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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Appeal No.: 2017AP000868

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

CASEY M. FISHER,
Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING POSTCONVICTION
RELIEF, ENTERED IN MILWAUKEE COUNTY CIRCUIT
COURT, THE HONORABLE JEFFREY A. WAGNER,
PRESIDING

BRIEF AND APPENDIX
OF DEFENDANT-APPELLANT

Steven Wright
State Bar No. 1090780
shwright@wisc.edu

Maria de Arteaga
State Bar No. 1095253
dearteaga@wisc.edu

Wisconsin Innocence Project
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706
(608) 262-1002

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INTRODUCTION

In 1994, the police suspected that three drug addicts may have murdered Yaser Mousa (“Mr. Mousa”). Indeed, the evidence against the three men was strong. An eyewitness identified one of the men by name. This eyewitness told police that these men had gunned-down the victim, and this same eyewitness told police that they had fled to a nearby and vacant drug house. Police, within hours of the tip, stormed that very drug house and found the three

men hiding. Police took the men into custody and found blood on one man's shirt. Police also tested these men's hands for gunpowder residue. The test confirmed, for two of the men, the presence of significant levels of barium and antimony, the basic elements of gunpowder.

But the police never charged these men. Instead, the police released these three and charged Casey Fisher ("Fisher"). Fisher, who had no connection to these three men, maintained his innocence. At trial, Fisher's counsel failed to raise the possibility that these three men murdered Mr. Mousa, and this failure now serves as the basis of this appeal. Fisher filed a § 974.06 motion, seeking a new trial, in part, based upon ineffective assistance of trial counsel. The Circuit Court denied the motion without a hearing.

Fisher filed a timely notice of appeal.

Fisher now asks this Court to reverse the Circuit Court order. Specifically, Fisher presents three related issues. First, Fisher should receive a new trial because he received ineffective assistance of counsel. Trial counsel failed to present important exculpatory evidence that demonstrated that three other men murdered Mr. Mousa. Second, Fisher is not precluded from filing his ineffective-assistance-of-counsel claim. Lastly, and in the alternative, Fisher asks this Court to grant him a new trial in the

interests of justice, because the jury never received the opportunity to hear this compelling third-party perpetrator evidence.

ISSUES PRESENTED

- I. The police collected third-party-perpetrator evidence that included an eyewitness statement, blood on one of the third party's shirt, and gunpowder on the hands of two of these third-parties' hands. Whether trial counsel, who did not call a single witness at trial, provided ineffective assistance by failing to introduce this third-party-perpetrator evidence?

The circuit court did not reach whether counsel provided ineffective assistance.

- II. Whether Fisher, pursuant to *State v. Romero–Georgana*, was precluded from filing his first § 974.06 motion that seeks relief based upon ineffective assistance of counsel?

The circuit court found that Fisher was “precluded from filing a new post-conviction motion raising issues he could have previously raised.”

- III. Should this Court exercise its independent and discretionary power to grant Fisher a new trial in the interests of justice, because the issue of the perpetrator’s identity was not fully tried?

Fisher did not raise this issue below, and the Circuit Court did not reach this question.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Fisher welcomes oral argument to clarify any questions the Court may have. No issue warrants publication. This Court can resolve all issues based upon existing precedent.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On October 26, 1993, Mr. Mousa, the owner of a neighborhood grocery store, closed his store and set the alarm at 8:48 p.m. (48:109). Within the next sixteen minutes, Mr. Mousa was murdered and robbed in a nearby alley known for prostitution. (48:109; 45:12,14).

I. The Police Investigation

Police, upon arrival, found Mr. Mousa slumped over the steering wheel of his idling vehicle with four gunshots wounds to the right side of his head. (45:11, 34).

At the scene, an anonymous eyewitness approached an officer. (28:11) (A-Ap. 114). According to the officer's report, the eyewitness told police that "the subjects who shot the above victim ran east bound from 2137 N. 28th Street across N. 28th into the vacant lot at about 2140 N. 28th Street and northbound in the alley to-ward [sic] the dope house" and that "[the eyewitness] was told that a person known as 'Little Rob' was involved." (28:11) (A-Ap. 114).

Officers immediately pursued this lead and found three men in the dope house identified by the eyewitness; these three men were: Robert Williams (alias "Little Rob"), Kevin Jones, and Tywan Beard. (28:11-12, 55) (A-Ap. 114-15, 158). Police discovered

Williams and Beard hiding in a dark hallway inside the dope house. (28:11) (A-Ap. 114). Police took the three men to the station, where investigators also swabbed each man's hands for gunshot residue. (28:12, 14-15) (A-Ap. 115, 117-18). Officers also noticed a spot of blood on Jones' gray t-shirt, so they confiscated the shirt. (28:12, 17) (A-Ap. 115, 120). Lab tests on the swabs revealed that two of these men, Jones and Williams, did have, on their hands, sufficient levels of barium and antimony, which are the basic elements of gunshot residue. (28:14-15) (A-Ap. 117-18).

Meanwhile, investigators continued to retrace Mr. Mousa's final moments. Investigators interviewed Mr. Mousa's employee and learned that, shortly after closing the shop, Mr. Mousa had given a ride to Fisher. (46:61). Police also interviewed Lolita Moore, the girlfriend of Little Rob. (28:21) (A-Ap. 124). Moore, a prostitute and drug user, told police that she'd heard that Fisher had robbed the victim. (28:19, 21) (A-Ap. 122, 124).

Police chose to interview Fisher. In that interview, Fisher denied any involvement in the robbery and murder. (28:23-24) (A-Ap. 126-27). Fisher acknowledged that Mr. Mousa gave him a ride to the gas station, but he claimed that Mr. Mousa dropped him off at a local gas station. (28:23-24) (A-Ap. 126-27). Fisher claimed, at the gas station, he met his friend Andree Ward. (28:23-24) (A-Ap. 126-27). Fisher and Ward then drove to Ward's girlfriend's house and hung out. (28:23-24) (A-Ap. 126-27). Fisher emphasized: the

last time he saw Mr. Mousa, Mr. Mousa was alive. (28:23-24) (A-Ap. 126-27).

