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

SUPPLEMENTAL REPLY BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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INTRODUCTION

At trial, counsel failed to present a defense. In fact, counsel failed to present a single defense witness. Now, Fisher's ineffective-assistance claim relies upon police reports that show police arrested three other men for the murder of Yaser Mousa. In short, discovery included a gift-wrapped defense for Fisher, but counsel failed to pursue this—or any other—defense.

In their second attempt at a Response, the State does not dispute the central facts. Indeed the parties agree: Counsel did not present evidence that three drug addicts killed Mousa. The parties do not dispute that a witness at the crime scene told police that the shooters ran from the scene. The parties do not dispute that the witness identified one of the men by name. The parties do not dispute that the witness told police the address to where the suspects fled immediately after the shooting. The parties do not dispute that the police found the men at the site identified by the witness, and two of the men were hiding in the dark. The parties do not dispute that police took these men into custody. The parties do not dispute that one suspect had human blood on his shirt. The parties do not dispute that two suspects' hands tested positive for gunshot residue.

Counsel's failures undermined the proper functioning of the adversarial process, which, in turn, undermines confidence in Fisher's conviction. Therefore, this Court should grant relief.

ARGUMENT

Fisher seeks a new trial because his counsel provided ineffective assistance, and because a new trial would serve the interests of justice. In response, the State offers three unpersuasive arguments.

First, the State argues that Fisher's post-conviction motion is conclusory and uncorroborated. This argument should fail because Fisher's post-conviction motion includes sufficient facts to allow the courts to meaningfully assess his claim.

Second, the State argues that, assuming deficiency, counsel's performance did not prejudice Fisher. This argument should fail because a reasonable probability exists that, but for counsel's deficiency, a different result would have occurred at trial.

Lastly, the State argues that this Court should not grant a new trial in the interest of justice. This argument should fail because the real controversy of identity was never fully tried.

Counsel's failure to present this gift-wrapped defense resides snuggly within the realm of successful post-conviction claims in which trial counsel either failed to utilize discovery or failed to present jurors with strong evidence of a third party perpetrator. *See*, *e.g*, *State v. Thiel*, 2003 WI 111, ¶ 37, 264 Wis. 2d 571, 665 N.W.2d 305 (counsel was ineffective for failing to review discovery); *Harris v. Reed*, 894 F.2d 871, 878-79 (7th Cir. 1990) (counsel was ineffective for failing to present evidence that police had arrested third-party perpetrators for same crime); *State v. Jenkins*, 2014 WI 59, ¶ 48, 355 Wis. 2d 180, 848 N.W.2d 786

(counsel was ineffective for failing to call witness who saw the shooting).

The circuit court never reached the merits of Fisher's claims. Therefore, this Court will evaluate the arguments anew. *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433 (holding this Court conducts a de novo review of claims alleging a post-conviction motion is conclusory); *State v. Langlois*, 2018 WI 73, ¶ 49, 382 Wis. 2d 414, 913 N.W.2d 812 (holding this Court conducts a de novo review of both deficiency and prejudice).

For these reasons, this Court should reverse the order of the circuit court and remand with an instruction to vacate Fisher's conviction.

I. Fisher's allegations are neither conclusory nor uncorroborated.

The lone question at trial was who robbed and murdered Yaser Mousa. Fisher alleges that counsel performed deficiently by failing to present the strong evidence that three other men committed the crimes. This strong evidence would have both incriminated the third-party perpetrators and exculpated Fisher.

The State argues that Fisher's allegations of deficiency are conclusory and uncorroborated. This argument lacks support in well-established case law. The Wisconsin Supreme Court has detailed the basic requirements of a motion alleging ineffective assistance. Such a motion must include sufficient facts that "allow the reviewing court to meaningfully assess [the defendant's] claim." *Allen*, 2004 WI 106, ¶ 21 (citation omitted). As a rule of thumb, Fisher's post-conviction motion must allege the "five 'w's' and one 'h'; that is, who, what, where, when, why, and how. A

motion that alleges, within the four corners of the document itself, the kind of material factual objectivity we describe above will necessarily include sufficient material facts for reviewing courts to meaningfully assess a defendant's claim." *Allen*, 2004 WI 106, ¶ 23.

