., ricochet marks) on the kitchen walls or elsewhere (R47:30-31).

All of the eye-witnesses testifying at trial swore either that Wilber did not shoot Diaz (R48:35; R49:8, 11-12, 46) or that they did not see who shot Diaz (R49:31, 41; R50:53, 60; R51:115-16, 175-76; R51:249, 255-56; R52:28-29). None claimed to have seen Wilber behind Diaz (R48:44, 57; R51:176; 253).

West and Jennings thought that the shooter was in the hallway toward the living room (R48:63; 75, 141).

Niles, Jennings, and Jeranek specifically testified that they did not see Wilber draw a gun or point one at Diaz (R49:41, 48; R50:60; R51:114, 116, 141-45, 153-56, 167, 175-76; *see* R53:28, 32-34; 51-55).

Torres testified that Wilber struck him and he blacked out just before the gunshot and did not see who shot Diaz (R51:249, 254; R52:28-29). When he came to, Wilber was crouched down, looking around confused (R51:256-59, 270).

Although Torres did not see the shot fired, he assumed that Wilber had shot Diaz because he saw Wilber with what he believed was a 9mm or 380 semiautomatic handgun afterwards (R51:256-58, 281-82). He admitted he could not be sure (R52:32), and that Wilber was never directly behind Diaz (*id.*:40).

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[3] The bullet jacket was found at some point sitting on the kitchen table. No one knew how it could have gotten there or whether someone picked it up and put it there. (R47:25, 57).

Torres claimed that Jeranek told him that he also saw Wilber with a gun after Diaz was shot, although Jeranek did not claim to have seen Wilber point a gun at Diaz (R51:262-63).

At trial, Jeranek swore that he neither saw Wilber with a gun nor told anyone that he had (R51:114, 116). A retired detective nonetheless claimed Jeranek told him that, before he heard a shot, Jeranek saw Wilber bend and point a semiautomatic handgun at Diaz as Diaz had turned around to leave the kitchen heading south (R51:286, 294-95, 303, 305-08).

Although she denied it at trial (R47:83; R48:22), some witnesses claimed that, after Diaz was shot, West screamed something to the effect of "You shot him. Get out of here." (R51:84, 266, 283, 295, 312).

Everyone in the kitchen responded to the shot like they had been shot at (R49:46; R51:156). Everyone tried to leave at once (*e.g.*, R51:260).

West, Jennings, Niles, and Jeranek testified that, after hearing the shot, they saw some version of Wilber reacting by flinching back scared, putting his hands up, "duck[ing] and cover[ing]," or patting himself down to check if he had been shot (R47:106; R48:18, 20, 22, 36, 38, 141; R49:42, 44-45; R50:58; R51:117, 144, 171).

The state also presented evidence that some unknown person had burned clothing and shoes in a grill at Wilber's sister's home the night Diaz was shot (R51:56-73), but admitted that it could not prove they were Wilber's (R43:18-19; R55:146),

Torres testified that there was tension in the house a week before between Diaz and a group that included Ricky Muniz, although Torres attempted to minimize it (R51:232; R52:48-50). He saw Muniz in the living room shortly before the tussle and

when Diaz was shot. Muniz had a handgun, although Torres claimed that it was a semiautomatic. (R51:263-64, R52:33-41; R108:Exh.51).[4]

## ARGUMENT

## I.

## BECAUSE HIS FACTUAL ALLEGATIONS, IF TRUE, MANDATE A NEW TRIAL, WILBER IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS NEWLY DISCOVERED EVIDENCE MOTION[5]

After Wilber's trial and direct appeal, he learned that Roberto Gonzalez actually witnessed Ricky Muniz shoot David Diaz and that Muniz had both asked Jonathan Martin to get rid of the revolver later that night and confessed to him that he had shot and killed Diaz. (R98:18-20, Attachs.314-23, 345-47).

Wilber's motion satisfied the requirements for a hearing on his newly-discovered evidence claim, having presented newly discovered evidence that he was both unfairly convicted and factually innocent of the charge. The circuit court nonetheless denied him that hearing based on a variety of findings that reflect much confusion regarding the applicable legal standards.

### A. The Applicable Legal Standards

#### 1. Newly discovered evidence

The general standards for a newly discovered evidence

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[4] Lea Franceschetti left the party before the tussle or shooting. Contrary to Torres' testimony, she claimed that Muniz had left even earlier. (R53:3-12).

[5] Because Wilber and his attorneys were unaware of the newly discovered evidence at the time of trial and his direct appeal, his motion satisfies the "sufficient reason" requirement of Wis. Stat. §974.06(4). *See* ***State v. Escalona-Naranjo***, 185 Wis.2d 168, 182 n.11, 517 N.W.2d 157 (1994); ***State v. Edmunds***, 2008 WI App 33, ¶11, 308 Wis.2d 374, 746 N.W.2d 590.

claim are well-settled if not always well-understood:

> To obtain a new trial based on newly discovered evidence, a defendant must establish by clear and convincing evidence that "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." [***State v. Armstrong***, 2005 WI 119, ¶161, 283 Wis.2d 639, 700 N.W.2d 98] (citation omitted). Once those four criteria have been established, the court looks to "whether a reasonable probability exists that a different result would be reached in a trial." *Id.* (citation omitted). The reasonable probability factor need not be established by clear and convincing evidence, as it contains its own burden of proof. *Id.*, ¶¶160-62 (abrogating ***State v. Avery***, 213 Wis.2d 228, 234-37, 570 N.W.2d 573 (Ct. App. 1997)).

***State v. Edmunds***, 2008 WI App 33, ¶13, 308 Wis.2d 374, 746 N.W.2d 590.

"A reasonable probability of a different result exists if 'there is a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt.'" ***State v. Love***, 2005 WI 116, ¶44, 284 Wis.2d 111, 700 N.W.2d 62 (citation omitted). The defendant need not prove that acquittal is more likely than not or that the evidence is legally insufficient but for the identified errors. ***Kyles v. Whitley***, 514 U.S. 419, 434-35 (1995). Rather, he need only show a reasonable probability of a different result. ***Love***, *supra*.

Newly discovered evidence is a matter of due process. *E.g.*, ***Love***, 2005 WI 116, ¶43, n.18.

**2. Adequacy of a motion to require a hearing**

"If the motion raises sufficient facts that, if true, show that the defendant is entitled to relief, the circuit court must hold an

evidentiary hearing" unless "the record conclusively demonstrates that the defendant is not entitled to relief." ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis.2d 358, 805 N.W.2d 334 (citation and internal quotation omitted). Also, while Wilber submitted his new evidence in the form of sworn affidavits, he was not required to do so; making the allegations in the motion itself would have been sufficient. *E.g.*, ***State v. Brown***, 2006 WI 100, ¶62, 293 Wis.2d 594, 716 N.W.2d 906. In assessing the sufficiency of a motion, its factual allegations must be accepted as true. ***Balliette***, 2011 WI 79, ¶12.

