STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP868

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CASEY M. FISHER,

Defendant-Appellant.

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

SUPPLEMENTAL BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Attorney General of Wisconsin

SARAH L. BURGUNDY
Assistant Attorney General
State Bar #1071646

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-8118
(608) 266-9594 (Fax)
burgundysl@doj.state.wi.us

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ISSUES PRESENTED

1. Is Casey M. Fisher entitled to a hearing on his claim that his trial counsel was ineffective for not attempting to present third-party perpetrator evidence, where Fisher has not explained how that evidence would be admissible, and where the evidence of Fisher's guilt at trial was overwhelming?

The circuit court denied Fisher's motion based on *Escalona*, so it did not reach this issue.

This Court should say, "No."

2. Is Fisher entitled to a new trial in the interest of justice based on the lack of third-party perpetrator evidence at his trial?

The circuit court declined to grant Fisher a new trial in the interest of justice.

This Court should say, "No."

INTRODUCTION

In 1993, a jury convicted Fisher of murdering Yaser Mousa. Now, 25 years later, Fisher seeks a new trial based on reports contained in the original discovery indicating that police had initially arrested, questioned, investigated, and released three other men as suspects.

The circuit court denied Fisher's motion on *Escalona* grounds. This Court initially reversed, holding that the record did not refute as insufficient Fisher's proffered reason for not having advanced this claim in his direct appeal. This Court then reconsidered that opinion on its own motion, withdrew it, and ordered the State to file a supplemental response brief addressing the merits of Fisher's underlying Wis. Stat. § 974.06 motion.

As for Fisher's ineffective assistance claim, the most relief Fisher could hope for at this point would be a *Machner*

hearing. But it does not appear that Fisher can demonstrate counsel's deficiency under the circumstances, and the overwhelming evidence of Fisher's guilt presented at trial conclusively demonstrates that Fisher cannot establish the prejudice prong of *Strickland*. Thus, this Court should affirm the circuit court's denial of Fisher's motion without a hearing.

As for Fisher's claim seeking a new trial in the interest of justice, Fisher failed to demonstrate entitlement to that extraordinary relief.

STATEMENT OF THE CASE

The State provided a statement of the case in its primary brief. It addresses additional facts in its argument below.

ARGUMENT

I. Fisher is not entitled to a *Machner* hearing on his ineffective assistance claim.

Whether Fisher's motion was sufficient to entitle him to an evidentiary hearing on his ineffective assistance of counsel claim is a question of law that this Court reviews de novo. *See State v. Balliette*, 2011 WI 79, ¶ 18, 336 Wis. 2d 358, 805 N.W.2d 334.

A. Relevant law

A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If the Court concludes that the defendant has not proven one prong of this test, it need not address the other. *Id.* at 697.

To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court "strongly presume[s]" that counsel has rendered adequate assistance. *Id*. Professionally competent assistance encompasses a "wide range" of behaviors, and a lawyer's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. at 687, 689. Failure to raise a meritless issue is not deficient performance. *See State v. Wheat*, 2002 WI App 153, ¶ 14, 256 Wis. 2d 270, 647 N.W.2d 441.

To show prejudice, the defendant must prove that the alleged defect in counsel's performance actually had an adverse effect on the defense. *Strickland*, 466 U.S. at 693. More than merely showing that the error had some conceivable effect on the outcome, "the defendant must show that there is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *State v. Pitsch*, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985) (quoting *Strickland*, 466 U.S. at 694). "[P]rejudice should be assessed based on the cumulative effect of counsel's deficiencies." *State v. Thiel,* 2003 WI 111, ¶ 59, 264 Wis. 2d 571, 665 N.W.2d 305.

Establishing prejudice under *Strickland* is difficult. "*Strickland* asks whether it is 'reasonably likely' the result would have been different. This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Harrington v. Richter*, 562 U.S. 86, 111–12 (2011) (citations omitted). "The

likelihood of a different result must be substantial, not just conceivable." *Id.* at 112.