A. Fisher's motion provided sufficient and substantiated facts.

Here, Fisher's motion provided sufficient facts to allow the reviewing court to meaningfully assess his claims. He alleged that three drug addicts shot and killed Mousa. (R. 29:2-3, 6-11.) He alleged that these three drug addicts were Little Rob, Keven Jones, and Tywan Beard. (R. 29:2-3, 6-11.) He alleged that these three shot Mousa in an alley beside 2137 North 28th Street the night of October 26, 1993, and he alleged that the three shooters fled to a drug house one block away. (R. 29:2-3, 6-11.) He alleged that soon after the shooting, the police took these three into custody for the murder. (R. 29:2-3, 6-11.) He alleged that the shooting occurred as a part of a robbery. (R. 29:2-3, 6-11.) And he alleged that counsel failed to investigate and present these facts to the jury. (R. 29:6-11.)

These allegations are well corroborated. Police reports confirm that:

- On the night of the shooting, a witness at the scene told police "the subject who shot [Mousa]" ran from the scene to a nearby dope house a block away. The witness told police that Little Rob was involved;

- Soon after receiving the information from the eyewitness, police stormed the drug house, where they found Kevin Jones, Little Rob and Tywan Beard. Little Rob and Beard were hiding in the dark;
- Police took all three into custody;
- Police swabbed their hands for gunshot residue and two of the suspects' hands revealed the presence of barium and antimony, the foundation of gun powder;
- Police found human blood on one of the three's shirt;[1]

(R. 28:11-17; 29:6-11.)

The parties do not dispute—and the circuit court found—that Fisher's attorney received these police reports during discovery. (R. 37:4.) The parties do not dispute that the police reports memorialize the early hours of the police investigation into Mousa's death. The parties do not dispute that the jury never heard this evidence. Finally, the parties do not dispute that unlike the alternative suspects, no eyewitnesses or physical evidence ever linked Fisher to the murder. Given that more evidence linked the third parties to the crime, prudent counsel would have no strategic reason not to pursue and present the third-party evidence.

Therefore, Fisher's allegations are not conclusory because these allegations permit the courts to meaningfully assess Fisher's ineffectiveness claim.

[1] As the State notes in its Supplemental Response, in May of 2017, Fisher successfully obtained DNA testing of the blood on Jones's shirt against a sample from Mousa. (State's Suppl. Resp. 6 n.2.) The State also notes that it is "not aware of any subsequent filing from Fisher regarding the results of that testing." (State's Suppl. Resp. 6 n.2.) In 2017, after sending the evidence to a crime lab for testing, the parties learned that during the original 1994 testing, the State Crime Lab cut out and consumed/destroyed the bloodstain. Therefore, Fisher will never have an opportunity to test the bloodstain on Jones's shirt.

B. The State incorrectly suggests that Fisher must demonstrate the admissibility of the evidence.

The State unpersuasively argues that Fisher should not receive relief, because "Fisher has not explained how that evidence would be admissible." (State's Suppl. Resp. 1); (*See also* State's Suppl. Resp. 7) ("[Fisher] cannot demonstrate that he could have filed a viable *Denny* motion to put this evidence before the jury.").

The Wisconsin Supreme Court has explicitly rejected this argument. "A movant need not demonstrate theories of admissibility for every factual assertion he or she seeks to introduce." *State v. Love*, 2005 WI 116, ¶ 36, 284 Wis. 2d 111, 132, 700 N.W.2d 62. In fact, the ultimate admissibility of the evidence "is not a matter to be decided from the face of the motion papers." *Love*, 2005 WI 116, ¶ 37. The information must be accepted as true. *Id*.

C. The third-party perpetrator evidence would be admissible to show a legitimate tendency that the three men actually committed the murder.

Fisher need not plead that the third-party perpetrator evidence was admissible, but, to be clear, Fisher could have presented such evidence at trial. *State v. Denny* permits a defendant to present evidence of a third-party perpetrator if the defendant can show that the third-party perpetrator had motive, opportunity, and a direct connection to the crime. *State v. Denny*, 120 Wis. 2d 614, 624-25, 357 N.W.2d 12 (Ct. App. 1984).