A. The shifting statements of Andree Ward

Police interviewed Fisher's alibi, Andree Ward, who denied Fisher's claim. Ward, a parolee for possession of cocaine, said that he and his cousin, Andre Goodman, drove past Mr. Mousa's grocery store around 8:35 p.m. (28:30-31) (A-Ap. 133-34). Ward claimed to see Fisher outside of Mr. Mousa's grocery store as he drove past. (28:30-31) (A-Ap. 133-34). Ward stated that he did not see Fisher at the gas station; nor did he give him a ride. (28:30-31) (A-Ap. 133-34). Ward claimed to see Fisher the next day. (28:31) (A-Ap. 134). At that time, Ward asked Fisher if he had heard that Mr. Mousa had been shot. (28:31) (A-Ap. 134). Fisher reportedly said no. (28:31) (A-Ap. 134). Ward said this was the extent of their conversation regarding the shooting. (28:31) (A-Ap. 134).

Police re-interviewed Ward, six days after his initial interview, and this time Ward gave a different statement. (28:36-39) (A-Ap. 139-42). In the previous statement, Ward said just he and Goodman drove by the store around 8:35 p.m. and that they did not stop at the store. (28:30) (A-Ap. 133). This time, Ward claimed that he and Goodman were joined by a third man, Jay Wonders, and that the three stopped at the store around 8:45 p.m. (28:36) (A-Ap. 139). Ward claimed, for the first time, that he and Wonders exited the car to talk with Fisher. (28:36) (A-Ap. 139).

During this talk, Ward claimed, Fisher shared his intent to rob Mr. Mousa. (28:36) (A-Ap. 139). Ward claimed that he, Wonders, and Goodman left Fisher, but that he and Wonders saw Fisher again the next day. (28:37-38) (A-Ap. 140-41). At this second meeting, Ward claimed for the first time that Fisher confessed to killing Mr. Mousa. (28:38) (A-Ap. 141).

B. The shifting statements of Andre Goodman

Police also interviewed Andre Goodman. Unlike Ward, Goodman denied seeing Fisher that night. (28:34) (A-Ap. 137). Goodman also offered no statement about seeing Fisher the following day. (28:34) (A-Ap. 137).

Police then re-interviewed Andre Goodman “due to the conflicting statements given to investigating detectives by Andre Ward and Jay Wonders.” (28:41) (A-Ap. 144). Like Ward, Goodman’s second statement changed substantially from his first. In this second statement, Goodman said he was with Ward and did see Fisher the night of the crime. (28:41) (A-Ap. 144). In this second statement, Goodman claimed he saw Ward and Wonders talk to Fisher outside the grocery store. (28:41) (A-Ap. 144). However, Goodman, again, offered no statement about seeing Fisher the following day. (28:41) (A-Ap. 144).

C. The conflicting statement of Jay Wonders

Police, seeking to corroborate Ward's second and revised statement, interviewed Wonders. (28:43-45) (A-Ap. 146-48). Indeed, Wonders corroborated some portions of Ward's statement. (28:43-45) (A-Ap. 146-48). Wonders claimed, for example, that Fisher shared his plan to rob Mr. Mousa. (28:43) (A-Ap. 146). Fisher, Wonders claimed, also confessed to killing Mr. Mousa. (28:44) (A-Ap. 147). But these two men's statements differed significantly. (28:43-45) (A-Ap. 146-48). For example, Ward claimed that Fisher shared his plan while the three men were outside Mr. Mousa's store; whereas, Wonders claimed that Fisher shared his plan while waiting outside a residence on North 25th. (28:36-39, 43-45) (A-Ap. 139-42, 146-48). Further, Ward claimed that Fisher shared his plan while meeting Ward and Wonders; whereas, Wonders claimed that Fisher shared his plan while meeting with Ward, Wonders, and Goodman. (28:36-39, 43-45) (A-Ap. 139-42, 146-48).

Based on these statements, Police arrested Fisher. (1:1)

II. At Trial

At trial, the State relied upon Goodman, Ward, and Wonders. (47:24-45; 48:24-62, 76-94). Each witness reiterated the final story they told police. Ward also claimed that Fisher asked him to serve as his alibi. (48:35).

The defense produced no witnesses and Fisher did not testify. The defense, however, highlighted inconsistencies between the statements of Ward, Goodman, and Wonders. (28:36-39, 43-45) (A-Ap. 139-42, 146-48).

The jury never learned that the police arrested alternative suspects. The jury never learned that an eyewitness at the scene both saw the shooters flee the scene and heard that Little Rob was involved. The jury never learned that two alternate suspects tested positive for barium and antimony. The jury never learned that one of the alternate suspects had human blood on his shirt.

The jury convicted Fisher of first-degree intentional homicide while armed and armed robbery. (13). The circuit court sentenced Fisher to a life sentence with parole eligibility on January 1, 2045 for the first-degree intentional homicide and a 20-year consecutive sentence for armed robbery. (13).

III. Post-Conviction and Direct Appeal

A. Direct Appeal

In July 1994, the State Public Defender appointed Attorney Mark Lukoff as postconviction counsel. (34:7) (A-Ap. 168). In November 1994, postconviction counsel concluded that Fisher lacked any meritorious reason for postconviction relief. (34:9-10) (A-Ap. 170-71). "At that time I advised you that I did not see any grounds for post-conviction motion, a sentence modification, or an

appeal in the case." (34:9) (A-Ap. 170). Counsel offered Fisher a handful of options that included proceeding *pro se*, hiring a new attorney, filing a no-merit report or abandoning his appeal. (34:9) (A-Ap. 170). A no-merit claim, counsel advised, "requires that I basically argue against you, and inform the court of appeals why there is nothing wrong with your case." (34:9) (A-Ap. 170). Fisher could also "seek assistance from another inmate or from LAIP." (34:10) (A-Ap. 171). Counsel only provided Fisher with "court records and transcripts which I had." (34:10) (A-Ap. 171).

