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 BRIEF AND SHORT APPENDIX (REPLACEMENT COPY)

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STATEMENT OF THE ISSUES

I. Whether a key witness's identification should have been suppressed as the result of an unnecessary and unnecessarily suggestive lineup procedure?

Terry raised the suppression issue in a pretrial motion. Following a hearing, the circuit court denied his motion and allowed the identification evidence at trial.

II. Whether Terry's counsel provided ineffective assistance by failing to obtain and present the testimony of an expert witness regarding the unreliability of various eyewitnesses' identifications?

Terry filed a postconviction motion raising this issue. Following briefing, the circuit court denied relief without a hearing on the ground that Terry could not prove prejudice.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Terry would welcome oral argument if of interest to the panel. Publication may be warranted insofar as Terry's unnecessary-showup argument considers whether simultaneously presenting suspects who look markedly different from each other to a witness to identify the lone perpetrator is a showup, as that term is defined in Wisconsin law.

STATEMENT OF THE CASE

Terry was prosecuted in the instant case for the shooting death of Naurice Elliot and related crimes. (R.1:1-2.) He went to trial. His defense was that he had not shot Elliot and that the witnesses claiming that he was the shooter were mistaken in their identifications. (*See* R.193:124-25, 131.)

The main witness against Terry was Thomas, a good friend of Elliot's who had been with him at the time of the shooting. (R.191:18-19.) According to Thomas, he and Elliot met Terry and a woman named Tiffany Carter at a gas station on 35th Street in Milwaukee. (*Id.*:27-29.) At that meeting, a drug transaction occurred between Carter and Elliot. (*Id.*:63-64.) After the transaction, Terry and Carter departed, whilst Elliot became disgruntled because he believed something had gone awry in the transaction. (*Id.*:30, 64-65.) Elliot thus directed Thomas to pursue Carter in his car. (*Id.*:24-25, 65.)

Once the pair caught up with Carter, Terry was no longer with her. (*Id.*:30.) Elliot got out and assaulted her. (*Id.*:32-34.) He yelled at her; he forcibly patted her down; and he punched her in the face. (*Id.*) Elliot's punch drew blood, and Thomas intervened to end the assault. (*Id.*:35.) Carter walked away. (*Id.*:36.) After Elliot and Thomas had returned to Thomas's car, they saw someone looking out of a nearby alley. (*Id.*:38.) Thomas testified at trial that he thought the person in the alley was Terry. (*Id.*:39.) Elliot directed Thomas to drive into the alley, which he did. (*Id.*: 42-43.)

Thomas said that once he entered the alley, he saw a person walking towards the car with a gun. (*Id.*:43, 45.) According to Thomas, that person was Terry. (*Id.*) Thomas claimed that Terry said, "You hit my bitch, P." (*Id.*:43-44.) As Terry approached the car, Elliot told Thomas to flee. (*Id.*:43.) Thomas put his car in reverse and tried to get away. (*Id.*:48.) He then heard two gunshots, seeing only one of them fired. (*Id.*:49-50.) One of the shots hit Elliot in the head, and he died in Thomas' car. (*Id.*:51.)

Police arrived on the scene shortly after the shooting, where they interviewed various witnesses. One woman, Cheryl Kubik, lived across the street from the houses that abutted the alley in which Elliot was shot. (R.187:51-52.) Kubik explained that she came outside to smoke and saw Thomas's car on the street across from

her porch. (*Id.*:55-56.) When Thomas began to drive away, Kubik saw a twenty- to thirty-year-old black man, approximately 6′2″ in height with a medium build and short braids or dreads chasing Thomas's car down the street. (*Id.*:59-60, 62.) There was no gun in his hands, which he was using to hold up his pants. (*Id.*:61.) Kubik could see the man's underwear, and she remembered that they were blue. (*Id.*) She lost sight of both the man and the car when they entered the alley. (*Id.*:79.) A few minutes later, she heard a gunshot. (*Id.*:78-79.) After the gunshot, Kubik saw three people exit the alley and enter a house across the street from her own. (*Id.*:66.) Not long thereafter, Kubik saw three people exit the front door of same home. (*Id.*:67.) Police were interviewing Kubik when those three people came out of the front door, and she told the officer that they were the same people that she had seen enter it from the alley after the shooting. (*Id.*:68.)