In short, circuit courts must assess the proffered evidence to determine whether there is a "legitimate tendency" that the third-

party perpetrator(s) *could have* committed the crime" (opportunity), and "whether, under the totality of the circumstances, the evidence suggests that a third-party perpetrator *actually committed* the crime" (direct connection). *State v. Wilson*, 2015 WI 48, ¶¶ 65, 71, 362 Wis. 2d 193, 864 N.W.2d 52 (emphasis in original). Finally, the circuit court must assess whether the third party had a motive to commit the crime. *Wilson*, 2015 WI 48, ¶¶ 62-63.

Importantly, such evidence need not be "substantial" to be admissible, as that would be "too strict a standard for the admissibility of such evidence and conflicts with our supreme court's pronouncements on the fundamental standards of relevancy." *Denny*, 120 Wis. 2d at 623. Further, "[o]verwhelming evidence against the defendant may not serve as the basis for excluding evidence of a third party's opportunity (or direct connection to the crime)." *Wilson*, 2015 WI 48, ¶ 69.

Here, the evidence is strong that the third parties committed the crime. The record clearly demonstrates that the three men had motive, opportunity, and a direct connection to rob and kill Mousa. No one disputes that Mousa was robbed. The men clearly had a motive to rob and then kill Mousa. A witness at the scene told police that the "subjects who shot [Mousa]" fled to a dope house located one block away. (R. 28:11.) Police immediately pursued this lead and found the three in the dope house identified by the witness. (R. 28:11-12.) These facts demonstrate opportunity. The witness, as well as the gunpowder residue and bloodstain, (R. 28:11-17), establish a direction connection.

This evidence could have been presented at trial through, among others, the police officer who spoke with the witness, the detectives who arrested the three suspects, and the lab technicians who analyzed the bloodstain and gunpowder residue. (R. 29:7-9.)

For these reasons, a court would have permitted the introduction of this third-party perpetrator evidence.

D. Our Supreme Court has made clear that counsel is obligated to investigate information in police reports.

Finally, the State suggests that Fisher's motion failed to adequately plead counsel's failure to investigate. (State's Suppl. Resp. 6). This argument, too, is unsupported by Wisconsin law. In *State v. Love*, for example, the defendant argued that trial counsel was ineffective for failing to investigate exculpatory information in police reports. *Love*, 2005 WI 116, ¶ 22. There, as here, the police reports included a witness statement, in which the witness told police that someone, other than the defendant, committed an armed robbery. *Id*. There, as here, the defendant pleaded that his counsel failed to investigate and interview the witness. *Id*. at ¶22; (R. 29:8).

In *Love*, like here, the State asserted that the defendant failed to adequately plead his ineffective assistance claim. *Love*, 2005 WI 116, ¶ 38. After examining Love's complaint, our Supreme Court disagreed. *Id.* at ¶ 32. The Court based its decision, in part, on the unremarkable proposition that "pursuant to the ABA Standards for Criminal Justice, trial counsel is obligated to investigate information in police reports." *Id*. at ¶ 40.

II. The record proves the precariousness of the prosecution's case; therefore, counsel's deficiency impermissibly prejudiced Fisher.

The State also argues that the failure to present the alternate suspects was not prejudicial, and the State focuses upon two components of the prosecution's case. First, the State relies upon the conflicting and changing statements of three witnesses who did not see the shooting. (State's Suppl. Resp. 10-11, 14-15.) Second, the State relies upon a police detective's uncontrolled experiment to create a pernicious and inaccurate timeline. (State's Suppl. Resp. 16-17.)

To be clear, no physical evidence linked Fisher to the murder. Police found no gunshot residue on his hands. Police found no blood on his clothes. Fisher made no incriminating statement to police, and detectives found neither the money that Fisher allegedly stole nor the gun he allegedly used.

A. The witnesses against Fisher are unreliable.

The State, both at trial and now in briefing, relies primarily upon three witnesses: Andre Ward, Andre Goodman, and Jay Wonders. (State's Suppl. Resp. 10-11, 14-15.) But, as the record shows, these witnesses are unreliable.