Fisher, then illiterate, followed counsel's advice and proceeded with the help of jailhouse lawyers. In fact, Fisher wrote this Court seeking an extension, because, in the words of the Court, "Fisher indicates that he is without legal knowledge and writing skills, and that he is dependent upon another inmate for assistance." (34:12) (A-Ap. 173).

Fisher, through his jailhouse lawyer, eventually filed a *pro se* motion, pursuant to Wis. Stat. section 809.30,¹ for postconviction relief seeking a new trial. (17; 34:21-33) (A-Ap. 182-94). Fisher first argued that the circuit court erred in not granting Fisher a continuance to locate favorable witnesses Adam Booker,

¹ We note that Mr. Fisher, acting *pro se*, incorrectly stated in his postconviction motion to the circuit court on March 15, 1996 that he was moving "pursuant to § 974.06(1)," when in fact the motion was a postconviction motion pursuant to 809.30(2)(h). (17:1; 34:21) (A-Ap. 182).

Hellewee Johnson, and Eugene Smith. (17; 34:22-25) (A-Ap. 183-86). These witnesses, Fisher claimed, would have provided testimony implicating someone other than Fisher as the perpetrator.² (34:22-23, 36-38) (A-Ap. 183-84, 197-99). Fisher also argued that his trial counsel provided ineffective assistance for 1) failing to obtain appearances at trial of these three witnesses, and 2) stipulating to a reading of a police report that Fisher argued misstated a witness statement. (17; 34:25-33) (A-Ap. 186-94).

On May 20, 1996, the circuit court, in a written decision, denied that motion. (18).

Fisher appealed his convictions and the denial of his postconviction motion, and on March 11, 1997, this Court issued a decision affirming Fisher's convictions and denying his postconviction motion. (22; 34:15-19) (A-Ap. 176-80).

B. Fisher files his first and only collateral post-conviction motions

In February 2017, Fisher filed twin postconviction motions. First, Fisher filed a motion, pursuant to Wis. Stat. section 974.07,

² According to police reports, immediately after the shooting, a man named Adam Booker saw a man with a gun run by him while he was on his porch. Adam Booker's mother, Hellewee Johnson, was inside that house when the man ran by. Police brought Adam Booker into the police station to view a photo array, which included Fisher. After viewing the photos, Booker stated the man who ran by him looked *similar* to Fisher. At a later date, Adam Booker viewed a live lineup, which also included Fisher. Adam Booker again stated that it was not Fisher and then went on to explain to police that he had known Fisher for about 12 years. (34:22-23, 36-38, 40) (A-Ap. 183-84, 197-99, 201).

seeking DNA testing of several items including the bloodstain found on the shirt of one of the three alternate perpetrators. (27). Both the State and the Circuit Court agreed. (37:2-3) (A-Ap. 101-02). If the blood on the shirt matched the blood of the victim, then Fisher had established a reasonable probability that he would not have been prosecuted or convicted.³

Fisher also simultaneously filed his first and only collateral new trial motion pursuant to Wis. Stat. section 974.06. (28; 29). In this motion, Fisher sought a new trial based upon two grounds. (29). First, Fisher argued that he should receive a new trial because he received ineffective assistance of counsel. Trial counsel failed to present important exculpatory evidence that demonstrated that Little Rob and two others murdered Mr. Mousa. (29). Second, Fisher argued that he should receive a new trial in the interests of justice, because the jury never received the opportunity to hear this same important exculpatory testimony. (29). Fisher requested a hearing to substantiate his claims. (29:2).

The State, in a written response, argued that case law precluded Fisher from filing a new trial motion based upon ineffective assistance of counsel. (31). Fisher, the state argued, should have brought his claim during his original post-conviction proceedings. (31:2-3). The State also argued that the circuit court

³ The Circuit Court denied testing of other pieces of evidence. (37:3) (A-Ap. 102). Fisher does not challenge the denial of testing on those other items.

lacked authority to grant a new trial in the interest of justice.
(31:3-7).

The circuit court agreed with the State, denying Fisher's
motion for a new trial without a hearing. (37:4) (A-Ap. 103).

Fisher now appeals.

ARGUMENT

The jury never learned about Little Rob and his two friends. The jury did not learn that an eyewitness identified the shooters and specifically stated that “Little Rob” was involved. They did not learn that the police took these three into custody. They did not learn that the police found blood on one suspect's shirts. They did not learn that Little Rob's and his friend's hands tested positive for the basic elements of gunpowder. This evidence, which could have been adduced through police testimony and records, was important exculpatory evidence, evidence that both showed Fisher's innocence and suggested Little Rob's guilt.

The failure to produce this evidence yielded two strong grounds upon which to grant Fisher a new trial. First, Fisher should receive a new trial because he received ineffective assistance of trial counsel. Fisher's counsel performed deficiently, and this deficiency prejudiced Fisher. Second, Wisconsin case law does not preclude Mr. Fisher from bringing this stronger ineffective-assistance claim. Finally, Fisher should receive a new trial in the Interest of Justice. The jury never received the opportunity to hear the important exculpatory testimony; and, therefore, the real controversy---the identity of Mr. Mousa's killer---was not fully tried.

I. Because trial counsel failed to present third-party perpetrator evidence that included an eyewitness statement that accused and named the third parties, human blood on one of the third party's shirt, and gunshot residue on the hands of two of these third parties, trial counsel was ineffective.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Fisher the right to effective assistance of counsel at critical stages of his prosecution. In order to prove that he received constitutionally inadequate assistance, Fisher must show that: (1) his counsel performed deficiently; and (2) counsel's deficient performance prejudiced him. *State v. Jenkins*, 2014 WI 59, ¶ 35, 355 Wis. 2d 180, 848 N.W.2d 786 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

Here, Fisher satisfies both inquiries. Indeed, Fisher's claim is similar to *Harris v. Reed*, a case in which counsel also failed to present strong evidence of a third-party perpetrator. 894 F.2d 871 (7th Cir. 1990).