Officers immediately confronted the three people that Kubik had pointed out and detained them. (R. 189:78.) They included Terry, Tiffany Carter, and Xavier Carter—Tiffany Carter's brother. (*Id.*:79, 81, 83-84.) Following their arrest, Terry and the Carters were made to sit on the curb while the investigation continued. (*Id.*:85.) Kubik told the investigating officer that one of the two men was the one that she had seen chasing Thomas's car. (R.187:68-69.) About six months later, police showed Kubik a photo array in which Terry was the target, but she was unable to identify him as the person that she saw chasing Thomas's car into the alley. (*Id.*:70, 72.)

Tiffany Carter provided multiple, differing statements to law enforcement and to Terry's defense attorney and she equally vacillated in her trial testimony, variously inculpating or exculpating Terry in the shooting. At one point before trial, the State was so worried about her unwillingness to testify at trial that the prosecution had her arrested and held on an

unaffordable bond until she could be deposed. (R.183:9-11, R.184:79.) The jury heard about Carter's multiple versions of events at trial, including excerpts from a video recording of her in-custody deposition. (*See, e.g.*, R.190:119-20.) Given the repeated impeachment of Carter's testimony by both the prosecution and the defense, her value as a witness for either side was insignificant. (*See* R.156:12 (State admits in postconviction response that, "[i]n fairness, Ms. Carter did on multiple occasions deny seeing [Terry] with a firearm or shooting.").)

Two women—the Funches sisters—had been attending a party on a lot abutting the alley where the shooting occurred. (R.188:91-92, 120.) Neither of them saw the shooting or the shooter, but they described seeing a black man in the alley around the time of the shooting. (*Id.*:101, 109, 126.) One sister—Antoinette—described that man as a black male, twenty-six to twenty-eight-years-old, 6'0"-6'1", 190 slender build, dark complexion, dreadlocks hanging everywhere. He was wearing bleach tie-died pants with white shoes and a bleached jean jacket. (*Id.*:101-05.) Antoinette saw something shiny in this man's hand. (*Id.*:105-06.) The other sister—Morgan—said she saw a tall black man with a slender build, twenty-four to twenty-five-years-old, dark complexion, with short dreadlocks and a hat. (*Id.*:129-31.) He was wearing a blue-jean outfit, including a vest and shorts, with white tennis shoes. She saw him with a gun. (*Id.*:126.) Neither sister saw Thomas's car in the alley, and neither identified Terry as the black man they had seen in the alley. (*Id.*:108, 111, 132, 133.)

Aside from Thomas and Carter, the only other witness to identify Terry as the shooter was Shawn Clifton. He lived in a home off the alley in which Elliot was shot and had a parking spot in the alley. (R.189:10-12.) Around the time of the shooting, he was returning home from work. (*Id.*:13-14.) He told police that, as he was pulling into his parking spot, he saw a black man

mere feet away with a gun shooting at another person at the end of the alley. (*Id.*:24-25.) He described the shooter as a black man with dark-complexion, standing approximately 6'2", weighing approximately 180 pounds with a medium build. (*Id.*:17-21.) The man's hair was in loose and stringy corn rows, and he wore large sunglasses. (*Id.*) He had on a dark jean jacket with possible bleach stains, a white T-shirt with bright graphics, and dark fitted jeans. (*Id.)* Clifton did not see Thomas's car in the alley. On the day of the shooting, Clifton was shown Terry, Carter, and her brother as they sat, under arrest, on the curb. (*Id.*:34-36.)