1. Andre Ward, a parolee convicted of drug offenses, is unreliable.

Police reports make clear that Andre Ward is unreliable. Ward, a parolee at the time of his police interview, had prior convictions for cocaine possession and reckless use of a weapon. (R. 28:30.) He gave two completely different statements to police. Ward admitted that he told police two different stories. (R. 28:39.)

Ward's stories changed radically. He shifted his story about: whether he spoke to Fisher the night of the murder, who was with him when he saw or spoke with Fisher, and where he saw Fisher the next day. Most strikingly, he shifted his story about his conversations with Fisher.

In his first interview with police, he said he didn't speak with Fisher the night of the shooting. (R. 28:30-31.) He claimed that he and Goodman drove past Fisher, and he claimed to have yelled at Fisher from his car. (R. 28:30.) In this first interview, he also claimed that he asked Fisher the next day if he had heard about the murder and that Fisher denied any knowledge of the murder. (R. 28:31.)

In the second interview, Ward told a much different story. This time, he claimed to stop at the gas station and to have engaged in a lengthy conversation with Fisher. (R. 28:36-39.) This time, he claimed that Goodman and Wonders accompanied him. (R. 28:36.) This time, he claimed, in the second meeting, that Fisher confessed to the murder in detail.[2] (R. 28:37.)

These distinctions are summarized in the following chart:

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[2] The State unpersuasively argues that the witnesses told police details of the killing that, the State claims, the witnesses could only have learned from the true killer. (State's Suppl. Resp. 17-18.) However, each verifiable detail "revealed" by these men would have been known to police and the community by the time police questioned Ward, Wonders, and Goodman. (*see* R. 28:26; 47:59) (police learned from Mousa's employee as early as October 27, 1993 that a bank bag, now missing, had been placed in Mousa's vehicle); (*see* R. 46:20, 33-34; 49:64-67) (the fact that Mousa was shot in the head and neck was known soon after Jordon Johnson discovered Mousa's body and after the police and pathologist arrived at the scene on October 26, 1993). Ward, Goodman, and Wonders were not interviewed until November 4, 1993 or after. (R. 28:30, 33, 43.)

	First Interview with police	Second Interview with police
Conversation with Fisher on the night of the murder	No Conversation. He saw Fisher standing outside Mousa's store. Ward drove past without stopping. He "yelled at [Fisher], 'WHAT'S UP' and that was the extent of their conversation." (R. 28:30.)	Conversation at Mousa's store. Ward was driving past Mousa's store and saw Fisher. Ward "got out of his vehicle." Ward claimed Fisher shared a plan to rob Mousa. (R. 28:36.)
Passengers in Ward's car	Andre Goodman (R. 28:30.)	Andre Goodman and Jay Wonders (R. 28:36.)
Conversation with Fisher the night after the murder	Ward asked Fisher whether he had heard about the murder. "Casey said no and that was the extent of their conversation regarding the shooting incident." (R. 28:31.)	Fisher confessed to the murder in detail. (R. 28:37-38.)
Location of this second conversation	Andre Ward's home (R. 28:31.)	Jay Wonders's home (R. 28:37.)

2. Andre Goodman is unreliable.

The parties agree that Goodman never claimed to have heard Fisher utter an incriminating word. Instead, the State used Goodman to bolster Ward's problematic and inconsistent statements. Goodman, too, offered wildly different versions of his interactions with Fisher. In his first interview with police, Goodman said that, on the night of the murder, "at no time did he see the suspect, Casey Fisher…." (R. 28:34.) In his second interview, however, Goodman changed his story. In this second interview, he claimed to have witnessed Fisher have a conversation with Ward and Wonders outside the store. (R. 28:41.)

However, he continued to deny hearing Fisher make any incriminating statements. (R. 28:41.)

These distinctions are summarized in the following chart:

	First Interview with police	Second Interview with police
Conversation with Fisher on the night of the murder	No Conversation. He didn't even see Fisher that night. "Mr. Goodman states at no time did he see the suspect, Casey Fisher, on this date." (R. 28:34.)	No conversation. However, he now says that he saw Fisher outside a grocery store. Goodman saw Wonders and Ward have a conversation with Fisher. Goodman, however, "never personally had any conversation with Casey Fisher at this location…" (R. 28:41.)
Passengers in Ward's car	No car ride where he saw Fisher. (R. 28:33-34.)	Andre Ward and Jay Wonders (R. 28:41.)
Conversation with Fisher the night after the murder	No Conversation (R. 28:33-34.)	No conversation (R. 28:41.)
Location of this second conversation	No Conversation (R. 28:33-34.)	No conversation (R. 28:41.)