A. Standard of Review

Whether Fisher received ineffective assistance is a mixed question of law and fact. *Jenkins*, 2014 WI at ¶ 38 (citing *State v. Domke*, 2011 WI 95, ¶ 33, 337 Wis. 2d 268, 805 N.W.2d 364). A circuit court's "findings of fact, including the circumstances of the

case and the counsel's conduct and strategy," are upheld unless clearly erroneous. *Jenkins*, 2014 WI at ¶ 38 (citing *State v. Thiel*, 2003 WI 111, ¶ 21, 264 Wis. 2d 571, 665 N.W.2d 305). Whether counsel's performance satisfies the constitutional standard for ineffective assistance of counsel is a question of law, which this Court reviews *de novo*. *Id.*

B. Fisher's counsel, who did not call a single witness, performed deficiently by failing to present the strong evidence of third-party perpetrators.

In determining whether counsel performed deficiently, a defendant must show that counsel's representation "fell below the objective standard of reasonably effective assistance." *Jenkins*, 2014 WI ¶ 40 (citing *Domke*, 2011 WI ¶ 36). Both failure to conduct a reasonable investigation and failure to call a witness to testify can constitute deficient performance. *State v. Delgado*, 194 Wis. 2d 737, 751-56, 535 N.W.2d 450 (Ct. App. 1995); *State v. Hubert*, 181 Wis. 2d 333, 343-44, 510 N.W.2d 799 (Ct. App. 1993); *Whitmore v. State*, 56 Wis. 2d 706, 715, 203 N.W.2d 56 (1973). Incomplete investigations, which are the result of inattention or oversight, do not constitute a reasoned strategic judgment to satisfy the Constitution. *Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

Here, trial counsel performed deficiently by mishandling evidence of Little Rob's and his friends' guilt. Specifically, counsel should have done the following:

First, counsel should have called and cross-examined police officers about their investigation into Little Rob. For example, the State called Detective Spingola, a lead investigator, to testify. (45:32-36; 46:8-45). Detective Spingola clearly took part in the investigation of Little Rob. Little Rob and his friends were “detained for Detective ... Spingola & Lewandowski” and “...conveyed to the fourth floor for questioning.” (28:12) (A-Ap. 115). Detective Spingola interrogated the men on the fourth floor of the police station. (28:12) (A-Ap. 115).

On cross-examination, defense counsel did not ask any questions about Little Rob. Three other police officers --- Mark Apriesnig, Dennis Kuchenreuther, Michael Lewandowski --- also testified. (45:10-15; 47:5-22; 48:95-125). Trial counsel asked none of these witnesses about the investigation and interrogation of Little Rob and the others.

Second, trial counsel should have presented police reports and witness statements that implicated Little Rob and his friends. Officer Williams' report is clear. (28:11-12) (A-Ap. 114-15). An eyewitness reported that the persons who shot Mr. Mousa ran into a nearby "dope house." (28:11) (A-Ap. 114). Further, the eyewitness reported to police that “"Little Rob" was involved.” (28:11) (A-Ap. 114). Neither the State nor trial counsel called Officer Williams to testify. Trial counsel should have called Officer Williams to testify about the eyewitness.

Third, counsel should have called lab technicians who identified the blood and the gunshot residue on these men's hands. Laboratory Analyst, Raymond G. Lenz, worked at the state crime lab in Milwaukee. (28:14) (A-Ap. 117). In his lab report, Lenz reported "sufficient levels of both barium and antimony" on the hands of Little Rob and one of his friends. (28:15) (A-Ap. 118). This discovery "indicate[d] the presence of gunshot residue." (28:15) (A-Ap. 118). Further, Laboratory Analyst Elaine Canales-Willson also worked at the state crime lab. (28:17) (A-Ap. 120). In her report, she confirmed the presence of a bloodstain "in the right shoulder area of [Jones'] shirt." (28:17) (A-Ap. 120). This stain "tested positive for blood and human origin." (28:17) (A-Ap. 120). Counsel called neither lab technician to testify.

Fourth, counsel should have investigated and interviewed the eyewitness who claimed to see the shooting, and counsel should have investigated and interviewed other people who might have seen the shooting.

These failures, combined and individually, constitute textbook deficient performance. *Strickland*, 466 U.S. at 691 ("Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."); *Jenkins*, 2014 WI ¶¶ 41-48 (finding deficient performance of trial counsel for failure to call a key witness).

C. Police records corroborated this deficiency.

Ordinarily, a defendant must call trial counsel to testify about alleged ineffectiveness. *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, sadly, Fisher's trial counsel, Bernard Goldstein, has died. (28:52) (A-Ap. 155). Under such circumstances, Fisher also "must support his allegations with corroborating evidence." *State v. Lukasik*, 115 Wis. 2d 134, 140, 340 N.W.2d 62 (Ct. App. 1983). "Such evidence could be letters from the attorney to the client, transcripts of statements made by the attorney or any other tangible evidence which would show the attorney's ineffective representation." *Id.*

1. Trial counsel is unavailable

As the circuit court notes, Fisher's Counsel, Bernard Goldstein, has died. (37:2) (A-Ap. 101). Therefore, he is unavailable.

As Fisher and the circuit court also note, another attorney, Attorney Robert A. Kagen, is listed on trial transcripts as appearing on behalf of the Defendant as well. (37:2) (A-Ap. 101). Kagen appears on the record very little, and it is unclear, even to Fisher, what role Kagen played on Fisher's defense team. Even if this Court, or the circuit court, did consider Kagen counsel, that should have been addressed at a hearing, which Fisher requested.