Fisher asks this Court to grant him a new trial based on his ineffective assistance claim. (Fisher's Br. 36, 39–40.) But a *Machner*[1] hearing is a prerequisite to this Court's granting Fisher that relief. *See State v. Curtis*, 218 Wis. 2d 550, 554, 582 N.W.2d 409 (Ct. App. 1998) ("a postconviction *Machner* hearing is a prerequisite to a claim of ineffective assistance of counsel").

A circuit court must conduct a hearing on a claim of ineffective assistance only when the defendant alleges sufficient material facts that, if true, entitle him or her to relief. *State v. Bentley*, 201 Wis. 2d 303, 309–10, 548 N.W. 50 (1996); *Nelson v. State*, 54 Wis. 2d 489, 497–98, 195 N.W.2d 629 (1972). Thus, "the motion must include facts that 'allow the reviewing court to meaningfully assess [the defendant's] claim.'" *State v. Allen*, 2004 WI 106, ¶ 21, 274 Wis. 2d 568, 682 N.W.2d 433 (quoting *Bentley*, 201 Wis. 2d at 314) (brackets in *Allen*).

If the defendant fails to raise facts in the motion sufficient to entitle him to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing. *Bentley*, 201 Wis. 2d at 310–11; *Nelson*, 54 Wis. 2d at 497–98. The defendant cannot rely on conclusory allegations, hoping to supplement them at a hearing. *Bentley*, 201 Wis. 2d at 313; *see Balliette*, 336 Wis. 2d 358, ¶ 68 ("The evidentiary hearing is not a fishing expedition to discover ineffective assistance; it is a forum to prove ineffective assistance.").

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[1] *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Here, Fisher cannot demonstrate that he is entitled to an evidentiary hearing; his allegations on both the deficiency and prejudice prongs come up short.

B. Fisher cannot demonstrate that he is entitled to a *Machner* hearing because his allegations of deficiency are uncorroborated and conclusory.

The third-party perpetrator evidence that Fisher believed trial counsel should have used at trial essentially involves an early lead that police pursued but that came up dry.

Mousa was found in an alley in his truck, shot to death. (R. 46:11–12.) According to a police report, when two officers arrived at Mousa's murder scene, an anonymous source approached them and said that "the subjects who shot" Mousa ran a block east to a drug house. (R. 28:11.) The source told police that "he was told that a person known as 'Little Rob' was involved." (R. 28:11.) Officers followed up at the house identified by the source and found Robert Williams (aka Little Rob), along with Tywan Beard and Kevin Jones. (R. 28:11–12.)

Police detained the men and took them into custody for questioning. (R. 28:12.) The police swabbed their hands and confiscated Jones's T-shirt after observing a "possible blood stain on the right side shoulder." (R. 28:12.) Testing of the hand swabs revealed that Jones and Williams had sufficient levels of barium and antimony on their hands to indicate the presence of gunshot residue. (R. 28:15.) However, the report stated that that result did "not prove that the subjects discharged a firearm" and that the barium and antimony could have been deposited on their hands in other ways. (R. 28:15.) Further, the "very small stain" on

Jones's shirt was identified as human blood, but the testing could not identify the blood type.[2] (R. 28:17.)

Police interviewed Lolita Moore, Williams's girlfriend. Moore told police that she was with Williams the night of Mousa's murder. (R. 28:21.) She also told police that a girl she knew, Keesha Jordan, told her that "K-C" had gotten a ride from Mousa, robbed him, and that the robber gave his mother some of the money he took and left town. (R. 28:21.)

Fisher alleges that counsel "performed deficiently by mishandling evidence of Little Rob's and his friends' guilt" in numerous ways, though he focuses on counsel's failure to present witnesses. (Fisher's Br. 17–19.) In making those assertions, however, Fisher skips some steps. He fails to recognize that to present witnesses on a third-party perpetrator theory, defense counsel had to have investigated the possibility of the theory and filed a successful *Denny* motion. *See State v. Wilson*, 2015 WI 48, ¶ 52, 362 Wis. 2d 193, 864 N.W.2d 52 (reaffirming that the *Denny* test is the correct and constitutionally proper test for circuit courts to apply when determining the admissibility of third-party perpetrator evidence).