#### 3. Standards of review

Sufficiency of a motion to require a hearing is a question of law, which this Court reviews *de novo*. ***Balliette***, 2011 WI 79, ¶18. The allegations of Wilber's motion must be accepted as true absent an evidentiary hearing, ***id.***, ¶12, even though, in other circumstances, the circuit court's findings of fact are upheld unless clearly erroneous, ***State v. Jackson***, 2016 WI 56, ¶45, 369 Wis.2d 673, 882 N.W.2d 422.

The "reasonable probability" analysis presents an issue of law reviewed *de novo*, ***State v. Plude***, 2008 WI 58, ¶33, 310 Wis.2d 28, 750 N.W.2d 42; *cf.*, ***State v. Harris***, 2004 WI 64, ¶11, 272 Wis.2d 80, 680 N.W.2d 737 (issues of constitutional fact, such as whether evidence withheld by the state is "material" by creating a reasonable probability of a different result, are reviewed independently); ***State v. Thiel***, 2003 WI 111, ¶¶23-24, 264 Wis.2d 571, 665 N.W.2d 305 ("reasonable probability of a different result" on ineffectiveness claim is reviewed *de novo*).

### B. Wilber's Motion Was Adequate to Require an Evidentiary Hearing

The case is a whodunnit in which every eyewitness at trial swore under oath either that Wilber did *not* shot Diaz or that

they did not see who shot him.

Wilber's Wis. Stat. §974.06 motion raised newly discovered evidence that Roberto Gonzalez was at the party and witnessed Ricky Muniz, not Wilber, shoot Diaz (R98:18-20, Attachs. 319-23). The motion also raised newly discovered evidence from Jonathan Martin that, on the night Diaz was shot, Ricky Muniz came to Martin's home seeking a change of clothing and asking that Martin get rid of Muniz's revolver. Muniz explained that "'some shit went down'" at a party "with a guy that he had an altercation with a few weeks earlier." Muniz later told Martin that he had shot "Gordo," the Mexican guy who hosted the party (i.e., Diaz) in the head. (R98:18-20, Attachs.314-18).

The evidence was new and the defense was not negligent in failing to discover it. Wilber and his attorneys had no reason to know about Martin's information until long after trial (R98:Attachs.314-18 (not disclosed until after Muniz died in 2008)) and, despite producing Gonzalez to the bullpen (*see* R55:99; R98:Attach.319)), the trial court denied Wilber's counsel an opportunity to interview him (R55:78-100).[6]

The new evidence likewise was material and not cumulative. The central issue at trial concerned who shot Diaz. Given the absence of evidence identifying someone else, the jury

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[6] After the evidence closed at trial, Monique West (Wilber's sister and Gonzalez's girlfriend) told trial counsel that Gonzalez had told her that he was at the party and saw "Isaiah" shoot Diaz (R55:64-68). Another sister also testified in an offer of proof to what Monique West supposedly told her (R55:11-56, 61-63).

If trial counsel unreasonably failed to investigate Gonzalez before trial based on information from Wilber that Gonzalez was at the party (R98:15; *see id.*:Attach. 345), that failure denied Wilber the effective assistance of counsel. Section III, *infra*. Post-conviction counsel attempted to interview Gonzalez, but could not obtain the necessary information as Gonzalez's fear of Muniz caused him not to cooperate (R98:Attach. 322-23).

bought the state's hypothesis that Wilber must have done so despite evidence strongly suggesting that he did not.

Nor is there any rational dispute that the new evidence creates a reasonable probability of a different result. The evidence against Wilber already was minimal at best given that:

- No witness testified they saw Wilber shoot Diaz; multiple witnesses thought the shot came from the living room.
- Wilber was in front of Diaz, who was shot in the back of the head.
- While a retired detective claimed that Jeranek said that Wilber pointed a semiautomatic pistol at Diaz as Diaz turned to leave the kitchen (R51:286, 303, 305-08), Jeranek denied under oath that he saw or said any of that (R51:114, 116).
- The physical evidence of the bullet fragments and the location and positioning of Diaz's body conflict with the state's theory. It was undisputed that Wilber was north of Diaz when he was shot and that the shot passed straight through Diaz's head. Yet, the fragments were found under the stove directly in line north of Diaz's body (*e.g.*, R47:25), and the state presented no evidence of biological spray to the south or that the bullet ricocheted off of anything on the south side of the kitchen (R47:30-31), evidence one would expect if the state's speculation were true.
- Moreover, it was undisputed that Diaz died immediately (R49:66), yet the photos of Diaz's body show his feet spread and the arms under his body (R108),

contrary to what one would expect had his body done the 180° corkscrew pirouette as it fell necessary to the state's speculative theory of the offense. (*See also* R51:279-80 (Diaz fell straight down)).

- Diaz was shot with a revolver in the back of the head; yet even the two witnesses who claimed that Wilber had a gun identified it as a semiautomatic (*e.g.*, R47:56; R51:256-58, 294).

- Torres saw Ricky Muniz, a person with whom Diaz had a dispute in the recent past, in the living room with a gun just minutes before Diaz was shot (R108:Exh.51).

- Even the circuit court deemed the state's "consciousness of guilt" theory based on the burned shoes too speculative to have any effect on the jury (R65:2; App. 52 ("[u]nder the circumstances, it is unlikely that the jury placed any significant weight on the burned shoes," both because the state conceded it could not connect them to Wilber and because they were not Wilber's size).

- Antonia West's hysterical statements immediately after Diaz was shot are at best ambiguous. They did not identify the shooter and, if the state's trial argument is correct that she did not see the shooting (R55:140-41), she would not have been in a position to say that Wilber was or was not the shooter.

Where, as here, the state's case already is of marginal sufficiency,any errors are likely to have a great impact on the jury. ***United States v. Agurs***, 427 U.S. 97, 113 (1976).

Moreover, the new evidence that Muniz shot Diaz from the living room with a revolver and then had Martin destroy the gun ties in perfectly with the defects in the state's case. The physical evidence all points to a shooter to the south of Diaz; Muniz, who had a prior dispute with Diaz, already was identified as being in that area with a gun just before the shooting; and Diaz was shot with a revolver, exactly the type of gun Muniz asked Martin to destroy for him.

Even though Wilber need not show even that a different result is more likely than not given the new evidence, the combination of the new and old evidence overwhelmingly suggests that Wilber is actually innocent.

### C. The Circuit Court's Denial Conflicts with Controlling Authority

#### 1. Jonathan Martin

In denying Wilber's motion without a hearing, the circuit court held that Martin's evidence regarding Muniz's actions and comments immediately after shooting Diaz was inadmissible hearsay absent testimony from Muniz himself. (R99:10-11; App. 10-11).[7] The court was wrong.

##### a. Portions of Muniz's comments were not "hearsay"

Portions of Martin's newly discovered information was not remotely "hearsay." Muniz asking Martin for clean clothing and to dispose of a gun the night that Diaz was shot assert no facts and thus are not statements offered for their truth and are not hearsay.

"'Hearsay' is a statement, other than one made by the

[7] Muniz is dead and cannot testify. (R99:11 fn.8; App. 11).

declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Wis. Stat. §908.01(3). Because Muniz's requests for new clothes and to dispose of a gun were not intended as "expression[s] of a fact, condition, or opinion," they were not statements. ***State v. Kutz***, 2003 WI App 205, ¶¶38-46, 267 Wis.2d 531, 671 N.W.2d 660; Wis. Stat. §908.01(1). Because they were neither statements nor offered to prove the truth of the matter asserted (there is no "truth" to a request), they were not hearsay. Wis. Stat. §908.01(3).