(29:2). Because a hearing was never ordered, Attorney Kagen was never served a subpoena.

2. Trial counsel's deficiency is corroborated

Because Fisher's counsel is unavailable, he must also support his ineffective-assistance claim with corroborating evidence. *Lukasik*, 115 Wis. 2d at 140.

Here, the documentary evidence well-corroborates Fisher's claim. First, police reports clearly show that the police seized Little Rob and his friends. (28:11-12) (A-Ap. 114-15). Second, counsel's file shows that the State provided counsel with these documents. Further, the trial record makes clear that counsel did not present this evidence to the jury.

The purpose of corroboration is simple. The courts wish to ensure that a defendant cannot wantonly blame a dead man for a reasonable strategic decision. *Lukasik*, 115 Wis. 2d at 140. "Such a burden will assure that post-conviction proceedings will not be brought solely on the basis of ineffective counsel when counsel dies or for some other reason becomes unavailable to explain his or her prior actions." *Id.*

Here, the courts have that assurance. The corroborating evidence clearly identifies these alternate suspects; discovery files

included the alternate suspects; and counsel failed to present these alternate suspects. Presentation of this evidence would have corroborated Fisher's defense: actual innocence of the crimes against Mr. Mousa.

But, even if counsel still lived, counsel could not characterize this failure as strategy. The record is devoid of any reasonable trial strategy to support defense trial counsel's failure to present this evidence. *See, e.g., Jenkins*, 2014 WI ¶¶ 40-48.

Trial counsel's representation therefore fell below objective standards of reasonable effective assistance of counsel. *See Id.*

D. The State's weak case relied upon the shifting statements of three untrustworthy witnesses, and therefore counsel's deficiencies prejudiced Fisher.

The defendant must show that counsel's failure resulted in prejudice. In order to demonstrate prejudice, Fisher must show 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* When a defendant alleges multiple deficiencies by trial counsel, "prejudice should be assessed based on the cumulative effect of counsel's deficiencies." *Thiel*, 2003 WI ¶ 59.

To be clear, prejudice is not an outcome-determinative standard; the focus is on the reliability of the proceedings. *State v. Pitsch*, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985); *State v. Smith*, 2003 WI App 234, ¶ 17, 268 Wis.2d 138, 671 N.W.2d 854. "The result of a proceeding can be rendered unreliable, and hence the proceeding itself, unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Pitsch*, 124 Wis. 2d at 642.

Here, counsel's deficiency has rendered Fisher's trial unreliable. The sole issue at trial was the identity of Mr. Mousa's killer. Defense counsel presented no real defense. Defense counsel called no witnesses, and Fisher did not testify. The jury was left only with the statements of the three unreliable State witnesses, one of whom was on parole for possession of cocaine when he gave his shifting police statements and trial testimony, claiming to have heard Fisher make incriminating statements. (28:30) (A-App. 133-34).

No physical evidence ever tied Fisher to the shooting, and the unrepresented evidence about Little Rob and his friends would have further exposed the weaknesses of the State's case: the inconsistent and varying statements and testimony of Ward, Goodman, and Wonders. *See, e.g., Jenkins*, 2014 WI ¶¶ 51-53 (finding prejudice based on counsel's failure to present exculpatory witness testimony when no physical evidence tied the defendant to

a shooting death and where none of the State's witnesses actually witnessed the shooting).

Counsel could have presented a clear defense: Little Rob and his friends killed Mr. Mousa. Police reports, arrest records, and State Crime Lab reports support these alternative suspects' guilt. This defense would have both enhanced Fisher's innocence claim and proven someone else murdered Mr. Mousa.

Because Fisher's trial counsel did not present the jury with the strong exculpatory evidence incriminating Little Rob and his friends, this Court cannot have confidence that the trial result was reliable. There is a reasonable probability that the result of the trial would have been different had trial counsel presented the jury with the compelling evidence of Little Rob's and Little Rob's friends' guilt.

E. Fisher's claim is similar to *Harris v. Reed*, in which the United States Court of Appeals for the Seventh Circuit ordered a new trial based upon ineffective assistance of Counsel.

The United States Court of Appeals for the Seventh Circuit found ineffective assistance in a remarkably similar case. In *Harris v. Reed*, someone shot and killed the victim on the streets of Chicago around 9:30 PM. 894 F.2d at 872. Investigators went door to door seeking witnesses who might offer a lead. *Id.* One

witness told police that he heard the shot and saw a black male running, in a northeasterly direction, from the crime scene. *Id.* A second witness offered a similar story, telling police that she “was sitting on the front porch of her house when she heard the shot. She then saw two men flee in a northeasterly direction away from the scene into a vacant lot.” *Id.* at 873. Both witnesses later identified the man---or one of the men--- as Melvin McWhorter. *Id.*

“Based upon the statements of these witnesses, the police questioned McWhorter, who denied both being in the area and any knowledge of the shooting.” *Id.* McWhorter later changed his story, this time admitting that he had been near the crime scene that night to buy drugs. *Id.* McWhorter also claimed to have seen Warren Harris, the defendant and appellant, leave the crime scene around the time of the shooting. *Id.*

For a month, McWhorter was the police’s prime suspect. *Id.*

Investigators, however, received a tip that, eventually, led to a motorist who claimed to have heard the gunshot, saw the defendant jump into a car and drive away. *Id.* Based upon this new eyewitness testimony, the police charged the defendant. *Id.*

At trial, defense counsel gave an opening in which counsel prepared the jury for evidence regarding Melvin McWhorter. *Id.* At trial, the State called six witnesses, but did not call any of the

witnesses implicating McWhorter. *Id.* at 874. During the trial, counsel did not offer any evidence implicating McWhorter. Counsel did not cross-examine witnesses about McWhorter. *Id.* Counsel rested without calling a single witness. *Id.* Indeed, defense counsel refused to offer a theory of defense after the prosecution rested its case. *Id.*

The United States Court of Appeals for the Seventh Circuit found that the defendant received ineffective assistance of counsel. *Id.* at 878-79. The Court emphasized trial counsel's "decision not to put on any witnesses in support of a viable theory of defense." *Id.* at 878.