Hence, what Fisher is really arguing is that counsel was deficient for a failure to investigate and failure to file a *Denny* motion, neither of which he has adequately argued to entitle him to a *Machner* hearing.

To start, "a defendant who alleges a failure to investigate on the part of his or her counsel must allege with specificity what the investigation would have revealed." *Thiel*, 264 Wis. 2d 571, ¶ 44 (quoting *State v. Leighton*, 2000

[2] In May 2017, Fisher successfully obtained DNA testing of the blood on Jones's shirt against a sample from Mousa. (R. 38.) The State is not aware of any subsequent filings from Fisher regarding the results of that testing.

WI App 156, ¶ 38, 237 Wis. 2d 709, 616 N.W.2d 126). To the extent that Fisher believes "counsel should have investigated and interviewed the eyewitnesses who claimed to see the shooting, and . . . other people who might have seen the shooting" (R. 29:8), Fisher fails to explain who these eyewitnesses were and what they would have reported or testified to. Same goes for Fisher's complaint that counsel never asked the testifying detectives at trial about their investigation and interrogation of Williams and the others (R. 29:8): Fisher fails to allege what those detectives would have said.

Moreover, Fisher fails to allege what counsel's investigation into Williams and his friends as third-party perpetrators would have revealed beyond the unknown witness's report to police, his hearing a rumor that Williams was involved, Williams and his friends' initial arrests, the test results indicating that Williams and Jones may have discharged guns, and the tiny bloodstain on Jones's shirt. Correspondingly, he cannot demonstrate that he could have filed a viable *Denny* motion to put this evidence before the jury.

Indeed, Fisher had to offer evidence that Williams and his friends (1) had motive, i.e., a plausible reason to commit the crime; (2) opportunity to commit the crime; and (3) a direct connection to the crime. *Wilson*, 362 Wis. 2d 193, ¶¶ 57–59. Fisher does not develop an argument for how his counsel could have filed a successful *Denny* motion, given that the information in the record regarding Williams and his friends involved an anonymous tip conveying a rumor that they were involved in the crime; police found them in a drug house; police arrested them, questioned them, and took specimens from them; and then police released them. In that information is no suggestion that Williams or his friends had a motive to kill Mousa, that anyone who was available to testify saw them at or near the crime scene, or that they had

any direct connection to the murder, such as possessing the weapon used or any items taken from Mousa's truck. Because Fisher wholly fails to demonstrate what counsel's *Denny* motion would have looked like—let alone how it could have succeeded—counsel cannot have been deficient for failing to investigate or advance a third-party perpetrator theory. Because his allegations of deficiency are undeveloped and conclusory, Fisher is not entitled to a *Machner* hearing on his claim.

Finally, in his motion, while Fisher sought a hearing on his claim, he also asserted that one of his two trial counsel has since died and that Fisher had sufficiently corroborated his allegations that the deceased attorney was deficient. (R. 29:9.) As corroboration, Fisher pointed to the police reports that were in discovery and the fact that trial counsel did not present the evidence to the jury. (R. 29:9.)

When counsel challenged through an ineffectiveness claim is deceased, "then the defendant should not, by uncorroborated allegations, be allowed to make a case for ineffectiveness." *State v. Lukasik*, 115 Wis. 2d 134, 140, 340 N.W.2d 62 (Ct. App. 1983). Rather, "[t]he defendant must support his allegations with corroborating evidence. 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.* The court presumes "that counsel had a reasonable basis for his actions, and the defendant cannot by his own words rebut this presumption." *Id.*

To start, Fisher had two trial counsel: Attorney Goldstein, who is deceased, and Attorney Robert Kagen, who is alive and still a member in good standing of the Wisconsin bar, but whom Fisher claims he unsuccessfully attempted to contact. It is not clear that Fisher's claim that Kagen was unresponsive to his requests, without more, establishes his

unavailability. *Cf. State v. Norman*, 2003 WI 72, ¶ 28, 262 Wis. 2d 506, 664 N.W.2d 97 (noting that the State has burden to demonstrate that a witness is absent despite its "good faith effort" to obtain the witness's presence at trial and "[t]he mere absence of a witness does not render the witness unavailable at trial for constitutional purposes").