A Milwaukee police detective who has since been fired from the department for violating a suspect's civil rights, Rudolfo Gomez, conducted the day-of identification procedure with Clifton. (R.199:25.) Other responding officers had first talked with Clifton about what he had witnessed, but then informed him that Det. Gomez would eventually come speak with him. (*Id.*) When Det. Gomez met with Clifton, he explained "that he was gonna drive [Clifton] past some people he wanted [Clifton] to take a look at." (*Id.*:31.) He instructed Clifton "to get in [his] vehicle so he could drive around and identify who he saw shoot a gun in the backyard." (*Id.*:25.) He told Clifton that he would "drive [him] past some suspects that they had on the curb." (R.189:34.)

But, to get to Det. Gomez's car, Clifton "had to walk right past [the suspects] to go onto the passenger side of [Gomez's] car that [he] was getting into." (R.199:35.) The suspects were sitting on the curb with their feet in the gutter. (*Id.*:26, 35.) He estimated that he got within "a foot-and-a-half" of the suspects on his walk to Det. Gomez's car (R.189:36), reiterating to the court that "[he] walked right by them." (R.199:42.)

Much to Clifton's chagrin, Gomez's car was parked only a "half a car length to the north of [the suspects]," and being in such proximity to them made

him "very, very nervous." (*Id.*:27, 35.) Clifton was "furious" and "scar[ed]." (R.189:34, 36.) He "felt [his] safety was in jeopardy." (*Id.*:46.)

Once Clifton arrived at the car, Det. Gomez opened the door for him. (R.199:26.) The men sat in the car just to the north of the suspects, and Det. Gomez "discussed what was going to happen and asked [Clifton] about [his] story again." (*Id.*:27.) After Clifton repeated his story, Det. Gomez "said: ['']All right. I want you to look over and identify who it was.['']" (*Id.*) After giving that instruction, Det. Gomez did not circle around and again drive past the suspects, as Clifton had anticipated. (*Id.*) Instead, he just "backed up" (*id.*) and "parked right in front of them" (R.189:35.)

At that time, Clifton identified Terry as the person with the gun. (*Id.*:35-36.) However, Clifton was unable to identify Terry six months later when he was shown a properly-executed photo array that included Terry as the target. (*Id.*:37-39.) Clifton explained that he did not identify Terry at that time because he was not "a hundred percent certain" that he was the shooter. (*Id.*41.) He noted that Terry's picture resembled the person that he had seen do the shooting, but he could not be certain that it was him. (*Id.*:41-42.)

Clifton is white; Terry is black. Attuned to the problems of cross-race identification[1], Terry's trial counsel attempted to elicit testimony regarding the

[1] "Approximately three-quarters of the more than 200 wrongful convictions in the United States overturned through DNA testing resulted from eyewitness misidentifications. Of that 77 percent, where race is known, 48 percent of the cases involved cross-racial eyewitness identifications." David Aaronson, *Cross-Racial Identification of Defendants in Criminal Cases: A Proposed Model Jury Instruction*, 23 Criminal Justice 4 (2008).

cross-race effect[2] from the detective who showed the photo lineup to Kubik:

> Q The importance of following these [recommended lineup] procedures is especially important where the target of the photo array's the different race than the person you're administering the photo array to, correct? . . .
>
> [A] I have never heard of that before. . . .
>
> Q What kind of training have you had in administering line-ups and photo arrays?
>
> A Just simple in-service training and just department policy, training policy.
>
> Q And in so doing, do they discuss with you all the science of identification?
>
> A Not necessarily, no.
>
> Q And it is not discussed with you that members of different races have a higher likelihood of misidentifying someone?
>
> A. No.

(R.188:29-30.) That was the only time that defense counsel attempted to address the cross-race effect and its impact on the reliability of the witnesses' identifications. No other evidence or testimony—lay or expert—was given informing the jury of the cross-race effect or its applicability in the instant case.