In particular, the Court criticized trial counsel for failing to call the two eyewitnesses who saw McWhorter. *Id.* "There is little objective reason to believe that the jury would not credit the testimony of [the two eyewitnesses]. They were contacted by the police soon after the incident. They were unbiased witnesses whose account of what they saw largely corroborated each others'. Finally, both witnesses positively identified McWhorter as the man (or one of the men) they saw fleeing from the scene." *Id.*

Harris is substantially similar to this case. In both cases, police had strong reason to suspect an alternative suspect. First, in both cases, the police took into custody the alternate suspect(s). Second, in both cases, the police interviewed eyewitnesses who

could offer incriminating testimony about seeing the alternate suspect(s) at the crime scene. Third, in both cases, the alternate suspects were indeed found in the neighborhood on the night of the murder. In *Harris*, the alternate suspect admitted to being in the neighborhood; here, police found the alternate suspects in a nearby neighborhood dope house.

In many ways, in the present case, the evidence of a third-party perpetrator is stronger. In the present case, the eyewitness identified the alternate suspect by name. In the present case, the police found blood on an alternate perpetrator's shirt. In the present case, the alternate suspects' hands tested positive for significant levels of barium and antimony, the basic elements of gunpowder.

Further, this case is similar to *Harris*, because, in both cases, defense counsel provided a poor defense at trial. In both cases, counsel failed to call a single defense witness. In both cases, counsel failed to present this important exculpatory evidence. In both cases, counsel failed to consult his client about a trial strategy that did not implicate the alternate suspect.⁴

In short, *Harris* stands for a rather unextraordinary proposition. Defense Counsel is ineffective when counsel both fails

⁴ The circuit court denied Fisher's motion without a hearing. This fact would have been developed at the hearing.

to present any defense and fails to present strong evidence of third-party perpetrator(s). Based upon the facts and reasoning of *Harris*, this Court should grant Fisher's motion for a new trial.

F. Conclusion

By failing to present compelling evidence that third-party perpetrators murdered Mr. Mousa, Fisher's trial counsel was ineffective. The record is devoid of any reasonable trial strategy to support trial counsel's failure to present this evidence. No reasonable attorney would keep this critical, exculpatory evidence from a jury. Had the jury been presented with the compelling evidence of Little Rob's and his friends' guilt, there is a reasonable probability that the result of the trial would have been different. Because Fisher received constitutionally ineffective assistance of counsel at trial, he is entitled to a new trial.

II. Fisher satisfies the criteria to receive relief in this successive ineffective assistance claim, because he did not know about the third-party perpetrators, and because this claim is clearly stronger than his first ineffective-assistance claim.

A. Statement of Law/Standard of Review

Whether Fisher's claims are procedurally barred depend upon the proper interpretation of Wis. Stat. section 974.06, which is a question of law that this Court must review de novo. *State v.*

Lo, 2003 WI 107, ¶ 14, 264 Wis. 2d 1, 665 N.W.2d 756; *State v. Escalona–Naranjo*, 185 Wis. 2d 168, 175-76, 517 N.W.2d 157 (1994).

The Wisconsin Supreme Court has articulated the two requirements necessary to bring a successive ineffective assistance of counsel claim in compliance with Wis. Stat. section 974.06. *State v. Romero–Georgana*, 2014 WI 83, ¶ 48, 360 Wis. 2d 522, 849 N.W.2d 668; *Escalona–Naranjo*, 185 Wis. 2d at 181. First, the defendant must show a sufficient reason for failing to raise the current issue earlier. *Romero–Georgana*, 2014 WI ¶ 48; *Escalona–Naranjo*, 185 Wis. 2d at 181-182. Second, the defendant must demonstrate that the claims made now are clearly stronger than previous claims. *Romero-Georgana*, 2014 WI ¶ 46.

B. Fisher did not know about the alternative suspects, and, therefore, he could not have included his current claim in his original post-conviction motion.

Fisher's original post-conviction counsel did not identify Fisher's current claim. In fact, post-conviction counsel did not identify any error at trial. To reach this conclusion, post-conviction counsel relied exclusively upon “court records and transcripts” in making his determination. (34:10) (A-Ap. 171). Post-conviction counsel clearly did not review discovery.

Post-conviction counsel offered Fisher a series of unpalatable options including a no-merit report. The no-merit report, post-conviction counsel advised, "requires that I basically argue against you, and inform the court of appeals why there is nothing wrong with your case." (34:9) (A-Ap. 170).

Fisher could, therefore, choose to abandon his claim or to pursue his claim himself. But, pursuing his own claim would not be easy. The circuit court correctly found that the police reports regarding the alternative suspects "were part of discovery." (37:4) (A-Ap. 103). The record suggests that post-conviction counsel did not review discovery; instead he limited himself to transcripts and court records. (34:7, 9-10) (A-Ap. 168, 170-71). Indeed, in his close-out letter to Fisher, post-conviction counsel did not mention discovery, saying to Fisher, "I gave you the court records and transcripts which I had." (34:10) (A-Ap. 171).

Therefore, Fisher did not receive these pieces of discovery. But, even if he had, he probably would not have been able to read the discovery due to his illiteracy. In the words of this Court, "Fisher indicates that he is without legal knowledge and writing skills, and that he is dependent upon another inmate for assistance." (34:12-13) (A-Ap. 173-74).