**b. Muniz's hearsay admissions are admissible as statements against interests**

Simply labeling the remaining portion of Muniz's comments to Martin – his description of what happened and what he did – as "hearsay" likewise is misplaced since, given the circumstances of Muniz's disclosures, the admissions would qualify as statements against interest. *See* Wis. Stat. §908.045(4) (hearsay exception where statement "so far tended" to "subject the declarant to....criminal liability" or "so far tended" to "make the declarant an object of hatred, ridicule, or disgrace" that a reasonable person in the declarant's position "would not have made the statement unless the person believed it to be true." Here, Muniz admitted committing murder, something a reasonable person generally would not do if it were not true.

Although "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated," Wis. Stat. 908.045(4), corroboration does not require proof certain. *E.g.*, ***State v. Guerard***, 2004 WI 85, ¶33, 273 Wis.2d 250, 682 N.W.2d 12. Rather, the proponent need only show "corroboration sufficient to permit a reasonable person to conclude, in light of all the facts

and circumstances, that the statement could be true." ***State v. Anderson***, 141 Wis.2d 653, 660, 416 N.W.2d 276 (1987). Moreover, "[t]he corroboration may come from *any* source." Blinka, D., *Wisconsin Evidence*, §8045.4 at 865 (3d ed. 2008).

There exists ample corroboration for Muniz's admissions to Martin. Torrez saw him in the living room with a handgun shortly before Diaz was shot (R51:263-64, R52:33-41). Gonzalez saw him shoot Diaz (R98:Attachs.319-23)). And Muniz's non-hearsay requests for a change of clothing and that Martin destroy the gun (R98:Attachs.314-18) themselves corroborate the fact that he did something incriminating with it that night.

**2. Roberto Gonzalez**

In rejecting Gonzalez's evidence that he saw Muniz shoot Diaz, the circuit court relied on three factors: (1) No one at trial had testified that Gonzalez was among those at the party, (2) Gonzalez provided no explanation for the difference between what Monique West claimed Gonzalez told her and what Gonzalez in fact swore to in his affidavit, and (3) the court deemed its interpretation of the trial evidence more credible and compelling than Gonzalez's sworn affidavit. (R99:11-16; App. 11-16).

Whether new evidence creates a reasonable probability of a different result involves two conceptually separate issues. The first is the substantive question of whether the new evidence, if credited by the jury, reasonably could have made a difference. The second is whether the new evidence is sufficiently credible for a jury to accept. *Compare* ***State v. Avery***, 2013 WI 13, ¶ 36, 345 Wis.2d 407, 826 N.W.2d 60 (although credible, newly discovered photogrammetry evidence deemed insufficient to create reasonable probability of a different result), *with* ***State v. McCallum***, 208 Wis.2d 463, 475, 561 N.W.2d 707 (1997) (evidence that is

incredible as a matter of law cannot create a reasonable probability of a different result).

The issue at trial was whether Wilber was the person who shot Diaz. There thus can be no rational dispute that new evidence that someone other than Wilber shot Diaz creates a reasonable probability of a different result if the jury finds it to be adequately credible.

The court below therefore focused on credibility and got it wrong. Gonzalez swore that he was at the party and saw Muniz shoot Diaz and that allegation must be accepted as true for purposes of assessing the sufficiency of the motion. ***Balliette***, 2011 WI 79, ¶12.

The fact that no one felt the need at trial to have identified Gonzalez (or many of the other 10-13 people still in the living room (R51:136-37, 277)) as being at the party is logically irrelevant. Gonzalez was not in the kitchen where Wilber and the trial witnesses were and where the state focused its case; he was in the living room from where Muniz shot Diaz.[8]

The circuit court's observation that Gonzalez's sworn statement that he personally witnessed Muniz shoot Diaz conflicted with what a *different* witness – Gonzalez's girlfriend, Monique West – had claimed Gonzalez told her around the time of Wilber's trial also is legally irrelevant even if we ignore, as the circuit court did, the fact that the court denied Wilber the opportunity at trial to learn what Gonzalez himself actually had to say.[9] *E.g.*, ***In re Commitment of Curiel***, 227 Wis.2d 389, 421,

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[8] The circuit court's speculation that, because Gonzalez was not mentioned by trial witnesses, he was not there, is also factually incorrect. *See* Motion for Remand at 7 (witnesses saw Gonzalez at the party).

[9] Oddly, the circuit court relied on the accuracy of Monique (continued...)

597 N.W.2d 697 (1999) (conflicting testimony does not render evidence incredible as a matter of law); ***Haskins v. State***, 97 Wis.2d 408, 425, 294 N.W.2d 25 (1980) (inconsistencies and contradictions "do not render the testimony inherently or patently incredible, but simply created a question of credibility for the jury, and not this court, to resolve").

Contrary to the assumption underlying the circuit court's denial of Wilber's motion, the court cannot reject the testimony of new witnesses merely because it may choose to disbelieve them or because it may find the witnesses at the trial more believable. *E.g.*, ***State v. Jenkins***, 2014 WI 59, ¶¶50-65, 355 Wis.2d 180, 848 N.W.2d 786; ***id.***, ¶¶69-98 (Crooks, J., Concurring). The focus of the test is on how a reasonable *jury* could view the evidence, not how the particular judge ruling on the motion might view it. ***Love***, 2005 WI 116, ¶44; ***McCallum***, 208 Wis.2d at 468, 474. Moreover, "[l]ess credible is far from incredible." ***Id.*** at 475.

Therefore, the question for the court is whether witness testimony creating a reasonable probability of a different result *could* be credited by a reasonable jury sufficient to create a reasonable doubt. Unless the evidence is incredible as a matter of law, i.e., "in conflict with ... nature or with fully established or conceded facts," ***Rohl v. State***, 65 Wis.2d 683, 695, 223 N.W.2d 567, 572 (1974), credibility must be left to a jury. *See, e.g.*, ***Jenkins***, *supra*; ***State v. Brown***, 96 Wis.2d 238, 247, 291 N.W.2d 528 (1980) ("Unless a witness's testimony is deemed incredible as a matter of law, the credibility of the witness is irrelevant in the trial

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[9] (...continued)
West's allegations to deny Wilber a hearing now, but previously relied on its negative view of the same allegations to deny Wilber's trial counsel an opportunity to meet with Gonzalez at trial and learn what Gonzalez himself had to say at that time (*see* R99:10-16; App. 10-16).

court's determination of whether the proffered third-party statement should be admitted." (footnote omitted)). *See also* ***State v. Poellinger***, 153 Wis.2d 493, 506, 451 N.W.2d 752 (1990) (inferences to be drawn from evidence must be left to trier of fact unless the evidence is incredible as a matter of law).