Ultimately, it was the State's theory that Terry had become angry at Elliot for assaulting Carter and shot him as retribution. (R.193:111, 113.) The State argued to the jury that Terry was the man who was seen chasing Thomas's car into the alley; he was the person who Thomas saw walking towards him in the alley; he was

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[2] *See* Michael Salfino, *Limits to the Lineup: Why We're Twice as Likely to Misidentify a Face of Another Race*, 40 Psych. Today 6, 30 (2006).

the person who shot into the car and killed Elliot. (*Id.*:142-43.)

To the contrary, the defense argued that the State was conflating two different people into one: the shooter and the person who chased Thomas into the alley. (R.193:135.) The defense relied on Kubik's testimony and that of other witnesses to develop the theory that, while Terry chased the car, he did not do the shooting. (*Id.*:136.) Instead, there was a second black man in the alley who shot at Elliot and that person was not Terry. (*Id.*:136-37.) Importantly, the defense pointed out that Kubik had seen a man with blue underwear chase the car into the alley and that Terry, when arrested, was wearing blue underwear. (*Id.*:124-25.) If Terry was the man with blue underwear that Kubik saw chasing the car—went the argument—then the man that Clifton and the Funches saw with a gun in the alley could not have been Terry. (*Id.*:136-37.)

To help advance that theory, Terry's counsel had, pretrial, sought to suppress Clifton's curbside identification on two related grounds. First, he argued that it was the result of an unnecessary showup procedure. (R.4:2.) Second, he argued that it was the result of impermissibly suggestive and inherently unreliable police practices, regardless of whether it was a showup. (R.17:6.) After taking testimony (*see* R.199), the circuit court denied Terry's motion (R.179:12; A-Ap 14).

The circuit court made no ruling on whether the procedure was a showup and, if so, whether it was necessary under the circumstances. (*See id.*:3-4; A-Ap 5-6.) Instead, the court considered the matter only as to "whether or not these procedures conducted by law enforcement were unnecessarily and impermissibly suggestive such that they rose to a violation of this defendant's rights." (*Id.*:4; A-Ap 6.) The court recognized that "Detective Gomez did not follow his agencies procedures. And behavior like this does create a risk of

misidentification when law enforcement officers don't follow their agency's procedures." (*Id.*:5; A-Ap 7.) The court recognized that while Det. Gomez did not tell Clifton that he thought one of the suspects was the shooter, he certainly had conveyed to Clifton "that these three people whom are sitting on the curb may have something to do with this offense." (*Id.*:9; A-Ap 11.) And thus, Det. Gomez's actions created a "high risk" of "undermin[ing] the reliability of Mr. Clifton's identification." (*Id.*)

Nonetheless, the court found "a lot of other indicia of reliability" supporting the admissibility of Clifton's statement. (*Id.*) First, he testified credibly as to his recollection and demonstrated no "motivation to lie or to color [his] identification[] in any way." (*Id.*:10; A-Ap 12.) Second, his identification was fairly contemporaneous to the event. (*Id.*) Third, there was no evidence showing that Det. Gomez had identified one of the three suspects to Clifton as the shooter. (*Id.*) Thus, the circuit court had "confidence that under the totality of the circumstances" Clifton's curbside identification was reliable, and thus not subject to suppression. (*Id.*:11-12; A-Ap 13-14.)

Also pretrial, Terry's trial counsel had talked to him about hiring an eyewitness identification expert to assist in the defense, but Terry had insufficient funds to do so. Despite Terry's inability to afford an expert and his having been determined indigent (R.167:4), trial counsel never motioned the circuit court for funds to hire one. *See Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (indigent defendant may be entitled to funding for expert). Ultimately, Terry's attorney neither obtained an expert nor presented relevant testimony at trial.