Because Fisher did not know about the alternative suspects, he could not have included his current claim in his original

postconviction motion. *See State v. Allen*, 2010 WI 89, ¶¶ 45-52, 328 Wis. 2d 1, 786 N.W.2d 124 (recognizing “unaware[ness] of the factual basis for...claims” as a basis for determining “sufficient basis”). In *Allen*, The Wisconsin Supreme Court, noting the procedural hurdles imposed by *Escalona-Naranjo*, noted that a “defendant could raise an issue ‘which for *sufficient reason*’ was not raised or was inadequately raised in a prior motion.” *Allen*, 2010 WI ¶ 26 (*quoting Escalona-Naranjo*, 185 Wis. 2d at 184). The Wisconsin Supreme Court then went on to entertain Allen’s argument that he had sufficient reason for raising his current claims because he was unaware of his claims at the time of the no-merit proceedings. *Allen*, 2010 WI ¶ 43-52.

The record in this case proves that Fisher was not aware of his claims: there would be absolutely no reason Fisher would leave out the compelling and varying pieces of evidence pointing to Little Rob and his friends’ guilt *other* than unawareness. Fisher never discovered the evidence of the alternative suspect either at trial or during his direct appeal proceedings. Only after retaining the Wisconsin Innocence Project did Fisher learn of the evidence of the third-party perpetrators, a fact which would have been developed at a hearing had the circuit court ordered one. In this case, Fisher’s unawareness of the factual basis for his claims at the time of his direct appeal proceedings is a “sufficient reason” for failing to raise it on direct appeal.

One last point: even if Fisher had pursued a no-merit route, the no-merit process would not have caught trial counsel's ineffectiveness. Postconviction counsel must identify those issues in the record worthy of no-merit consideration. *See* Wis. Stat. § 809.32(1)(a) (“The no-merit report shall identify anything in the record that might arguably support the appeal and discuss the reasons why each identified issue lacks merit.”). To evaluate a no-merit, the Court limits its diligent review to the no merit report and the issues appearing within the record. *See State v. Tillman*, 2005 WI App 71, ¶ 17, 281 Wis. 2d 157, 696 N.W.2d 574.

At trial, neither side presented evidence of these alternate suspects. Therefore, information about these three alternative suspects does not appear in the record. Fisher, again who was illiterate, did not know about the alternative suspects; and therefore, could not have included this complaint in his no-merit response. Because this error appears outside the record, the no merit process would not have caught it.

As a result, Fisher has sufficient reason for not including his current claim based on trial counsel’s failure to investigate and present evidence about the alternative suspect in his original postconviction motion.

C. Fisher's new claim is clearly stronger than his previous claims, which were weak and conclusory.

In his previous claim, Fisher, *pro se*, poorly "raises essentially two issues for review: (1) whether the trial court erroneously exercised its discretion when it failed 'to grant a continuance to locate favorable defense witnesses'; and (2) whether the trial court erroneously rejected his ineffective assistance of counsel claim without holding an evidentiary hearing." (22:1-2; 34:15-16) (A-Ap. 176-77); *State v. Fisher*, No. 96-1081 (Wis. Ct. App. March 11, 1997) (unpublished) (internal quotations omitted)); *see also* (17:1-13; 34:21-33) (A-Ap. 182-94). This Court dismissed the motion without a hearing, and the Court of Appeals affirmed. (34:15-19) (A-Ap. 176-80).

The Court of Appeals clearly rejected both claims as weak. In the four-page, unpublished, per curium opinion, the Court found that Fisher waived his first argument. (22:3; 34:17) (A-Ap. 178). The Court rejected his second argument, because Fisher failed to allege sufficient facts to justify either an evidentiary hearing or relief. (22:4; 34:18) (A-Ap. 179).

Almost any claim Fisher might file is stronger than these two weak claims. These two claims lacked any foundation in the record or in the law. The Court of Appeals correctly noted that Fisher "did not present anything that required an evidentiary hearing." (22:4; 34:18) (A-Ap. 179). In fact, "the record conclusively

establishes that Fisher was not entitled to the relief he sought." (22:4; 34:18) (A-Ap. 179).

Here, Fisher, now represented by counsel, files a clearly stronger claim. The claim is supported by facts. The claim is also strongly rooted in case law. Because this current claim is clearly stronger than Fisher's earlier claim, Fisher has satisfied his burden.

D. The Circuit Court incorrectly held that the law imposes a higher burden upon a pro se litigant

In denying Fisher's motion for a new trial, the circuit court held that Wisconsin law, articulated in *Escalona-Narajno*, precludes Fisher from filing successive ineffective assistance of counsel claims. (37:3-4) (A-Ap. 102-03). The circuit court then held, as a matter of law, that because Fisher acted as his own counsel, the standard articulated in *Romero-Georgana* does not apply to him. (37:4 n.3) (A-Ap. 103 n.3). According to the circuit court, Fisher could not receive relief for his current claim *even if* the circuit court found Fisher had sufficient reason for failing to raise the issues previously and the claims are clearly stronger than his previous claims. (37:4 n.3) (A-Ap. 103 n.3). Therefore, according to the circuit court, because Fisher acted as his own counsel, he had an absolute "duty to raise all issues at the time of his original motion." (37:4 n.3) (A-Ap. 103 n.3).

Contrary to the circuit court's assertion, *Escalona-Naranjo* does not preclude Fisher from raising the current ineffective assistance of counsel claim. See 185 Wis. 2d at 181; (37:3-4) (A-Ap. 102-03). In *Escalona-Naranjo*, the Wisconsin Supreme Court specifically stated that a defendant may raise "an issue of constitutional dimension which for *sufficient reason* was not asserted or was inadequately raised in his original, supplemental or amended postconviction motions." *Escalona-Naranjo*, 185 Wis. 2d at 184.

This is Fisher's first, collateral post-conviction motion filed pursuant to section 974.06. He filed a single, *pro se* postconviction motion, pursuant to section 809.30, and, once the circuit court denied that motion, he filed a direct appeal in this Court. While it is true that Fisher raised an ineffective assistance of counsel claim in his original *pro se* postconviction motion, the current basis for the ineffective assistance of counsel claim was never asserted in his original postconviction motions.

