STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2017AP1625-CR

**STATE OF WISCONSIN,**
Plaintiff-Respondent,

-vs.-

**MELVIN LIDALL TERRY,**
Defendant-Appellant.

**ON APPEAL FROM THE DEC. 17, 2014, JUDGMENT OF CONVICTION, THE HONORABLE STEPHANIE ROTHSTEIN, PRESIDING, AND THE AUG. 4, 2017, ORDER DENYING POSTCONVICTION RELIEF, THE HONORABLE MARK A. SANDERS, PRESIDING.**
**MILWAUKEE COUNTY CASE NO. 2013CF2759**

# DEFENDANT-APPELLANT'S REPLY BRIEF

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## ARGUMENT

### I. THE CLIFTON IDENTIFICATION EVIDENCE SHOULD HAVE BEEN OMITTED; TERRY SHOULD HAVE A NEW TRIAL BECAUSE THE STATE CANNOT DISPROVE THAT IT CONTRIBUTED TO THE VERDICT.

#### A. The curbside identification procedure was a showup.

As a threshold matter, Terry disagrees with the State's proposition that a showup occurs only when a single suspect is presented to a witness. (*See* St.'s Br. at 16.) The State cites to a footnote in *State v. Dubose* for support. *Id.* (citing 2005 WI 126, ¶ 1 n.1, 285 Wis. 2d 143, 699 N.W.2d 582). However, the precise contours of what constitutes a showup were not at issue in *Dubose*. Instead, the issue was only whether the procedure of showing a single suspect to a witness with a suggestion that the suspect may have been involved in the crime violated the suspect's constitutional rights. *Dubose*, 2005 WI 126, ¶¶ 1, 9-10. Certainly, *Dubose* recognized that procedure as a showup, but it did hold that a showup occurs only when police use that procedure. *See id.*

In fact, the language in *Dubose* on which the State relies is completely quoted from a prior Wisconsin case, which itself relied on the United States Supreme Court's decision in *Stovall v. Denno*[1]: "'A "showup" is an out-of-court pretrial identification procedure in which a suspect is presented singly to a witness for identification purposes.' *State v. Wolverton*, 193 Wis. 2d 234, 263 n.21, 533 N.W.2d 167 (1995) (citing *Stovall* [,] 388 U.S. [at] 302)." *Id.* But not even *Stovall* gets the State where it wants to go. *Stovall*, like *Dubose*, addressed the constitutionality of showing a single suspect to a witness but never concluded that a showup occurs *only when* a single suspect is presented. *See* 388 U.S. at 301-02.

[1] 388 U.S. 293 (1967).

In fact, in a subsequent case, the Supreme Court specifically distinguished "a lineup, also known as an 'identification parade' *or 'showup,'*" from "presentation of the suspect alone to the witness, as in *Stovall v. Denno*." *United States v. Wade*, 388 U.S. 218, 229 (1967) (emphasis added). Five years later, in *Kirby v. Illinois*, the Supreme Court used the term "showup" to refer to an identification procedure in which a witness was simultaneously shown *two codefendants* for identification purposes. 406 U.S. 682, 684-85 (1972). *Wade*'s recognition that a showup is not coextensive with the procedure *Stovall* and *Kirby*'s application of the term to showing multiple suspects simultaneously proves that a showup may involve more than one person. *See id.* The State's limited interpretation of "showup" is thus inconsistent with the Supreme Court's use of that term, on which our own courts have relied to define it. Thus, a showup should not be conceptually limited to only those circumstances in which a suspect is singly presented to a witness.

Instead, it should be understood to involve circumstances like those in Terry's case where his appearance was so different from the other people that he immediately stood out to the witness who had been instructed at the curb to pick out who commited the crime. Those are the necessary elements of a showup: presenting a person to a witness under circumstances that both cause the person to stand out and include a suggestion by the police, whether covert or overt, that the person is a suspect. *See Kirby*, 406 U.S. at 684-85.

### B. Showup or not, Clifton's identification should have been suppressed.

When the procedure in Terry's case is properly understood as a showup, the question becomes whether it was necessary. In response, the State argues that police lacked probable cause to arrest Terry, and thus the showup was necessary. (St.'s Br. at 17.) The State explains

that probable cause requires evidence showing "a substantial likelihood that the suspect committed a crime." *Id.* (citing *State v. Lange*, 2009 WI 49, ¶ 38, 317 Wis. 383, 766 N.W.2d 551). But that is not a fair articulation of the relevant standard; it demands more certainty than probable cause requires.