The circuit court impermissibly substituted its credibility findings for that of a jury, noting that it did not believe Gonzalez's affidavit. Instead, it believed that a jury would find more compelling evidence that one of the five eye-witnesses who testified at trial allegedly told a police officer "that Wilber had shot David Diaz"(R99:16; App. 16). However, the officer testified that Jeranek saw Wilber with a semiautomatic and even he did not claim that Jeranek said he saw Wilber shoot Diaz (*e.g.*, R51:294). In fact, Jeranek testified under oath that he made no such statement and, like the other four eye-witnesses at trial, denied seeing Wilber either shoot Diaz or point a gun at him (R51:114, 116).

The court also noted that one other eye-witness – Torres – testified that he saw Wilber crouching in the kitchen with a gun *after* Diaz was shot, and that many witnesses testified that Wilber was being a jerk at the party (R99:16; App. 16).[10] However, being a jerk does not make one a killer, and the court overlooked the facts that Torres is the only one to state under oath that Wilber ever had a gun, that he only saw it out *after* the shooting while Wilber was in a defensive posture looking confused, and even then Torres identified it as a semiautomatic, while Diaz was shot

[10] The circuit court's perception that the newly-discovered evidence claim involving Gonzalez was not "clearly stronger" than the issues raised on Wilber's direct appeal (R99:17; App. 17), is irrelevant. The "clearly stronger" standard applies to appellate ineffectiveness claims, *see* ***State v. Starks***, 2013 WI 69, ¶¶56-60, 349 Wis.2d 274, 833 N.W.2d 146, not newly discovered evidence.

with a revolver (*e.g.*, R51:256-59; R47:56).

Because the lower court applied the wrong legal standard, substituting its own credibility assessment for that of the jury, and because nothing suggests that the new evidence is incredible as a matter of law, the order below must be reversed and the case remanded for an evidentiary hearing. *E.g.*, ***McCallum***, *supra* (circuit court erred by applying wrong legal standard and substituting its own credibility findings for those of a jury).

## II.

## THE EVIDENCE WAS INSUFFICIENT FOR CONVICTION

Even if one ignores, as the state did below, the exculpatory or at worst equivocal nature of the testimonial evidence presented at trial, the uncontested physical evidence mandated acquittal by any reasonable jury. (R98:8-10).

Due Process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." ***In re Winship***, 397 U.S. 358, 364 (1970); *see* ***Jackson v. Virginia***, 443 U.S. 307 (1979). The conviction cannot stand if "the evidence viewed most favorably to the state and the conviction is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *See* ***Poellinger***, 153 Wis.2d at 501. Review is *de novo*. ***State v. Hanson***, 2012 WI 4, ¶15, 338 Wis.2d 243, 808 N.W.2d 390.

Contrary to the circuit court's holding (R99:9-10 & n.5; App. 9-10), sufficiency is a matter of due process that can be raised under §974.06. *E.g.*, ***State v. Miller***, 2009 WI App 111,

¶¶25-30, 320 Wis.2d 724, 772 N.W.2d 188.[11]

As already discussed, the eye-witnesses testified uniformly either that Wilber did not shoot Diaz or that they did not see the shooting at all, evidence consistent with someone having fired the shots from outside the kitchen. The prosecutor called them "liars," but a burden of proof may not be met by negative inference from a witness's "incredible" testimony. *See, e.g.*, ***State v. Nichelson***, 220 Wis. 2d 214, 224, 582 N.W.2d 460, 465 (Ct. App. 1998).

Speculation based on Torres's claim that he saw Wilber crouching with a semiautomatic handgun when Torres came to *after* Diaz was shot does not alone support a reasonable inference that Wilber shot him. Everyone was responding to the shot in a similarly defensive manner, and Diaz was shot it the top of the back of his head with a revolver, not by a crouching man with a semiautomatic.

The only evidence potentially supporting Wilber's conviction, is the claim that, contrary to his trial testimony, Jeranek told a detective that he saw Wilber bend and point a gun at Diaz's head just before he heard the shot fired. Generally, a jury might be entitled to believe such evidence even though it conflicted with the other witnesses and Jeranek denied it under oath. *E.g.*, ***Curiel***, 227 Wis.2d at 421.

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[11] Because the state has no legitimate interest in upholding a conviction unsupported by the evidence, review of a sufficiency claim that was overlooked on direct appeal is not barred by §974.06(4). *Cf.*, ***Bousley v. United States***, 523 U.S. 614 (1998) (despite failing to raise claim on direct appeal, defendant entitled to raise claim on federal habeas that he is actually innocent of the charged offense); ***Murray v. Carrier***, 477 U.S. 478, 495-96 (1986) (same). *But see* ***State v. Kaster***, 2006 WI App 72, ¶9, 292 Wis. 2d 252, 714 N.W.2d 238 (barring sufficiency argument on §974.06 motion). Because ***Kaster*** is controlling until overruled, Wilber's sufficiency claim is raised to preserve the issue for Supreme Court and federal review.

However, sufficiency must be assessed based on "the evidence which [the jury] had a right to believe and accept as true." ***State v. Hamilton***, 120 Wis. 2d 532, 541, 356 N.W.2d 169 (1984). Conviction cannot be upheld based on evidence that is incredible as a matter of law, i.e., "in conflict with ... nature or with fully established or conceded facts," ***Rohl***, 65 Wis.2d at 695.

Wisconsin courts have long adhered to the rule that undisputed physical evidence renders conflicting testimony incredible as a matter of law. *E.g.*, ***Samulski v. Menasha Paper Co.***, 147 Wis. 285, 133 N.W. 142, 145 (1911); ***Chart v. G.M. Corp.***, 80 Wis.2d 91, 111-12, 258 N.W.2d 680 (1977) (photographs render conflicting expert testimony incredible). The same rule applies in criminal cases. *E.g.*, ***State v. Lucynski***, 48 Wis.2d 232, 238–39, 179 N.W.2d 889 (1970).

That rule applies squarely here. The undisputed physical evidence demonstrates that

- Diaz was shot in the back of the head (R49:54),
- the bullet fragments passed straight through his head and would have kept traveling in a straight line unless they ricocheted off of something (R49:70-72),
- the bullet fragments were found under the stove, directly north of Diaz's head, in line with a shot fired from south of his body (R47:25),
- the police found no physical evidence of any ricochet on the south wall as would have been necessary if the state's theory were accurate (R47:30-31),
- Diaz died immediately (R49:66) and fell face forward into the kitchen where it is undisputed that

Wilber was located, and

- Diaz's legs were separated approximately shoulder width and his arms were under his body (*e.g.*, R108 (photos)), indicating that he fell straight forward rather than in the corkscrew pirouette necessary for the state's theory to be accurate.

The physical evidence thus established that the fatal shot was fired from behind Diaz, to the south of where he and Wilber were standing in the kitchen.[12] The inferences from statements attributed to Jeranek on which the state's speculative theory is based conflict with the physical evidence and thus are incredible as a matter of law. *E.g.*, ***Lucynski***, *supra*.