But in any event, even assuming Fisher cannot secure Kagen as a witness, he had not met his burden of presenting corroborating evidence that either Goldstein or Kagen lacked a reasonable basis for their actions. In other words, his indication that the discovery contained reports regarding Williams and his friends is not enough; he offers nothing to corroborate his conclusory allegations that his attorneys did not review the discovery, follow up on the possibility of Williams as a third-party perpetrator, or consider a *Denny* motion.

Hence, Fisher failed to demonstrate that he is entitled to a *Machner* hearing to establish the deficiency prong. And as discussed below, the record conclusively demonstrates that any deficiency by counsel was not prejudicial.

C. The record conclusively demonstrates that Fisher murdered Mousa; therefore, he cannot establish prejudice based on the lack of third-party perpetrator evidence.

This was not a close case, not by a long shot. After the four-day trial, the jury deliberated for just over an hour and a half to convict Fisher of Yaser Mousa's murder. (R. 50:21–24.) Indeed, the evidence of Fisher's guilt was overwhelming.

1. Fisher, who told friends he was planning to rob Mousa, got a ride from Mousa.

Mousa owned the A and B Grocery store at North 25th Street and Garfield in Milwaukee's north side. (R. 47:21;

48:24–25.) On the night of October 26, 1993, he was closing the store at approximately quarter to nine with his employee, Will Nelson. (R. 47:58.) At closing, Nelson testified, he loaded items into Mousa's truck while Mousa locked up and set the store alarm. (R. 47:58.) That night, Nelson put in the front seat of Mousa's truck a bag of groceries, a green bank bag with what Nelson believed to contain no more than $200 or $300, and Mousa's .357 magnum gun, which Mousa carried for protection due to past robberies. (R. 47:59.) Based on records from the alarm service, Mousa set the alarm at 8:48 that night. (R. 48:4; 49:109–10.) Based on Mousa's wife's testimony and another witness who overheard the phone call that Mousa made to his wife just before closing, Mousa was planning on heading directly to his south-side home after closing the store. (R. 47:97; 49:12.)

Just before that all happened, at around 8:30 or 8:45 p.m., three men—Andre Goodman, Jay Wonders, and Andree Ward—were in Ward's blue Cadillac near the corner where the A and B was located. (R. 48:25; 49:25, 76.) All three men testified that Fisher was outside near the A and B and Ward's house; all three knew Fisher, who lived at his mother's home on 25th Street, about a half block from the A and B. (R. 48:26; 49:26, 77.)

Ward got out of the car, and he and Fisher talked on the sidewalk. (R. 48:26; 49:26.) Wonders also got out of the car and stood nearby. (R. 48:26; 49:42.) According to Ward, Fisher said that he needed money and that "[he had] a move up," which Ward understood (and Fisher clarified) to mean that Fisher was going to rob the store. (R. 49:27, 45.) When Ward expressed disbelief, Fisher said, "I'm for real." (R. 49:27.) Wonders also testified that Fisher told him that he was going to rob the store. (R. 49:77, 85.) Wonders told Fisher not to do it. (R. 49:85–86.) Ward and Wonders then got back into Ward's car, and Goodman, Ward, and Wonders

drove off. (R. 49:27, 78, 86.) After a brief stop at Ward's mother's house, Ward dropped Wonders off at his house, and Ward and Goodman went to Ward's girlfriend's place. (R. 49:27, 49, 78.)

Both Nelson and Bryan Gibbs, a friend of Fisher's who lived across the street from Fisher's mother and who was standing outside his place that night, testified to what happened next at 25th and Garfield. Nelson testified that Fisher was one of the A and B's many regular customers, and both Nelson and Gibbs described Fisher and Mousa as good friends. (R. 47:93, 114.) Gibbs testified that he purchased a beer and some snacks from the A and B just before Nelson and Mousa were locking up. (R. 47:97–98.) After Gibbs left the store, he was hanging out outside his house, when Fisher approached him and asked if the store was still open. (R. 47:98–99.) Gibbs said that the store was still open but getting ready to close, and Fisher mentioned that he was going to ask Mousa for a lift to a girl's house. (R. 47:98–99.) Gibbs then saw Fisher go to the store and talk with Nelson and Mousa, who were coming outside to lock up. (R. 47:99.)