The circuit court seems to suggest that because Fisher acted as his own counsel, his "legal work" is somehow held to a higher standard than that of appointed postconviction counsel, and because of that, *Romero-Georgana* does not apply to *pro se* litigants. (37:4 n.3) (A-Ap. 103 n.3). Wisconsin law simply does not support that.

Because Fisher was not aware of the evidence regarding any alternative suspects until the Wisconsin Innocence Project took and investigated his innocence claim, Fisher has a sufficient reason for failing to raise the current issue earlier. Fisher's claim that trial counsel was ineffective for failing to investigate or present the strong evidence implicating the alternative suspects is clearly stronger than his previous claims.

E. Conclusion

The record shows that Fisher received constitutionally deficient assistance of counsel at trial. His claim of ineffective assistance of trial counsel based on his attorney's failure to present crucial evidence implicating third-party perpetrators is clearly stronger than his claims on direct appeal. The record demonstrates that Fisher was unaware of the factual basis for this claim, giving him sufficient reason for failing to raise the claim earlier.

Therefore, Fisher requests that this Court reverse his conviction and grant him a new trial.

III. Fisher should receive a new trial in the interest of justice, because the jury, which received no viable defense, also never heard the strong evidence incriminating third-party perpetrators.

Section 752.35, Wis. Stats., provides this Court with inherent authority to order a new trial where “it appears from the record that the real controversy has not been fully tried, or that it is probable that justice for any reason miscarried.” *See also Vollmer v. Luety*, 156 Wis. 2d 1, 19-20, 456 N.W.2d 797 (1990). The Wisconsin Supreme Court has clarified that “the 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, even if this occurred because the evidence or testimony did not exist at the time of trial.” *State v. Maloney*, 2006 WI 15, ¶ 14 n.4, 288 Wis. 2d 551, 709 N.W.2d 436; *See also State v. Hicks*, 202 Wis. 2d 150, 159-60, 549 N.W.2d 435 (1996); *State v. Wyss*, 124 Wis. 2d 681, 735, 370 N.W.2d 745 (1985); *State v. Jeffrey A.W.*, 2010 WI App 29, ¶ 14, 323 Wis. 2d 541, 780 N.W.2d 231; (34:78-108) (A-App. 239-69).

Here, the real issue---the identity of Mr. Mousa's killer---has not been fully tried. The purpose of reversal by this Court, when the real controversy was not fully tried to the trial court, is “to maintain the integrity of our system of criminal justice so that we can say with confidence that justice has prevailed.” *Jeffrey A.W.*, 2010 WI App ¶ 14 (citing *State v. Hicks*, 202 Wis. 2d 171-72).

The jury was not given the opportunity to examine evidence that bears on a significant issue in the case: the identity of Mr. Mousa's killer. Here, the crucial evidence is the involvement of Little Rob and his friends. The jury never heard about the eyewitness, the police reports, the police raid of a dope house, the police decision to seize and interrogate, the lab reports, the presence of potential gunshot residue, or the presence of blood. This evidence is crucial. And because the jury never received this evidence, we cannot be confident that justice has prevailed. As a result, Fisher deserves a new trial in the interest of justice.

CONCLUSION

Casey Fisher asked Mr. Mousa for a short ride to a gas station almost 24 years ago, a decision Mr. Fisher has regretted ever since. A decision that led police to assume Fisher must have committed the crimes against Mr. Mousa because of the proximity in time to Mr. Mousa's death. However, Casey Fisher has adamantly denied involvement in the crimes against Mr. Mousa from the moment of his arrest. Importantly, the police had evidence not only from an eyewitness at the scene, but also various police reports and lab reports all pointing to three other men as the real perpetrators of the crimes against Mr. Mousa.

The central issue at Fisher's trial—the identity of Mr. Mousa's killer—was never fully tried. The jury never heard the crucial evidence regarding the involvement of Little Rob and his friends. The jury never heard about the eyewitness, the police reports, the police raid of a dope house, the police decision to seize and interrogate, the lab reports, the presence of potential gunshot residue, or the presence of blood.

Rather, the jury was left with the shifting statements of the three State witnesses as the only theory of the crime. Statements, to be sure, by three people that never witnessed the crime, one of whom was on parole for possession of cocaine during police questioning and at trial. Perjury or false accusations are the leading contributing factor to wrongful convictions.⁵ In cases of homicide, perjury or false accusations were a contributing factor in 69% of wrongful convictions.⁶ The crucial, unrepresented evidence of Little Rob's and his friends' guilt would have exposed the weaknesses at the center of the State's case.

Because the exculpatory evidence was not presented to the jury, we cannot be confident in the outcome of Fisher's trial. Fisher's trial counsel's failure to present the compelling, exculpatory evidence was textbook deficient performance, and this deficiency prejudiced Fisher. Fisher is therefore constitutionally

⁵ <http://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx>

⁶ <http://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx>

entitled to a new trial. Additionally, to maintain the integrity of our criminal justice system and ensure confidence that justice has prevailed, Fisher deserves a new trial in the interest of justice.

For these reasons, Fisher respectfully requests that this Court grant Fisher's motion for a new trial so that justice may prevail. However, at the very least, Fisher requests that this Court remand this case to the circuit court for a hearing.

Respectfully submitted this 31st day of August 2017.

Steven Wright
State Bar No. 1090780
608.890.3540
shwright@wisc.edu

Maria de Arteaga
State Bar No. 1095253
608.890.3859
dearteaga@wisc.edu

Attorneys for Defendant
Wisconsin Innocence Project
975 Bascom Mall
Madison, WI 53706

CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 7,905 words.

Dated this 31st day of August 2017.

Maria de Arteaga
State Bar No. 1095253

CERTIFICATION AS TO APPENDIX

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

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 31st day of August 2017.

Maria de Arteaga
State Bar No. 1095253

CERTIFICATION AS TO COMPLIANCE WITH 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 31st day of August 2017.

Maria de Arteaga
State Bar No. 1095253