A conviction cannot be based, as here, upon a string of assumptions, speculation and guesswork, especially when it conflicts with the undisputable physical evidence. Where, as here, the desired inference can be attained only by "building an inference upon an inference," the result is speculation rather than a rational and permissible process of inferring one fact from another. ***Home Savings Bank v. Gertenbach***, 270 Wis. 386, 71 N.W.2d 347 (1955). Conviction of a criminal offense cannot be based upon such speculation. *E.g.*, ***State ex rel. Kanieski v. Gagnon***, 54 Wis.2d 108, 117, 194 N.W.2d 808, 813 (1972).

[12] In fact, three different experts will and would have testified that, based on the physical evidence, the shot originated from the living room area and not the kitchen as the state speculated. (R98:Attachs.308-11, 331-40).

## III.

## WILBER IS ENTITLED TO A HEARING ON HIS CLAIM THAT TRIAL COUNSEL DENIED HIM THE EFFECTIVE ASSISTANCE OF COUNSEL

Trial counsel's unreasonable failure to investigate Roberto Gonzalez or to retain experts to address the speculative nature of the state's theory denied Wilber the effective assistance of counsel. U.S. Const. amend. VI; Wis. Const. Art. I, §7. There was no legitimate tactical basis for such failures of counsel, such failures were unreasonable under prevailing professional norms, and Wilber's defense was prejudiced by them.

### A. Applicable Legal Standards

Because the circuit court denied Wilber's §974.06 motion without a hearing, the sufficiency of the motion must be reviewed *de novo* and the factual allegations must be accepted as true. ***Balliette***, 2011 WI 79, ¶¶12, 18.

An ineffectiveness claim is not an assault on the general competence of trial counsel nor is it a moral judgment on counsel's abilities or conduct. "[J]udges should recognize that all lawyers will be ineffective some of the time; the task is too difficult and the human animal too fallible to expect otherwise." *See* ***State v. Felton***, 110 Wis.2d 485, 499, 329 N.W.2d 161 (1983) (citation omitted).

A defendant alleging ineffective assistance of counsel first "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 (1986), *quoting* ***Strickland v. Washington***, 466 U.S. 668, 688 (1984). Reasonableness must be evaluated from counsel's perspective at the time of the alleged error. ***Kimmelman v. Morrison***, 477 U.S. 365, 384 (1986), *citing* ***Strick-***

***land***, 466 U.S. at 689. Deficiency is shown when counsel's errors resulted from oversight or inattention rather than a reasoned defense strategy. *See* ***Wiggins v. Smith***, 539 U.S. 510, 534 (2003); ***Kimmelman***, 477 U.S. at 385; ***State v. Moffett***, 147 Wis.2d 343, 355, 433 N.W.2d 572 (1989).

The second prong requires resulting prejudice. "The defendant is not required to show 'that counsel's deficient conduct more likely than not altered the outcome in the case.'" ***Moffett***, 147 Wis.2d at 354 (quoting ***Strickland***, 466 U.S. at 693); *see* ***Kyles v. Whitley***, 514 U.S. 419, 434 (1995). Rather, the question on review is "whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. No supplemental, abstract inquiry into the "fairness" or reliability of the proceedings is permissible. ***Williams v. Taylor***, 529 U.S. 362 (2000).

In assessing resulting prejudice, the Court must consider the totality of the circumstances, ***Strickland***, 466 U.S. at 695, and thus must assess the cumulative effect of *all* errors. *E.g.*, ***State v. Thiel***, 2003 WI 111, ¶¶59-60, 264 Wis.2d 571, 665 N.W.2d 305 (addressing cumulative effect of deficient performance of counsel).

Once the facts are established, each prong of the analysis is reviewed *de novo*. ***Thiel***, 2003 WI 111, ¶¶23-24.

### B. Deficient Performance - Failure Reasonably to Investigate

The circuit court did not address whether trial counsel's failures constitute deficient performance, instead merely finding that there was no reasonable probability of a different result (R86:12 & fn.5; R99:11-16, 17-18 & fns.12-13; App. 11-18, 31).

### 1. Gonzalez

Should the Court hold that trial counsel unreasonably failed to investigate Gonzalez before trial, and that Gonzalez's evidence of having witnessed Muniz shoot Diaz is therefore not newly discovered evidence, then that same unreasonable failure constitutes deficient performance under ***Strickland***, *supra*. Although he did not know what Gonzalez would say, Wilber told Chernin before trial that Gonzalez was at the party and asked Chernin to speak with him (R98:Attach.345). Chernin did not do so (*see* R553-9).[13]

"Information is the key guide to decisions and action. The lawyer who is ignorant of the facts of the case incapacitates himself to serve his client effectively." ***State v. Harper***, 57 Wis.2d 543, 553 , 205 N.W.2d 1 (1973). Counsel, therefore, has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 690-91. Inaction by counsel is excused only if he made a "rational decision that investigation is unnecessary." ***Crisp v. Duckworth***, 743 F.2d 580, 583 (7th Cir. 1984);.

Given the physical evidence that the shot was fired from behind Diaz in the living room, combined with a police investigation that focused exclusively on Wilber and those in the

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[13] Unlike Chernin, Wilber's post-conviction counsel sought to investigate what Gonzalez knew but, given his fear of Muniz, Gonzalez failed to cooperate. (R98:Attachs.319-20, 344). Gonzalez's failure to cooperate until Muniz was no longer a threat denied Wilber the information necessary to raise his claim of ineffective assistance of counsel regarding Gonzalez on direct appeal, *see* ***State v. Byrge***, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999) (defendant claiming ineffective failure to investigate must show what reasonable investigation would have produced), and thus provides sufficient reason under Wis. Stat. §974.06(4) to raise that claim now. *See, e.g.*, ***State v. Escalona-Naranjo***, 185 Wis.2d 168, 182 n.11, 517 N.W.2d 157 (1994) ("sufficient reason" exists where future events were not foreseen at time of prior motions).

kitchen, discovering what those in the living room knew would have been an obvious and necessary basis for investigation. Chernin's failure to investigate Gonzalez accordingly cannot be dismissed as reasonable. *See* ***Montgomery v. Petersen***, 846 F.2d 407, 412 (7th Cir. 1988) (nonstrategic decision not to investigate is inadequate performance).

**2. Experts**

Chernin likewise acted unreasonably in failing to seek out and retain appropriate experts to counter the state's speculative theory of the offense and to bolster the defense that the physical evidence excluded Wilber as the shooter.[14] The funds were available to do so (R98:Attach.345). The state's theory that the bullet defied the laws of physics by doing a U-turn in mid-air either before striking Diaz or after striking him, so that a shot fired toward the south would end up north of the supposed shooter without evidence of having ricocheted off of anything, was patently absurd. However, counsel cannot rely on the common sense or scientific knowledge of jurors, especially given the state's insistence on pursuing the case despite the physical evidence showing Wilber's innocence. *E.g.*, ***Pavel v. Hollins***, 261 F.3d 210, 216 (2nd Cir. 2001) (failure to prepare defense due to perceived weakness of prosecutor's case is deficient performance); ***Harris v. Reed***, 894 F.2d 871, 878-79 (7th Cir. 1990) (counsel's failure to present witnesses supporting a viable defense, instead "tempt[ing] the fates" by resting on perceived

[14] If Chernin is deemed to have acted reasonably in not retaining experts, then the new exculpatory expert evidence in Wilber's §974.06 motion must be deemed newly discovered evidence justifying reversal for a hearing on that ground. *See, e.g.*, ***State v. Edmunds***, 2008 WI App 33, 308 Wis.2d 374, 746 N.W.2d 590. The evidence did not exist at trial; it is not cumulative of other expert testimony; and whether the physical evidence rebutted the state's speculative theory of the offense was and is a core disputed issue in the case.

weakness of the prosecution's case, deemed deficient performance).