Despite the absence of any expert testimony on eyewitness identification generally or the cross race effect specifically, defense counsel asked the circuit court for a jury instruction addressing the problem of the cross-race effect. (*See* R.40:1.) Specifically, defense counsel

wanted the court to instruct the jurors that they could "consider, if [they] th[ought] it [wa]s appropriate to do so, whether the fact that the defendant is of a different race than the witness[es] ha[d] affected the accuracy of the witness[es]' original perception or the accuracy of a later identification." (*Id.*) The text of his proposed instruction was taken from a pattern instruction proposed by the American Bar Association in light of its "recogni[tion] that in particular cases cross-racial identification may increase the risk of erroneous conviction." ABA Crim. Just. Sect., *Report to House Delegates 104D* (available at http://bit.ly/2j91uah) (last accessed Nov. 15, 2017); (*see also* R.40:1). The circuit court denied the defense's request for the cross-race instruction:

> So I find that, first of all, we have sufficient instructions at our disposal here that are standard pattern instructions approved by our Wisconsin state Supreme Court that safeguard Mr. Terry's rights to have the jury appropriately informed of the law.
>
> Secondly, I'm finding that your request is untimely because there's a very – there's a very important paragraph that you're asking for and that the ABA recommends in their draft that had it been disclosed to the prosecution prior to this late request, your opponent may have added additional questions to their witnesses. And that paragraph is the following: "You propose" and the A[B]A draft contains this. "You may also consider whether there are other factors present in this case which overcome any such difficulty of identification. For example, you may conclude that the witness had sufficient contacts with members of the defendant's race that he or she would not have greater difficulty in making a reliable identification."
>
> That is something that if this had been requested in a timely fashion, the state may have chosen to inquire of its witnesses about what their contacts were, are, have been in their lifetime with people who are of different racial backgrounds. They have

> not had the opportunity to prepare for this instruction. And so that is yet another reason why I am going to deny your request for instruction No. 1.

(R.193:13-14.) Ultimately, the jury heard no evidence and received no instruction regarding the cross-race effect.

Postconviction, Terry retained Prof. Brian Cutler, PhD, to provide an opinion regarding the reliability of the eyewitness identifications in this case. (*See* R.148:18-32.) Dr. Cutler is the Interim Dean of the Social Science and Humanities Faculty at the University of Ontario. (*Id.*:36.) He has a doctoral degree in psychology and actively conducts and supervises research in the areas of eyewitness memory and mistaken identifications. (*Id.*:36-45.) In addition to his research, Dr. Cutler has written numerous books, chapters, and articles related to mistaken eyewitness identification and the procedures associated with eyewitness identifications. (*Id.*)

Following his retainer, Dr. Cutler reviewed a variety of materials related to the instant case including but not limited to police reports, transcripts of various proceedings, and the video recording of a lineup at which Terry was the target. (*Id.*:35.) In his report, Dr. Cutler explains "that certain factors associated with the conditions under which the eyewitnesses viewed the events that unfolded on June 18, 2013 and identified Mr. Terry increased the risk of mistaken identification." (*Id.*:19.) The precise contours of Dr. Cutler's report will not be restated here in detail but his ultimate conclusion is as follows:

> In sum, the impoverished witnessing conditions and suggestive showup procedure contributed to the risk of false identification for all three witnesses [(Clifton, Kubik, and Thomas)]. If Mr. Terry was falsely identified by the eyewitnesses on the day of the crime, those false identifications could be expected to carry forward to subsequent identifications. While the photoarray procedure shown to Mr. Clifton and Ms. Kubik and the live

> lineup procedure shown to Mr. Thomas were decidedly less suggestive and generally followed the procedures outlined in the Model Policy, these identification procedures were already contaminated by the prior identifications of Mr. Terry (and perhaps by the prior acquaintance and earlier sighting of Mr. Terry by Mr. Thomas).

(*Id.*:31.)

Terry filed a postconviction motion arguing that his counsel was ineffective for not having procured the services of and presented testimony from an expert like Prof. Cutler. (R.148:1.) The circuit court ordered briefing (R.149) and denied his motion without a hearing (R.163; A-Ap 16-26). The court concluded that Terry could not prove prejudice derived from the absence of an expert. (*Id.*:11; A-Ap 26.) It did not decide deficiency. (*Id.*)

Terry appeals. (R.164.)