3. Jay Wonders is unreliable.

Wonders's statements, too, are problematic. Police reports noted the "conflicting statements given to investigating detectives by Andre Ward and Jay Wonders." (R. 28:41.) The differences between these men's statements are not small. For example, Ward and Goodman both testified the conversation with Fisher, on the night of the shooting, occurred outside Mousa's store. (R. 48:25; 49:25.) Whereas, Wonders testified that the alleged conversation occurred outside Ward's house. (R. 49:77.) 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. (R. 28:36-39, 43-45.)

Goodman maintained that he didn't speak to Fisher, at any time, about a plan to rob Mousa or the murder. (R. 48:26.)

4. The State inflates the importance of Gibbs's testimony.

Lastly, the State relies upon the testimony of Bryan Gibbs.[3] To be clear, Gibbs did not testify that he saw Fisher shoot Mousa. Further, Gibbs did not testify that Fisher confessed that he shot Mousa. Instead, the State suggests that Fisher threatened Gibbs, which, according to the State, provides further evidence of Fisher's guilt. But the record reveals a more complex encounter. First, as the State concedes, prosecutors held Gibbs in jail to secure his testimony. (State's Suppl. Resp. 12 n.4.) During cross-examination, Gibbs waivered on his claim that Fisher threatened him, stating, "Look, I don't feel like going through all that right there because this ain't got nothing to do with this case, not when it come down to that on the streets, all right. That's between me and him." (R. 47:108-09.) No corroboration exists that the supposed threats occurred.

B. The State's proffered timeline is unreliable.

The State, both here and below, also relies upon a confusing and unreliable timeline to attack Fisher's claim. The State tries to

[3] The State also briefly relies upon the testimony of Deon Wesley to corroborate Ward, Wonders, and Goodman. (State's Suppl. Resp. 15.) The State fails to note, however, that Wesley was not interviewed until shortly before the original trial date, and more importantly, police never prepared reports on any interviews with Wesley. (R. 47:6.) Wesley claimed at trial that Fisher told him "he had shot at somebody *by a store or something*." (R. 47:47) (emphasis added). In addition to Wesley providing a clearly inaccurate statement about where the shooting took place, Wesley could not even remember what month this supposed conversation took place. (R. 47:48.)

establish a small and precise window of four to five minutes in which only Fisher could have murdered the victim. (State's Suppl. Resp. 16-17.) But the State's Response demonstrates that its objective timeline relies upon the subjective estimates of several witnesses. (State's Suppl. Resp. 13) ("Johnson…heard what he described as three gunshots at *approximately* 9 p.m."); State's Suppl. Resp. 13) ("Johnson *estimated* that he saw Mousa five minutes after hearing the gunshots…"); (State's Suppl. Resp. 16) ("Lewandowski *estimated* that between 8:48 and 8:52p.m., Mousa went to his truck, Fisher talked to Nelson and Mousa, Fisher got into Mousa's truck, and Mousa drove away."); (State's Suppl. Resp. 16) ("by Jhonson's account, it took *roughly* seven minutes between hearing gunshots, his seeing Mousa, and his retun to his house where his mother called 911"); (State's Suppl. Resp. 17) ("*Estimating* an 8:52p.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."). (emphasis added in each parenthetical).

The State, here and below, trumpets Detective Lewandowski's "time study." (State's Suppl. Resp. 17) ("Lewandowski drove one of those routes; driving 25 mph…"); (R. 49:100-02). But the Detective's testimony tells the story of an uncontrolled and unreliable experiment. At trial, the Detective conceded that he never made reports of his "time study," testifying only to his memory of this supposed study. (R. 49:114-16.) In fact, the Detective could not even specifically recall which day or at what hour he conducted this "study." (R. 49:114-16.) The Detective claimed that he used a "wrist watch that has a – second hand" for

the timing, conceding he did not even use a time clock that could be set at the start and finish of a timed event. (R. 49:116.) The Detective further conceded that he made several personal judgments as to which roads to take in timing his routes. (R. 49:116-21.) Finally, the Detective conceded that he obeyed the traffic signs and speed limit while conducting his "study," and yet had no information confirming whether Mousa did the same the night of his murder. (R. 49:121-23.)