*Dubose* noted that "'[p]robable cause to arrest refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime." 2005 WI 126, ¶ 36 n.13 (quotation marks and authority omitted). And *Lange*—the case to which the State cites for support—relevantly explains that "although probable cause must amount to 'more than a possibility or suspicion that the defendant committed an offense,' the evidence required to establish probable cause 'need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not.'" *See* 2009 WI 49, ¶ 38 (quoted authority omitted).

The State's attempt to increase the probable cause standard should not carry the day. Instead, as Terry argued in his opening brief and consistent with extant law, the police had probable cause at the time he was detained. The showup was thus unnecessary and should have been suppressed.[2]

Supposing for argument's sake that what occurred with Clifton was either not a showup or was necessary,

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[2] The State should lose its probable cause argument for another reason: it argued the opposite position below. Namely, when arguing Terry's suppression motion, the prosecutor said, "I do think that there was clearly . . . probable cause to arrest [Terry]." (R.178:39.) Insofar as the State has taken an inconsistent position on appeal to the one it took below, it should be judicially estopped from arguing that there was no probable cause for Terry's arrest. *State v. White*, 2008 WI App 96, ¶ 15, 312 Wis. 2d 799, 754 N.W.2d 214, *Harrison v. LIRC*, 187 Wis. 2d 491, 497, 523 N.W.2d 138 (Ct. App. 1994).

the circuit court should still have suppressed his identification as the unreliable result of an impermissibly suggestive practice.

Terry detailed the suggestiveness of Det. Gomez's procedure in his opening brief and will not here repeat that argument. Instead, he will constrain his reply to the State's espoused inability to understand the significance of the nervousness and fear that Det. Gomez's procedure instilled in Clifton. (St.'s Br. at 18.) Here is why it matters. Research has shown that witnesses under stress or duress are more likely to make a misidentification. Kenneth A. Deffenbacher, et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 L. & Hum. Behavior 687, 694 (2004). Insofar as Det. Gomez's procedure induced nervousness and fear in Clifton, it increased the likelihood of misidentification. When that heightened chance of misidentification is coupled with Det. Gomez's simultaneous direction that Clifton should pick the shooter from the people on the curb, the procedure was unduly suggestive.

Finally, the State's position that Clifton's identification was reliable does not respond to the presence of scientifically verified reliability problems. As Terry laid out in his opening brief, there are numerous, empirically validated reliability problems in the circumstances of Clifton's identification: short duration, distracted viewing of a stranger of a different race whose face was partially obscured, which occurred during a high stress situation involving a gun. The State's reliance on Clifton's description of the shooter's clothing as demonstrative of the reliability of his identification is of no help. After all, Terry was the only person on the curb who wore clothing anything like that worn by the shooter. Thus, he would have—and, as Clifton readily admitted, did—stick out because of his clothing. For those reasons and the ones more fully articulated in Terry's first brief, the State cannot prove that Clifton's

identification was reliable; it should have been suppressed.

### C. The State cannot prove that the Clifton identification did not contribute to the verdict; its admission was thus not harmless.

There is a difference between harmless error and prejudice. Harmless error requires the State to disprove the error's contribution to the verdict. *Satterwhite v. Texas*, 486 U.S. 249, 258-59 (1988). Prejudice necessitates a defendant's proof of a reasonable probability of a different result but for the error. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). That is a distinction with a difference: the tests not only burden different parties with proof, but they also require proof of different things. Under the harmless error analysis, Terry does not have to prove anything but for an error; thereafter, the State must prove that the error did not contribute to the verdict. *Chapman v. California*, 386 U.S. 18, 24 (1967).

Contrary to that law, the State argues that the test for harmless error is nearly the same as the test for prejudice in the ineffective assistance of counsel context. (St.'s Br. at 20.) The only difference, says the State, is that under harmless error, it bears the burden of proof. *Id.* But that is not a correct articulation of the harmless error test.

As the United States Supreme Court has before noted, *Strickland* prejudice is not harmless error. *See Lockhart v. Fretwell*, 506 U.S. 364, 369 n.2 (1993) (distinguishing question of harmless error from *Strickland* prejudice), *Lafler v. Cooper*, 132 S. Ct. 1376, 1393 n.1 (2012) (Scalia, J., dissenting) (same); *see also* John H. Blume & Christopher Seeds, *Reliability Matters: Reassociating* Bagley *Materiality*, Strickland *Prejudice*, *and Cumulative Harmless Error*, 95 J. Crim. L. & Criminology 1153, 1165-67 & n.39 (2005) (*Strickland* "reject[ed] harmless-error and newly-discovered-evidence prejudice standards"). Insofar as Wisconsin cases might

be read as suggesting a different test for harmless error, that standard would be an incorrect understanding of clearly established Supreme Court law. *Jensen v. Clements*, 800 F.3d 892, 895, 908 (7th Cir. 2015).