According to Nelson, Fisher approached Nelson as he was walking away from the store. Fisher asked Nelson where Mousa was going and whether Nelson thought Mousa could give him a ride. (R. 47:61.) Nelson told Fisher that Mousa was going home and that Fisher should go ask him. (R. 47:61.) Nelson then continued on his way. According to Gibbs, Fisher talked to Mousa and then got in the passenger side of Mousa's truck. (R. 47:99; 48:9.)

Gibbs saw Mousa then drive south on 25th Street; Mousa and Fisher were the only two in the car and Mousa beeped and both Fisher and Mousa waved to Gibbs as they passed. (R. 47:99, 110.) Although Gibbs, when he testified, claimed to have lost sight of Mousa's truck before it turned off of 25th Street (R. 47:110–11), he told police shortly after

Mousa's murder that he saw Mousa's truck turn right westbound onto Brown, which was two blocks south of Garfield[3] (R. 48:10).

Gibbs testified that he had seen Fisher with a gun two days before Mousa's murder. (R. 47:107.) But shortly after the murder, Gibbs told police that Fisher was hanging out with Gibbs behind Gibbs's house on the day of Mousa's murder, and that Fisher lifted his shirt and revealed an "uzi type" gun. (R. 48:13.) A detective testified that an uzi emits 9-millimeter bullets. (R. 48: 22.) Gibbs also told police that he had seen Fisher with many guns over the years, and that Fisher carried almost exclusively 9-millimeter handguns. (R. 48:13.)

Finally, Gibbs acknowledged that Fisher threatened him not to testify. Gibbs told police that friends of Fisher's from Racine came to Milwaukee and threatened him. (R. 48:21.) He also testified that when he and Fisher were escorted to the trial,[4] Fisher used words and gestures

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[3] This Court may find it helpful to cross-reference the relevant area on Google Maps, which the State hyperlinks here and which can be found by entering the address abutting the alley where Mousa was found, 2137 North 28th Street, and focusing on the areas between North Avenue to the north, Lisbon Avenue to the south, North 25th Street to the east, and North 29th Street to the west. *See Cloe v. City of Indianapolis*, 712 F.3d 1171, 1177 n.3 (7th Cir. 2013) (taking judicial notice from Google Maps), *overruled on other grounds by Ortiz v. Werner Enterprises, Inc.*, 834 F.3d 760 (7th Cir. 2016).The State has also provided a printout of a map depicting that area as an attachment to this brief with circles identifying the intersection of Garfield and North 25th (where the A and B was located), the alley behind 2137 North 28th Street (where Mousa's truck and body were found), and the gas station at 27th and Lisbon (where Fisher told police Mousa had dropped him off). (R-App. 101.)

[4] Gibbs was held in jail to secure his testimony because he initially failed to appear for his subpoena. (R. 48:4.)

indicating that Gibbs would be shot if he testified. (R. 47:103.)

2. Minutes after Fisher got in Mousa's truck, Mousa was found shot to death three blocks away.

Gibbs told police that he remained outside when, about 10 minutes after Mousa drove past him, he heard around six gunshots in loud, rapid succession. (R. 48:11.) He told police that the shots sounded like they had come from 27th and Brown. (R. 48:11.)

The shots actually were discharged near 28th and Brown; Jordan Johnson was living at 2137 North 28th Street when he heard what he described as three gunshots at approximately 9 p.m. in the alley behind his house. (R. 46:18.) He went outside to see what had happened and discovered Mousa, in his truck, slumped over and bleeding from the head. (R. 46:20.) Johnson did not see anyone running from the scene. (R. 46:29.) Johnson went back into the house and told his mother what he saw, and she called 911. (R. 46:20.) Johnson estimated that he saw Mousa five minutes after hearing the gunshots and that his mother called 911 two minutes after Johnson saw Mousa. (R. 46:19–20.) According to police records, the 911 call came at 9:04 p.m., 16 minutes after Mousa had set his store alarm. (R. 47:19.)