Worst yet, the State cherry-picks the estimates of select witnesses to build its timeline. The State acknowledges, for example, Gibbs told police that *ten minutes* passed between seeing Mousa drive past and hearing gunshots from the area where Mousa was shot. (State's Suppl. Resp. 13.) Gibbs later testified that "about fifteen minutes" lapsed between the time he saw Fisher get into the car and the gunshots. (R. 47:101.) And yet, the State seemingly fails to incorporate or to apply Gibbs's statement to police or his testimony in the creation of its timeline. Perhaps this is because, in a case where every minute counts in the construction of a timeline, Fisher's version of events is in fact feasible when incorporating Gibbs's testimony.

Therefore, the State's assertion that Fisher's version of events was not plausible in light of the timing of Mousa's murder is plainly unreliable.

C. Because the State's evidence against Fisher is unreliable, counsel's failure to present the third-party evidence prejudiced Fisher.

The State argues that "the record conclusively demonstrates that Fisher murdered Mousa." (State's Suppl. Resp. 9.) This claim

is a clear exaggeration. A more-accurate assessment of the record shows the case against Fisher was frail.[4] The prosecution presented unreliable witnesses, an unreliable road test, and an unreliable timeline.

To assess prejudice, this Court should consider three factors. First, the State's case was frail. Second, trial counsel failed to present any defense. Third, trial counsel could have presented strong evidence of third-party perpetrators. Trial counsel's failure to present the third-party perpetrator evidence was prejudicial because "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *See Jenkins*, 2014 WI 59, ¶ 78 (internal citations omitted). Accordingly, based upon these three factors, Fisher has satisfied his burden.

III. The State never alleges that counsel was not deficient, and, therefore, a *Machner* hearing is unnecessary where deficiency is conceded.

Fisher alleges that counsel performed deficiently because counsel failed to present strong third-party perpetrator evidence. The State, both here and below, never disputes this central proposition. Instead, the State spends much time arguing that Fisher failed to properly plead his deficiency. (State's Suppl. Resp. 2-9.) The State never argues that, if properly pled, counsel's

[4] The State's frail case, perhaps, explains why it felt compelled to supplement the record with Google Maps. In providing this Court with a map, however, the State failed to include the other important location. That of the "dope house" located at 2716 W. Garfield, a block from the shooting, where Little Rob and his friends were found following the shooting. (*See* A-Supp. App. 101.)

performance met the "objective standard of reasonableness considering all the circumstances." *Jenkins*, 2014 WI 59, ¶ 36.

This Court gave the State a second chance to address the merits. The State, again, has failed to respond to this cornerstone of Fisher's opening brief. This failure is understandable. Trial counsel failed to present any defense, when police reports provided a strong defense. Such is textbook deficiency.

Arguments left unrefuted in response to an appeal are deemed conceded. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp*., 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Because the deficiency prong is conceded, a *Machner* hearing is not necessary. *See e.g., State v. Smith*, 207 Wis. 2d 258, 275 n.11, 558 N.W.2d 379 (1997) ("In light of the State's concession of deficient performance as well as our own conclusion on deficient performance, no *Machner* hearing is necessary given the facts of this case."). In any event, there can be no reasonable strategy to fail to present strong evidence of an alternate suspect.

IV. The State fails to distinguish Fisher from *Harris*.

Fisher avers that his ineffectiveness claim is similar to the ineffectiveness claim in *Harris v. Reed*, 894 F.2d 871 (7th Cir. 1990). The State chooses to brush aside *Harris*. Instead, the State attempts to change the subject, claiming that "the question here is limited to whether Fisher is entitled to a *Machner* hearing on this claim, which *Harris* does not speak to." (State's Suppl. Resp. 18-19.) The State goes further, making the curious point, "even if *Harris* was on point, it lacks any persuasive support." (State's Suppl. Resp. 19.)