Instead, in any harmless error analysis, the "focus [is] on the effect of the error on the jury's verdict," but not the sufficiency of the evidence aside from that which was improperly admitted. *See State v. Weed*, 2003 WI 85, ¶ 29, 263 Wis. 2d 434, 666 N.W.2d 485. If a reasonable probability exists that the error contributed to the jury's verdict regardless of the sufficiency of the other evidence, it must be set aside. *Chapman*, 386 U.S. at 24, *Jensen*, 800 F.3d at 902. As the beneficiary of the alleged error in the instant case, the State has the burden of proving that it was harmless; that is to say, that there is no reasonable probability that Clifton's identification contributed to the jury's verdict. *Chapman*, 386 U.S. at 24, *State v. Sullivan*, 216 Wis. 2d. 768, 792-93, 576 N.W.2d 30, 41 (1998). The State cannot meet its burden.

Clifton was not some minor part of the State's case. He was a disinterested witness who told the jury that he saw Terry in the alley shooting a gun. The significance of Clifton's identification to the State's case is apparent given the prosecutor's reliance on it in closing. After specifically mentioning Clifton by name eight times in closing remarks, the prosecutor leaned heavily on Clifton's curbside identification in rebuttal to counter Terry's theory of defense:

> And, ladies and gentlemen, one other thing. Defense counsel stated it's entirely reasonable to believe that the individual who went running after that red car was different than the shooter. *Two problems with that and they're two huge problems*.
>
> No. 1, the individual that went running after that car, the defense counsel says: Hey, all the evidence is not 100 percent. All the evidence you should believe is the defendant. *That's the same person that is identified by the same, not 100 percent, by*

> *Shawn Clifton as being the shooter*. No longer wearing the jean jacket that's in the house but still having that shirt. He doesn't focus on the guy without the dreads. He doesn't even focus on the girl. He thinks that's a guy because he focuses on one person. He focuses on the defendant. He focuses on the man wearing the white shirt with the multicolors, the defendant, the only guy with the dreads. That's the person he saw shoot who then went into the house and took the jacket off.
>
> But here is another portion of that, ladies and gentlemen. Defense counsel also stated the reason that you should know this is because of the discrepancy from the description in the alley, from the description out on the street. *Well, Shawn Clifton's already bridged that. . . .*
>
> You take *all of the evidence together*. All of the evidence together shows, ladies and gentlemen, Naurice Elliott punched her. They went into the alley. They were confronted by the defendant. He pulled a gun and he shot Naurice Elliott in the head. Because when you put Terry Smith, Cheryl Kubik, Debra Leighton, Morgan Funches, Antoinette Funches, *Shawn Clifton*, [Thomas][3] and Tiffany Carter all together, ladies and gentlemen, *when you consider the totality of all of the evidence, it points to only one person*, only one person, the defendant.

(R. 141-42, 144-45 (emphasis added).) As the prosecutor's words demonstrate, Clifton's identification resolved big holes in the State's case, given Terry's theory of defense. Additionally, the prosecutor's words tell the jury to consider "all the evidence together" to reach the conclusion that "the totality of all the evidence . . . points to" Terry. *Id.* That evidence includes Clifton's identification.

And let's not forget the State's argument below in postconviction pleadings. There, the State wrote that Clifton "conclusively linked the testimony of the Funches with Ms. Kubrik [*sic.*] and Ms. Leighton"

[3] Pseudonym for victim.

thereby "link[ing] the dreadlocked man that chased the red Cadillac to the dreadlocked man with a silver gun in the alley." (R.156:7.) Importantly, the State needed the jury to believe that both of those men were Terry. The State's closing argument, rebuttal, and postconviction pleading all demonstrate its opinion that Clifton's testimony was a key part of its case against Terry.

But now, rather than addressing the significance of Clifton's identification to its case against Terry, the State attempts to prove the error harmless by arguing that the other evidence was sufficient. However, that argument does not prove harmlessness. *Jensen*, 800 F.3d at 902. The State cannot prove the error harmless because it cannot prove that Clifton's identification in no way contributed to the verdict. *Satterwhite*, 486 U.S. at 258-59.