Attorney Chernin's failure to find and retain an appropriate expert such as those who came forward for Wilber's post-conviction motion, appears to have been based on oversight rather than any reasoned strategy. Nothing in the record suggests that he made a strategic decision not to seek expert assistance, let alone that any such decision was a reasonable one. Accordingly, at least absent some unforeseen justification at the ***Machner*** hearing, his failure was unreasonable. *E.g.*, ***Wiggins***, 539 U.S. at 534 (errors due to oversight are deficient performance); *see* ***Thomas v. Clements***, 789 F.3d 760, 768–69 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1454 (2016) (non-strategic failure to seek out appropriate experts deemed deficient performance).

### C. Counsel's Deficient Performance Prejudiced Wilber's Defense

After his conviction and direct appeal, Wilber discovered the exculpatory evidence confirming Muniz as the shooter and found exactly the type of experts that Chernin should have found prior to trial. Although the state succeeded in concealing from Wilber and his experts most of the photographs of the scene that had been disclosed to Chernin prior to trial (*see* R78:10-11; R86; App. 20-32), the photographs and other evidence that were available permitted them to opine to a reasonable degree of scientific certainty that the state's theory of the offense was essentially bogus (R98:Attachs.308-11, 331-40).

Resulting prejudice turns on the cumulative effect of all errors and newly discovered evidence, *e.g.*, ***Thiel***, 2003 WI 111, ¶¶59-60, and is reviewed *de novo*, *id.*, ¶¶23-24.

As discussed, Sections I,B & II *supra*, the state's case against Wilber already was marginal at best. The combined

effect of the expert evidence and the newly discovered evidence that Muniz shot Diaz from the living room and later had Martin destroy the gun cannot help but create a reasonable probability of a different result. Even if the Court deems the evidence marginally sufficient absent expert testimony explaining how the physical evidence contradicts the state's speculative theory, such evidence guiding the jury's consideration of that evidence and its impact cannot help but impact its assessment of the state's speculative theory.

As already discussed, Section I,C, *supra*, the circuit court's summary rejection of Martin's and Gonzalez's evidence identifying Muniz as the shooter conflicts with established Wisconsin law.[15]

The court below recognized that the proposed expert testimony "may have assisted the factfinder to some extent." It nonetheless opined without explanation that the experts' conclusions are "speculative" and insufficient to create a reasonable probability of a different result given the eye-witness testimony. (R99:11-16, 17-18 & fns.12-13; *see* R86:12 & fn.5; App. 11-18, 31).

Again, the circuit court improperly arrogated to itself the jury's role of assessing credibility and weight and, in the process, improperly focused solely on the few bits of evidence it deemed compelling while ignoring all of the contrary evidence that a jury reasonably could credit instead. *E.g.*, ***Jenkins***, 2014 WI 59, ¶64; 96 Wis.2d at 247**.**

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[15] Evidence at a hearing may show that, given Gonzalez's failure to cooperate with Wilber's post-conviction counsel out of fear of Muniz, he might not have cooperated with Chernin either, shifting the issue to newly discovered evidence rather than ineffectiveness.

## IV.

## WILBER IS ENTITLED TO A HEARING ON HIS CLAIM THAT POST-CONVICTION COUNSEL DENIED HIM THE EFFECTIVE ASSISTANCE OF COUNSEL

Wilber's post-conviction counsel, Brian Kinstler and Martin Kohler, also unreasonably failed to investigate appropriate experts to confirm the fact that the physical evidence disproved Wilber's guilt and thus failed to challenge Chernin's ineffectiveness in failing to do so (R98:15-16). That failure constitutes ineffectiveness of post-conviction counsel and provides sufficient reason under §974.06(4) allowing Wilber to raise the trial ineffectiveness claim now. *E.g.*, ***State ex rel. Rothering v. McCaughtry***, 205 Wis.2d 675, 556 N.W.2d 136 (Ct. App. 1996).[16]

### A. Applicable Legal Standards

Although post-conviction or appellate counsel is not constitutionally ineffective solely because the attorney fails to raise every potentially meritorious issue, *see* ***Smith v. Robbins***, 528 U.S. 259, 287-88 (2000), counsel's decisions in choosing among issues cannot be isolated from review. *E.g.*, *id.*; ***Gray v. Greer***, 800 F.2d 644, 646 (7th Cir. 1986). The same ***Strickland*** standard for ineffectiveness – unreasonable/deficient performance plus resulting prejudice – applies to assess the constitutional effectiveness of post-conviction or appellate counsel. ***Robbins***, *supra*.

The Seventh Circuit has summarized the standards as follows:

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[16] Martin's and Gonzalez's fear of Muniz and their resulting failure to provide their evidence regarding him until after his death excuses post-conviction counsel's failure to discover it and provides independent grounds for "sufficient reason" under §974.06(4). *E.g.*, ***Edmunds***, *supra*.

> [W]hen appellate counsel omits (without legitimate strategic purpose) "a significant and obvious issue," we will deem his performance deficient . . . and when that omitted issue "may have resulted in a reversal of the conviction, or an order for a new trial," we will deem the lack of effective assistance prejudicial.

***Mason v. Hanks***, 97 F.3d 887, 893 (7th Cir. 1996).

The Wisconsin Supreme Court, however, has suggested a different and more restrictive standard for assessing the effectiveness of post-conviction or appellate counsel. *See* ***State v. Starks***, 2013 WI 69, ¶¶59-60, 349 Wis.2d 274, 833 N.W.2d 146, *reconsideration denied*, 2014 WI 91, 357 Wis.2d 142, 849 N.W.2d 724, and *reconsideration denied*, 2014 WI 109, 358 Wis.2d 307, 852 N.W.2d 746, *cert. denied*, 135 S. Ct. 1548 (2015). In ***Starks***, the Court held that satisfying the deficient performance/resulting prejudice standard of ***Strickland***, *supra*, is no longer sufficient for assessing claims of ineffective post-conviction or appellate counsel. Rather, the Court limited such ineffectiveness solely to cases in which prior counsel failed to raise one or more issues that were "clearly stronger" than the issues counsel chose to raise. 2013 WI 69, ¶¶56-60; *see* ***State v. Romero-Georgana***, 2014 WI 83, ¶¶4, 44-46, 360 Wis. 2d 522, 849 N.W.2d 668.[17]

Again, deficient performance and resulting prejudice are issues of law reviewed *de novo*. ***Thiel***, 2003 WI 111, ¶¶23-24.