Police arrived and, based on their investigation, concluded that Mousa's killer had been sitting in the passenger seat of the truck. (R. 47:28.) That was so for four reasons. First, police found four 9-millimeter casings in the truck in locations that had to have been discharged inside the truck. (R. 47:29–30.) Second, Mousa had been shot at close range—within four to twelve inches—on the right side of his neck and face. Police knew this because his bullet wounds had powder stippling around them, which was

consistent with a gunshot within a close range. (R. 47:29–30.) Third, the driver's side window was broken out, which, in addition to the locations of Mousa's injuries, indicates that the shots had come from the passenger side of the truck. (R. 47:31–32; 49:70–73.) Finally, the scene was extremely bloody—one detective noted that Mousa's head "exploded"—but the blood spatters ended abruptly at the passenger seat. That indicated that the shooter was hit with the blood and brain matter while he sat in the passenger seat, thus preventing it from otherwise landing on the seat. (R. 47:31–32.)

The bank bag was no longer in Mousa's truck, but his gun, still holstered, remained, as did his bag of groceries. (R. 47:18.) Later, police found over $8000 in cash on Mousa's person. (R. 49:75.)

3. The next day, Fisher told his friends that he killed Mousa.

The next morning, word got around the neighborhood about Mousa's murder. Ward, after hearing the news, went to Fisher's house, but Fisher's mother said he had not been home since 11 the night before. (R. 49:29.) Ward then called Wonders, who told him that Fisher was at his place. (R. 49:31.) Ward arrived at Wonders's place five minutes later, and asked Fisher, "I know you didn't do it, did you?" (R. 49:32.) Fisher told Ward and Wonders that he shot Mousa, and provided details: he said that Mousa turned right onto Brown from North 25th, at which point Fisher pulled out a gun and told Mousa to keep driving. (R. 49:33, 80.) Fisher said that Mousa told him he "didn't have to do this" and that he would give Fisher anything he wanted. (R. 49:34.) Fisher told Ward and Wonders that he then just shot Mousa "because he didn't want to get caught up for no armed robbery." (R. 49:34, 81.) Fisher also told them that the shot hit Mousa in the neck, causing blood to squirt out.

(R. 49:34, 80.) Fisher said he then "freaked out" and "panicked" and shot Mousa four or five times in the head. (R. 49:34–35, 81.)

Fisher said that he ran from the truck and dropped his gun. (R. 49:35, 81.) According to Ward, Fisher said that he felt bad because he had "fucked up" and that he "killed the dude for nothing." (R. 49:32, 35.) Fisher told Ward and Wonders that he took the bank bag, and said that it had a roll of food stamps and not much money, around $60 or $70 by Ward's recollection. (R. 49:32–33, 80–81.)

Another witness, Deon Wesley, said that he was visiting his cousin, Goodman, at some point after October 26, 1993, and that Fisher was there. (R. 47:46.) Wesley noticed that "everybody was acting all funny" and asked Fisher why. (R. 47:47.) Fisher told Wesley that "he had shot at somebody by a store or something." (R. 47:47.) Wesley did not want to hear more or become involved, so he left. (R. 47:47, 55.)

4. Fisher's version of events that he told police was not plausible and was contradicted by his friends' testimony.

Police interviewed Fisher a few days after the murder; Detective Michael Lewandowski testified to what Fisher told him in that interview. Fisher confirmed that he got into Mousa's truck after Mousa closed the store, but that he asked Mousa to drive him south to a gas station at 27th Street and Lisbon so he could buy cigarettes. (R. 49:104.) According to Fisher, Mousa took 25th Street south past Brown to Lisbon, made a right turn onto Lisbon, and dropped Fisher off at the gas station. (R. 49:104–05.) Fisher said that Mousa then made a left to drive south on 27th Street, and Fisher did not see him again. (R. 49:105–06.)