ARGUMENT

I. EVIDENCE OF A KEY WITNESS'S PRETRIAL, OUT-OF-COURT IDENTIFICATION SHOULD HAVE BEEN SUPPRESSED.

"When reviewing a motion to suppress, [appellate courts] uphold the circuit court's findings of fact unless they are clearly erroneous. However, [appellate courts] independently review the circuit court's application of constitutional and other legal principles." *State v. Hibl*, 2006 WI 52, ¶ 23, 290 Wis. 2d 595, 714 N.W.2d 194. In other words, whether the admission of identification evidence violated the defendant's constitutional rights is a question that appellate courts review de novo, giving deference to the circuit court's factual findings. *State v. Dubose*, 2005 WI 126, ¶ 16, 285 Wis. 2d 143, 699 N.W.2d 582.

A. The identification procedure used amounted to an unnecessary showup, rendering it inadmissible.

Wisconsin recognizes a due process right unique to its constitution: out-of-court showup identifications are not admissible unless, under the totality of the circumstances, they were necessary at the time. *Dubose*, 2005 WI 126, ¶ 33. When probable cause exists to arrest a suspect, a showup identification is not necessary. *Id.* Thus, if police have probable cause to arrest a suspect of any crime then a showup identification is unnecessary and thus inadmissible under the Wisconsin constitution. *State v. Nawrocki*, 2008 WI App 23, ¶ 26, 308 Wis. 2d 227, 746 N.W.2d 509.

Dubose, the case that recognized the Wisconsin constitution's unique protections against showup identifications, described them as "an out-of-court pretrial identification procedure in which a suspect is presented singly to a witness for identification purposes." 2005 WI 126, ¶ 1 n.1. In Terry's case there is no question that he was not alone when shown to Clifton. Instead, he was on the curb with two other people. However, the circumstances surrounding that identification procedure made it the equivalent of a showup, and *Dubose*'s necessity provision should thus apply.

Clifton was simultaneously shown three suspects, two men and one woman. Of those three suspects, only Terry had dreadlocks, a unique identifier of the suspect of which Clifton had informed the police. (R.199:31.) Likewise, Terry was the only person wearing clothes similar to the description that Clifton had given to police. (*Id.*:37.) He was in light-colored clothes while the other two suspects were in dark clothes. (*Id.*) Furthermore, Terry was wearing a white t-shirt with different colored prints on the front. (*Id.*:44.) When Clifton first saw the suspects on the curb, the uniqueness of Terry's

appearance was obvious and distinguished him from the others. (*Id.*) Clifton became so focused on Terry that he never even recognized that one of the other suspects was a woman.

Given Terry's uniqueness and Clifton's early recognition of it, the circumstances in which he was presented to Clifton were the equivalent of a showup. That is to say, the procedure amounted to presenting Terry to Clifton singly for the purpose of identification. *Dubose*, 2005 WI 126, ¶ 1 n.1. Before exhibiting Terry to Clifton, Det. Gomez specifically told Clifton that he wanted him to "identify who he saw shoot a gun in the backyard." Then, when the two finally got into Det. Gomez's car after walking within feet of the suspects, Det. Gomez told Clifton to "look over and identify who it was" on the curb that had done the shooting. (R.199:27.)

Whereas Terry admittedly stood out from the other two suspects, showing him to Clifton under directions that he was to pick out the person who did the shooting amounted to a showup. Thus, the admissibility of Clifton's identification depended on the necessity of the showup. *Nawrocki*, 2008 WI App 23, ¶ 26. Namely, if police had probable cause to arrest Terry, the showup was unnecessary. *Id.*

"Probable cause to arrest is the quantum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime." *State v. Secrist*, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999). It "deals with probabilities and need only be sufficient to lead a reasonable officer to believe that guilt is more than a possibility." *Village of Elkhart Lake v. Borzyskowski*, 123 Wis. 2d 185, 189, 366 N.W.2d 506 (Ct. App. 1985).