### B. Post-conviction Counsel's Failure to Consult an Expert and Raise Chernin's Failure to Do So Denied Wilber the Effective Assistance of Post-conviction Counsel

Whether one applies the federal ***Strickland*** standard or the

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[17] Because ***Starks*** is more restrictive than the controlling federal standard for assessing ineffectiveness claims, it is not constitutionally valid. However, this Court does not have the authority to correct the ***Starks*** Court's mistake. ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

more restrictive ***Starks*** standard, post-conviction counsel's failure to consult with an appropriate expert to address the state's theory of the case was deficient performance.

Just as Chernin's failure to conduct such an investigation was unreasonable, *see* Section III,B,2, *supra*, it was equally unreasonable for post-conviction counsel to fail to do so. Wilber's conviction turned, not on speculative evidence that some unknown person had burned shoes too small for Wilber or on whether Wilber was shackled during part of the trial, but on the jury buying the state's theory that the physical evidence somehow could be massaged enough to permit attributing Diaz's death to Wilber. The issues raised by post-conviction counsel were not only exceedingly weak (*see* R65; R69); they do not even address the fact that the evidence conflicts with the state's theory of conviction.

For the reasons already discussed, moreover, a reasonable investigation would have produced expert testimony explaining that the physical evidence in the case in fact disproves the state's theory that resulted in Wilber's conviction (R98:Attachs. 308-11, 331-41). Whether raised as ineffectiveness of trial counsel, as newly discovered evidence, or more appropriately both, a claim based on expert testimony thus would have been clearly stronger than the feeble arguments raised on direct appeal.

## V.

## THE COURT ERRONEOUSLY EXERCISED ITS DISCRETION BY DENYING REMAND

After Wilber's prior attorney sought numerous extensions for filing his opening appeal brief, Wilber retained undersigned counsel. Recognizing certain easily correctable technical defects in the original motion, counsel moved this Court for remand to correct those errors, as encouraged by ***State v. Sutton***, 2012 WI

23, ¶¶20, 48, 339 Wis.2d 27, 810 N.W.2d 210 (2012) (Court of Appeals has discretion to remand and such remand to correct technical pleading errors "shall be freely given at any stage of the action when justice so requires" ). Motion for Remand and to Stay Proceedings on Appeal (9/11/17).

In addition to many of the legal errors discussed here that could have been corrected on remand without involving this Court, *id.* at 4-7 the motion also explained that the circuit court had based its decision on a number of easily correctable erroneous factual assumptions. For instance, the circuit court assumed that Gonzalez was not at the party since no one saw the need to mention him at trial. Other witnesses, however, saw him there. *Id.* (Affidavit of Angela Kvidera). Likewise, the circuit court found significant the perceived absence of any explanation why Gonzalez would have told Monique West at the time of trial that "Isaiah" had shot Diaz and now swears that Muniz did so. The remand motion explains that Gonzalez never told anyone that an "Isaiah" had shot Diaz, so there is no change to explain. *Id.*

Finally, the remand motion noted the new disclosure from Martin that the gun Muniz asked him to destroy was a Smith and Wesson .357 magnum revolver, *id.*, exactly the type of weapon used to kill Diaz (R47:56; R49:84-88,98).

Although not specifically raised in the remand motion, remand also would have allowed Wilber, consistent with ***Sutton***, *supra*, to correct other easily correctable potential pleading defects that the state might raise here in an effort to use technicalities to deny Wilber the relief to which he is entitled.

The Court, however, denied remand as unnecessary, asserting that "the motion itself indicates that the circuit court's purported errors could be addressed on direct appeal." (App. 55).

A court erroneously exercised its discretion by basing its decision on factual findings that are clearly erroneous. ***Seifert v. Balink***, 2017 WI 2, ¶93, 372 Wis. 2d 525, 570, 888 N.W.2d 816, 839, *reconsid. denied*, 2017 WI 32, 374 Wis. 2d 163, 897 N.W.2d 54. Here, the Court's assumption that the identified errors could all be addressed on direct appeal is not accurate. While *some* of the circuit court's errors could be corrected on appeal, the motion also raised mistaken factual assumptions relied upon by the circuit court. Because the evidence rebutting those assumptions is not in the record, the circuit court's factual errors can only be corrected on remand. *See* ***State v. Jackson***, 69 Wis.2d 266, 274, 230 N.W.2d 832 (1975) (appeal limited to facts of record).

Here, as in ***Sutton***, the Court denied remand mistakenly believing that the defendant would have some other avenue for possible relief. 2012 WI 23, ¶48. Should the circuit court's mistaken factual assertions or some other easily curable technical defect prove decisive here, this Court's mistaken belief mandates remand for exactly the reasons deemed controlling by the Supreme Court in ***Sutton***. ***Id.***, ¶¶48-50.

## VI.

## A NEW TRIAL IS APPROPRIATE IN THE INTERESTS OF JUSTICE

Even if some perceived technical defect should bar reversal on other grounds, reversal remains appropriate in the interests of justice under Wis. Stat. §752.35 given that the real controversy was not fully tried and the conviction reflects a miscarriage of justice. *See* ***Vollmer v. Luety***, 156 Wis.2d 1, 456 N.W.2d 797 (1990). The Court's discretionary authority to reverse in the interests of justice furthers its obligation to do justice in an individual case. ***Id.***, 156 Wis.2d at 15.

This Court may exercise its discretion under §752.35

regardless whether the circuit court misused its discretion. *See* ***Stivarius v. DiVall***, 121 Wis.2d 145, 152 & n.5, 358 N.W.2d 530 (1984).

### A. The Real Controversy was Not Fully Tried

"'[T]he real controversy has not been tried if the jury was not given the opportunity to hear and examine evidence that bears on a significant issue in the case." ***State v. Maloney***, 2006 WI 15, ¶14 n.4, 288 Wis.2d 551, 709 N.W.2d 436.

The real controversy here concerned whether Wilber shot Diaz. Although the eyewitnesses at trial uniformly testified either that Wilber did not shoot Diaz or that they did not see him do so, the state relied on the absence of a specific identifiable alternative to "prove" its case. It also benefitted from the absence of a defense expert explaining why the physical evidence contradicted the state's speculative "magic bullet" and "pirouette" theoriea. As a result, a man who quite likely is guilty of nothing more than being a jerk and starting fist-fights at a party is serving a life sentence for murder.

While the jury heard that Ricky Muniz previously had a dispute with Diaz and was in the living room with a gun shortly before the shooting (R51:232, 263-64; R52:33-41, 48-50; R108:Exh.51), it did not have the benefit of Gonzalez's eyewitness testimony that Muniz in fact shot Diaz from the living room (R98:Attach. 319-23). Nor did the jury have the corroborating testimony from Jonathan Martin that, shortly thereafter, Muniz came to him all nervous and "crazy," looking for a change of clothes and someone to get rid of his revolver, a revolver that he admitted he had used to shoot Diaz in the head to prevent Diaz from shooting Wilber (R98:Attach.314-18).

Also, while the circuit court noted that the jury had

defense counsel's argument that the physical evidence did not fit the state's speculative "magic bullet" and "pirouette" theory (R99:18; App. 18; *see* R55:160-169), arguments are not evidence (R55:122). *E.g.*, ***State v. Perkins***, 2001 WI 46, ¶41, 243 Wis.2d 141, 626 N.W.2d 762. Regardless whether Chernin acted reasonably, his failure to retain an appropriate expert denied the jury the evidence and the rationale to a reasonable degree of scientific certainty *why* the state's theory was bogus.