The State does not address the remarkable similarities between *Harris* and Fisher. In both cases:

- The victim was shot in the evening in a major American city.
- Police arrived, secured a crime scene, and canvased the area.
- During the investigation, police met a witness who had information about the shooting.
- A witness told police he saw the perpetrator flee the scene immediately after the shooting.
- A witness told police the direction in which the perpetrator fled.
- The police arrested the person identified by the witness.
- The arrested suspect was involved with drugs.
- Trial counsel failed to present the third-party perpetrator evidence.
- Trial counsel rested without calling a single witness.
- Trial counsel did not offer his own theory of defense.

Harris, 894 F.2d at 872-74.

Based upon these facts, the United States Court of Appeals for the Seventh Circuit granted relief. *Id.* at 878. The State does not spend much effort trying to distinguish *Harris* and Fisher. Instead, the State makes the blanket claim that Harris's claim was stronger. (State's Suppl. Resp. 19.) The State argues that, because *Harris* had two witnesses, then *Harris* is stronger. (State's Suppl. Resp. 19.) But clearly, *Harris* is not stronger than Fisher. In Fisher's case:

- A witness at the scene identified one of the shooters by name.
- The arrestees were arrested soon after the shooting a mere one block from the crime scene.
- One arrestee had human blood on his shirt.

- Two arrestees had gunpowder on their hands.

Harris, alone, is sufficient persuasive precedent to grant relief. But Wisconsin courts have consistently held counsel performs deficiently when counsel fails to review and use useful discovery or fails to call important witnesses. *See e.g., State v. Theil*, 2003 WI 111, ¶ 37, 264 Wis. 2d 571, 665 N.W.2d 305 (Counsel was ineffective for failing to review key discovery.); *Jenkins*, 2014 WI 59, ¶ 41-48 (Counsel, who failed to call eyewitness, was ineffective.).

V. Because the real controversy of identity, the lone issue at trial, was never fully tried, this Court should grant a new trial in the interest of justice.

This Court possesses a "broad power of discretionary reversal pursuant to Wis. Stat. § 752.35." *State v. Davis*, 2011 WI App 147, ¶ 16, 337 Wis. 2d 688, 808 N.W.2d 130 (citing *Vollmer v. Luety*, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990)). This power "provides authority to achieve justice in individual cases." *Id*. This Court may exercise this power of reversal where "the jury was not given the opportunity to hear and examine evidence that bears on a significant issue in the case." *Davis*, 2011 WI App 147, ¶ 16 (internal citations omitted).

Importantly, in order to exercise this power, this Court "need not first conclude that the outcome would be different on retrial. Instead, we reverse to maintain the integrity of our system of criminal justice and so that we can say with confidence that justice has prevailed." *State v. Jeffrey A.W.*, 2010 WI App 29, ¶ 14, 323 Wis. 2d 541, 780 N.W.2d 231 (internal citations omitted). In addition, this Court need not find that Fisher's counsel performed

deficiently in order to find that the real controversy was not fully tried. *Id.* at ¶ 20 (granting a new trial in the interest of justice despite finding that counsel was not deficient in failing to present important evidence).

The exclusion of the evidence incriminating Little Rob and his friends prevented the real controversy of the identity of the perpetrator(s) from being fully tried. In order to maintain the integrity of our system of criminal justice and have confidence that justice has prevailed, a jury must be given the opportunity to hear and evaluate this critical evidence. Because the issue of identity has never fully been tried, Fisher deserves a new trial in the interest of justice.

CONCLUSION

For these reasons, and for those in his opening brief and reply brief, Casey Fisher respectfully requests that this Court reverse the Milwaukee County Circuit Court's denial of his Wis. Stat. § 974.06 motion and remand with an instruction to grant a new trial.

Respectfully submitted this 8th day of November, 2018.

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19 for a brief and appendix produced with a proportional serif font. I certify that, consistent with this Court's order filed June 25, 2018, that this supplemental reply is no more than twenty pages.

Dated this 8th day of November, 2018.

_____

Maria de Arteaga
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CERTIFICATION AS TO COMPLIANCE WITH 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, 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 8th day of November, 2018.

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Maria de Arteaga
State Bar No. 1095253