Terry should have a new trial.

## II. TERRY CAN PROVE PREJUDICE FROM THE ABSENCE OF AN EYEWITNESS EXPERT.

The State's first counterargument to *Strickland* prejudice is an attack on the credibility of evidence that Terry submitted in support of his postconviction motion. (St.'s Br. at 26.) That is an inappropriate avenue of attack at this stage. *See State v. Allen*, 2004 WI 106, ¶ 12, 274 Wis. 2d 568, 628 N.W.2d 433. Issues of credibility are to be resolved at an evidentiary hearing in open court. *State v. Leitner*, 2001 WI App 172, ¶ 34, 247 Wis. 2d 195, 633 N.W.2d 207. But, the circuit court refused to give Terry an evidentiary hearing. Prior to a hearing, allegations in a defendant's postconviction motion are to be taken as true, *viz.* credible. *Id.* Thus, the argument that Dr. Cutler's report cannot prove prejudice because—in the State's eyes—it has credibility problems is a nonstarter.

Next, the State argues that the body of scientific research regarding reliability issues with eyewitness identifications is commonsense, and thus Dr. Cutler's testimony would have "added nothing of value." (St.'s

Br. at 26-27.) That line of argument defies belief, and psychological research shows it to be meritless. *See* Tanja Rapus Benton, et al., *Eyewitness Memory is Still not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts*, 20 Appl. Cognit. Psychol. 115, 127 (2006). The factors affecting reliability in eyewitness identifications are "not common sense to jurors." *Id.* In Benton's study, "jurors evidenced the *greatest deficiency in knowledge of eyewitness issues* based on the lack of correspondence between their responses and those of the experts, as well as their overall accuracy rate." *Id.* at 119-20, 125-26 (emphasis added). Dr. Cutler's expert opinion thus would have meaningfully contributed to the jury's knowledge about reliability issues with the various witness identifications.

As a third line of attack, the State says Dr. Cutler's report is not worth much because it talks a good deal about stranger identifications. (St.'s Br. at 27.) The State then writes, "Terry ignores that there were no positive identifications in this case by the witnesses to whom Terry was a complete stranger." (*Id.*) Of course, that is not true; Clifton is a stranger to Terry. As detailed above, Clifton is not some minor witness. Instead, as the State has before argued, his testimony links its case together. The State's choice on appeal to ignore Clifton's stranger identification therefore substantially undercuts its no-prejudice argument.

Ultimately, what matters for prejudice purposes is exactly what the State argued in its closing argument and postconviction pleadings: Clifton's identification links its case together and defeats Terry's theory of defense. Being able to establish scientifically verified reliability problems in the witnesses' identifications that are otherwise outside the common sense of the jury would allow Terry to unlink the person chasing the Cadillac and the person in the alley with a gun. Severing that connection would lead to a reasonable probability of a

different result because only one of those people did the shooting.

If Terry is the person running behind the Cadillac and following it into the alley—as was his theory of defense—it would have been impossible for him to be in front of and walking toward the Cadillac when it entered the alley as the shooter was doing. Not only could Dr. Cutler explain reasons to discount Clifton's identification, but he could also show problems with Thomas's identification that would allow the jury to understand how Thomas could have wrongly identified Terry. And from that, the jury can conclude that the shooter was really someone other than Terry. Dr. Cutler's testimony showing the reliability problems with Clifton and Thomas's identification would therefore have created a reasonable probability of a different result.

## CONCLUSION

For all those reasons and the reasons more fully explicated in his opening brief, Terry asks for a new trial. Alternatively, he asks for a *Machner* hearing on the issue of his counsel's deficiency.

Dated this 2nd day of March, 2018.

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## CERTIFICATION

I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full

line of body text. The length of this brief is 2,994 words, as counted by the commercially available word processor Microsoft Word.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Section 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 2nd day of March, 2018.

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**CERTIFICATION OF FILING BY THIRD-PARTY COMMERCIAL CARRIER**

I hereby certify, pursuant to Rule 809.80(4)(a), Rules of Appellate Procedure, that this Appellant's Brief and Short Appendix will be delivered to a FedEx, a third-party commercial carrier, on March 2, 2018, for delivery to the Clerk of the Court of Appeals, 110 East Main Street, Suite 215, Madison, Wisconsin 53703, within three calendar days. I further certify that the brief will be correctly addressed and delivery charges prepaid. Copies will be served on the parties by the same method.

Dated this 2nd day of March, 2018.

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