At the time of the curbside identification, officers had probable cause to arrest Terry. Those officers knew that Elliot had been fatally shot in an alley behind the 400 block of North 34th Street. (R.178:17-18; R.182:6.) Dispatch had informed responding officers that the suspect was a black male with dreads. (R.182:6.) Upon arriving at the scene, officers made contact with Clifton. (*Id.*:7.) He gave officers a description of the person who he had seen shooting in the alley, including his height, hairstyle, and attire. (*Id.*:8-9.) Officers then spoke to M. Funches who offered a similar description of a person she had seen in the alley. (*Id.*:9-10.) She also told police about a woman who had been seen with the shooter in the alley. (*Id.*) What is more, she told officers that she had seen that woman enter the backyard of 424 North 34th Street. (*Id.*:11.)

Next, at least one witnesses across the street from 424 North 34th Street explained to responding officers that she had seen three people enter that home moments after the shooting. (*Id.*:12-13.) While that witness was being interviewed, she saw three people exit the residence and identified them to police as the same people who had earlier entered it from the alley. (*Id.*) The interviewing officer then saw those same three people leaving the house and getting into a vehicle out front. (*Id.*:13.) Before those suspects could leave, officers detained them on the curb. (*Id.*:13-14.)

Under the circumstances, police had probable cause to arrest Terry for his suspected involvement in the shooting. Witnesses described a shooting in the alley behind 424 North 34th Street. One witness described the shooter as a man fitting Terry's general description. Another witness told police that the shooter had been with a woman who had been seen entering the backyard of 424 North 34th Street. A third witness pointed Terry, Carter, and X. Carter out to police as they exited 424 North 34th Street, telling officers that those were the same people she had seen enter the house from the rear shortly

after the shooting. A reasonable officer could "believe that [Terry's] guilt [wa]s more than a possibility," and thus could have probable cause to arrest him. *Borzyskowski*, 123 Wis. 2d 185, 189.

For the purposes of probable cause, it does not matter that Terry may not have been the shooter. Nor does it matter the witness may have erred when she identified him as one of the three people she had seen enter the rear of 424 North 34th Street shortly after the shooting. When deciding probable cause, police are not required to resolve potentially innocent explanations. *See State v. Higginbottom*, 162 Wis. 2d 978, 995, 471 N.W.2d 24 (1991). Thus, under the circumstances at the time of the curbside identification, police had probable cause to arrest Terry and the showup was unnecessary. *Nawrocki*, 2008 WI App 23, ¶ 26. It should have been suppressed. *Id.*

B. Even if the identification procedure was not an unnecessary showup, it was impermissibly suggestive and the ensuing identification was unreliable under the circumstances; it should have been suppressed.

"A criminal defendant is denied due process when identification evidence admitted at trial stems from a pretrial police procedure that is 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" *State v. Wolverton*, 193 Wis. 2d 234, 264, 533 N.W.2d 167, 178 (1995) (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)). However, impermissibly suggestive procedures do not violate a defendant's due process rights. Instead, a constitutional violation further requires that the identification was unreliable under the totality of the circumstances. *Id.*, *Manson v. Brathwaite*, 432 U.S. 98, 106 (1977), *Neil v. Biggers*, 409 U.S. 188, 199 (1972). The defendant bears the burden of proving that the

procedures were impermissibly suggestive. *Wolverton*, 193 Wis. 2d at 264, 533 N.W.2d at 178. The State then bears the burden of proving reliability in the face of impermissibly suggestive procedures. *Id.* If the State cannot meet its burden, the identification should be suppressed, lest the defendant's constitutional rights be violated.

In Terry's case, the identification procedure used with Clifton was impermissibly suggestive. As detailed above, Det. Gomez told Clifton that he had some suspects from which he wanted Clifton to identify the shooter. Det. Gomez then marched Clifton to his car and past those suspects while they were detained on the curb, causing Clifton to come within a foot-and-a-half of them. Once in the car, Gomez reiterated that Clifton was to pick from the suspects the person who he had seen do the shooting. Det. Gomez then backed his car up about a half-a-car-length so that Clifton was in front of the suspects. At the time of his identification, Clifton was extremely nervous, scared, and furious at Det. Gomez. He was worried about his safety because the suspects would know that he was making an identification.