Fisher told police that he saw Ward in his Cadillac parked at the gas station. (R. 49:107.) He claimed that Ward

gave him a ride to a different gas station to buy his cigarettes, that he and Ward drove to Ward's girlfriend's apartment and hung out there for a while, and that Ward drove Fisher back to his mother's house at around 11, where Fisher saw his mom and went to bed. (R. 49:107–08.) Fisher claimed that he learned of Mousa's death the next day and that police were after him, so he walked the streets and slept in a park, before eventually turning himself in a few days later. (R. 49:108.)

Contrary to Fisher's explanation to police, however, Ward testified that was he was not at the gas station at 27th and Lisbon that night. (R. 49:35–36.) He also testified that Fisher asked Ward to be an alibi witness and to tell police that he had picked up Fisher at the Lisbon gas station on the night of Mousa's murder. Ward refused. (R. 49:35–36.)

Further, Detective Lewandowski testified that Fisher's version of events was not plausible in light of the timing of Mousa's murder. Lewandowski testified that Mousa set the store alarm at 8:48 p.m. (R. 49:109–10.) Based on the statements of Fisher, Nelson, and Fisher's friends, Lewandowski estimated that between 8:48 and 8:52 p.m., Mousa went to his truck, Fisher talked to Nelson and Mousa, Fisher got into Mousa's truck, and Mousa drove away. (R. 49:110–11.) Lewandowski, then working backward from the 9:04 p.m. 911 call, noted that by Johnson's account, it took roughly seven minutes between his hearing gunshots, his seeing Mousa, and his return to his house where his mother called 911, which meant that the shooting occurred at 8:56 or 8:57 p.m. (R. 49:111.)

According to Lewandowski, that timing fit with Mousa's having driven Fisher directly to the spot where he was killed. Mousa's truck was found facing south at roughly the same north latitude as the store, but three and a half blocks west. (R. 49:98; R-App. 101.) For Mousa to have reached that destination and south-facing position by

starting to drive south on 25th and turning right on Brown, Mousa likely made a right on North 27th, 28th, or 29th streets, drove north, and then turned into an alley that provided access to the north end of the alley between 28th and 29th. (R. 49:100–01.) Lewandowski drove one of those routes; driving 25 mph, it took him three and a half minutes to get from 25th and Garfield to where Mousa's truck was found. (R. 49:100–01.) Estimating an 8:52 p.m. departure time, that route or a similar one would have correlated with Fisher's shooting Mousa at 8:56 or 8:57 p.m. (R. 49:110–11.)

In contrast, Fisher told Lewandowski that Mousa drove south and dropped him off at the gas station at Lisbon and 27th Street, and then continued south—i.e., the opposite direction from where Mousa's body and truck were found—after dropping Fisher off. (R. 49:104–05.) Police timed the drive, again at 25 mph, from 25th and Garfield to 27th and Lisbon; that trip took three minutes, which would have meant that Mousa dropped Fisher off at 8:55 p.m. (R. 49:109.) Thus, according to Lewandowski, Fisher's version was not feasible; if Mousa was driving alone south from Lisbon on North 27th Street by 8:55 p.m., he could not have been shot one or two minutes later by someone in his passenger seat at 2137 North 28th Street. (R. 49:109–10.)

5. Evidence that police initially followed up on a tip that other people may have been involved would not have affected the jury's verdict.

Given all of that overwhelming evidence, assuming Fisher's counsel could have presented the third-party perpetrator evidence that Fisher now advances, the verdict would have been the same. The third-party evidence does not explain why Fisher's friends told police and testified that Fisher revealed his plans to rob Mousa, that Fisher told them that he murdered Mousa, and that he revealed details

of the killing—including that he shot Mousa in the head and neck and took the bank bag—that Fisher's friends would have had no basis to know had Mousa's killer not told them.