The Supreme Court faced a similar situation in ***State v. Hicks***, 202 Wis.2d 150, 549 N.W.2d 435 (1996), holding that the absence of DNA evidence to the effect that a hair found in the apartment of a rape victim could not have been the defendant's, when combined with the prosecutor's use of the hair at trial as affirmative proof of the defendant's guilt, mandated relief in the interests of justice:

> To maintain the integrity of our system of criminal justice, the jury must be afforded the opportunity to hear and evaluate such critical, relevant, and material evidence, *or at the very least, not be presented with evidence on a critical issue that is later determined to be inconsistent with the facts.* Only then can we say with confidence that justice has prevailed. [citation omitted].

202 Wis.2d at 171-72 (emphasis added).

Here, as in ***Hicks***, the state affirmatively and repeatedly relied upon a particular theory of the facts that depended on the absence of evidence supporting an alternative theory.

As in ***Hicks***, the evidence that was denied to the jury, either by counsel's failures or because it did not then exist, directly rebuts the state's claims. The state's theory underlying Wilber's conviction is not merely speculative; it conflicts with the physical evidence, evidence that is fully consistent with the account of Muniz's shot from the living room.

As in ***Hicks***, the unavoidable and unmistakable effect of the absence of evidence from Gonzalez, Martin, and the experts at the first trial is that the real controversy regarding whether Wilber shot Diaz was not fully and fairly tried. Reversal in the interests of justice accordingly is justified because, given the totality of these circumstances, "a new trial is required to accomplish the ends of justice." ***State v. Davis***, 2011 WI App 147, ¶16, 337 Wis. 2d 688, 808 N.W.2d 130 (citation omitted).

**B. Justice has Miscarried Here**

The interests of justice also require grant of a new trial under §752.35 because it is probable, indeed inescapable, given the new evidence that justice has miscarried in this case. ***Vollmer***, 156 Wis.2d at 19.

The new evidence of Muniz's actual involvement in killing Diaz fits comfortably with both the eyewitness testimony and the undisputed physical evidence, something that the state's "magic bullet" or "pirouette" theories never did. The expert testimony explaining the fatal conflict between the physical evidence and the state's speculative theory further emphasizes the point that the state charged the wrong man.

But for the absence of that evidence, the outcome in this case thus easily could have been different. Given the existing weakness of the state's case at trial, *see* Section II, *supra*, and the nature of the evidence not provided to the original jury, there cannot help but be "a substantial probability of a different result on retrial." ***Vollmer***, 156 Wis.2d at 16-17.

## VII.

## THE CIRCUIT COURT ERRONEOUSLY EXERCISED ITS DISCRETION IN REFUSING TO ORDER THE STATE TO PROVIDE WILBER COPIES OF PHOTOGRAPHS DISCLOSED TO HIS PRIOR LAWYER IN PRETRIAL DISCOVERY

The state provided access to more than 140 photographs to Chernin in pretrial discovery (R78:6, 10; *see* R85). While Chernin viewed those photographs, he either did not obtain copies or he did not provide the copies to Wilber after his representation ended. Because his new experts deemed the photographs important to their evaluation of the state's case, Wilber therefore sought copies of the previously disclosed photographs through both Open Records and in his *pro se* §974.06 motion (R92; R98:Attachs.305-06, 328-30).

The state, however, objected to providing copies of the previously disclosed photographs to Wilber, his new attorney, or his experts (R78:10-11), and the circuit court refused to order it to do so (R86; App. 20-32).

The circuit court erroneously exercised its discretion. Contrary to the analysis by everyone below, this is not a matter of post-conviction discovery controlled by ***State v. O'Brien***, 223 Wis.2d 303, 588 N.W.2d 8 (1999). "Discovery" is a procedure to obtain previously undisclosed evidence. *See* ***State v. Schaefer***, 2008 WI 25, ¶¶29-31, 308 Wis.2d 279, 746 N.W.2d 457.

Wilber did not seek a general right to review the prosecutor's file, *compare* ***Britton v. State***, 44 Wis.2d 109, 170 N.W.2d 785 (1969) (there is no general right to inspect the prosecutor's files after trial), or even disclosure of anything that had not previously been disclosed. Rather than seeking "discovery," Wilber merely sought copies of photographs that previ-

ously were disclosed to his attorney but not turned over to him.

The circuit court had the authority to order provision of the copies subject to reasonable conditions as to cost and the like, without regard to the restrictive requirements for post-conviction "discovery." *See* ***State v. McClaren***, 2009 WI 69, ¶3, 318 Wis.2d 739, 767 N.W.2d 550 ("Wis. Stat. § 906.11 authorizes a judge to exercise control over the presentation of evidence so that the truth can be effectively ascertained and so that time will not be needlessly wasted"); *cf.*, ***id.***, ¶24 (distinguishing "discovery" from advance notice of evidence to be used).

The state has no "privilege" to conceal previously disclosed evidence from the defense, *cf.*, Wis. Stat. §905.11 (waiver of privilege by voluntary disclosure), and the prosecutor's obligation is to seek justice, not merely uphold convictions. ***Berger v. United States***, 295 U.S. 78, 88 (1935). Concealing previously disclosed evidence to prevent the defendant from exercising his right to seek relief conflicts with that obligation.

A court erroneously exercises its discretion when acting based on a wrong legal standard. *E.g.*, ***Sutton***, 2012 WI 23, ¶48.

The state cannot prove the error was harmless beyond a reasonable doubt, *e.g.*, ***State v. Mayo***, 2007 WI 78, ¶47, 301 Wis.2d 642, 734 N.W.2d 115, and Wilber cannot fairly be required to argue how the photographs would have changed things without having access to them. Given the expert's existing opinions and the vigor with which the state sought to conceal the photographs from Wilber and his experts, however, one can infer that they do not support the state's position. *See* ***Kochanski v. Speedway SuperAmerica, LLC***, 2014 WI 72, ¶12, 356 Wis. 2d 1, 850 N.W.2d 160 (missing witness inference).

At Wilber's request, the circuit court stayed proceedings

on his substantive claims pending decision on the request for copies of the photographs so he could incorporate the photos into his motion (R77; App. 33). The appropriate remedy, therefore, is to reverse the order denying Wilber's motion, remand with directions to order the state to provide Wilber copies of the photos, and allow him to file an amended motion if appropriate based on the photos.

## CONCLUSION

For these reasons, Danny Wilber respectfully asks that this Court vacate his judgment of conviction, dismiss the charge against him and, if such relief is not granted, remand the matter to the circuit court for production of the requested photographs and a hearing on his motion for a new trial.

Dated at Milwaukee, Wisconsin, November 27, 2017.

Respectfully submitted,

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## RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10, 985 words.

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Robert R. Henak

## RULE 809.19(12)(f) CERTIFICATION

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

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Robert R. Henak

Wilber Ct. App. Brief.wpd

## CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 27th day of November, 2017, I caused 10 copies of the Brief and Appendix of Defendant-Appellant Danny Wilber to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688.

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Robert R. Henak