Further, the third-party perpetrator evidence was not particularly compelling. That police initially followed up on a lead that did not appear to pan out does nothing to implicate Williams and his friends. Indeed, far from offering "a clear defense: Little Rob and his friends killed Mr. Mousa" (Fisher's Br. 24), the alleged third-party perpetrator evidence would not have undercut the State's strong case establishing that Fisher killed Mousa.

Fisher argues that the State's case was weak because Ward, Wonders, and Goodman offered "shifting statements" and were untrustworthy witnesses. (Fisher's Br. 22.) He argues that the trial was unreliable because counsel presented no witnesses and failed to present "the compelling evidence of Little Rob's and [his] friends' guilt." (Fisher's Br. 24.) But Fisher's counsel brought out that Ward, Wonders, and Goodman initially did not tell the police about what they knew, mainly because they were Fisher's friends or they did not want to get involved in the investigation or both. That any of them had committed past crimes did not render their testimony inherently untrustworthy, especially considering that each eventually and separately told police the same story. Ward and Wonders told police that Fisher declared he was going to rob Mousa, and that Fisher admitted to doing it—including providing accurate details—the next day. Goodman did not hear Fisher's incriminating statements but corroborated that Ward and Wonders made contact with Fisher just before the murder.

Fisher argues that *Harris v. Reed*, 894 F.2d 871, (7th Cir. 1990), provides persuasive support for this Court to grant a new trial based on ineffective assistance of counsel. (Fisher's Br. 24–28.) But the question here is limited to whether Fisher is entitled to a *Machner* hearing on this

claim, which *Harris* does not speak to. In any event, in *Harris* the third-party perpetrator evidence was strong (two witnesses identified the third party as fleeing the scene and the third party lied to police in his first interview) in contrast to weak prosecution evidence (a single witness who offered inconsistent testimony against Harris). *See Harris*, 894 F.2d at 872–73, 874. Even if *Harris* was on point, it lacks any persuasive support.

Fisher is not entitled to a hearing on his ineffective assistance claim. This Court should affirm.

II. Fisher is not entitled to a new trial in the interest of justice.

Whether this Court should invoke its power to grant a new trial in the interest of justice under Wis. Stat. § 752.35 is within this Court's discretion. *See State v. Avery*, 2013 WI 13, ¶ 23, 345 Wis. 2d 407, 826 N.W.2d 60.

Under Wis. Stat. § 752.35, this Court may order discretionary reversal for a new trial: (1) where the real controversy has not been tried; or (2) where there has been a miscarriage of justice. *See Vollmer v. Luety*, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). This Court may exercise this power without finding the probability of a different result on retrial. *State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996). This Court approaches "a request for a new trial with great caution," and will exercise its discretionary power "only in exceptional cases." *Morden v. Continental AG*, 2000 WI 51, ¶ 87, 235 Wis. 2d 325, 611 N.W.2d 659 (citations omitted).

There is nothing in this record or Fisher's brief that supports the conclusion that the real controversy was not tried or there was a miscarriage of justice. Rather, the trial court record demonstrates the contrary. There is no basis for this Court to exercise its discretion and grant Fisher this extraordinary remedy. Thus, for the same reasons that

Fisher is not entitled to a hearing, let alone relief outright, on his claim of ineffective assistance based on counsel's alleged failure to present third-party perpetrator evidence, he is not entitled to a new trial in the interest of justice.

CONCLUSION

This Court should affirm the circuit court's order denying Fisher postconviction relief.

Dated this 17th day of September, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General of Wisconsin

SARAH L. BURGUNDY
Assistant Attorney General
State Bar #1071646

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-8118
(608) 266-9594 (Fax)
burgundysl@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,793 words.

_____
SARAH L. BURGUNDY
Assistant Attorney General

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I hereby certify that:

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

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Dated this 17th day of September, 2018.

_____
SARAH L. BURGUNDY
Assistant Attorney General

Supplemental Appendix
State of Wisconsin v. Casey M. Fisher
Case No. 2017AP868

SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

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 one or more initials or other appropriate pseudonym or designation, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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SARAH L. BURGUNDY
Assistant Attorney General

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SARAH L. BURGUNDY
Assistant Attorney General