During the curbside identification, police had made no arrangements to minimize uniquely identifying features in the suspects. They were not identically dressed. In fact, Terry's was in light clothes and the other two were in dark. They did not have similar hairstyles, and Terry stood out as the only one with dreadlocks.

On those facts, the circuit court rightly concluded that Det. Gomez created a high risk of misidentification in the procedure that he used with Clifton. The entire procedure was impermissibly suggestive, which the State did not contest below.

Instead, the State argued and the circuit court agreed that Clifton's identification was reliable, despite the suggestive police procedure. To ascertain reliability

under impermissibly suggestive practices, the following factors are relevant:

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.

Brathwaite, 432 U.S. 114. When those factors are applied to Clifton's identification, it is not otherwise reliable under the circumstances.

Clifton—a white man—first encountered the black man that he would later identify as Terry while parking his car. That black man was wearing large-framed sunglasses that covered part of his face. Clifton explained that the whole incident took place in twenty seconds. He explained that he was then frightened and feared for his life. He saw a gun in the shooter's hand, which he would later describe to police. Additionally, when he made his identification, Clifton was nervous, scared, and furious at the detective who was forcing him to pick out a suspect only feet away. Under those circumstances, Clifton's identification is not reliable.

As Prof. Cutler explains in his report:

> Psychological research has demonstrated that the eyewitness's ability to form a memory trace adequate for description and identification is dependent upon a variety of factors associated with the eyewitness' level of attention (e.g., cognitive capacity, exposure duration, memory load, stress), environmental conditions (e.g., lighting, distance, visual obstacles in the line of vision), and properties of the subject being observed (e.g., cross-race recognition, disguises).

(R.148:22-23.) Several of those factors contribute to unreliability in Clifton's identification.

First, Clifton said what he witnessed lasted only twenty seconds. "Brief exposure times are associated with increase rate of error in eyewitness identification. Moreover, eyewitnesses are known to overestimate the duration events, particularly when under stress." (*Id.*25 (citations omitted).)

Second, "[e]xtreme stress," like the fear Clifton admitted during the event, "is known in the eyewitness research to impair encoding and subsequent eyewitness identification." (*Id.* (citations omitted).)

Third, "[t]he presence of a weapon tends to draw the attention of eyewitnesses, leaving less attention to deploy to the perpetrator's facial characteristic. Eyewitness identifications, therefore, tend to be less accurate when a weapon was visually present at the time of the crime." (*Id.* (citations omitted).) Given that Clifton later described the gun to police, it is clear that he "paid at least some attention to it[,] leaving less attention to deploy to the perpetrator's face and physical characteristics during the time [he] w[as] focusing on the weapon." (*Id.*)

Fourth, "[c]ognitive psychological research has found that dividing attention disrupts encoding processes." (*Id.*:25-26 (citations omitted).) A distracted witness who "divides his attention between focusing on the perpetrator and other matters (e.g., scanning the scene for other dangers, planning an escape, concentrating on other activities) . . . has less attention to devote to the perpetrator's characteristics, thus increasing risk of eyewitness identification errors." (*Id.*) In addition to weapon focus, Clifton's "driving may have contributed to divided attention while viewing the perpetration, ultimately interfering with their encoding of the perpetrator's characteristics." (*Id.*)

Fifth, Clifton admitted that the person he saw was wearing large-framed sunglasses. Research has shown

that "[d]isguising facial features disrupts encoding and impairs eyewitness identification accuracy." (*Id.*:26 (citation omitted).) Sunglasses, specifically, have been found "to have a particularly detrimental effect on encoding and subsequent eyewitness accuracy." (*Id.*)

Sixth, Clifton and the person he saw do the shooting are of different races. Research has shown that "[o]ther-race identifications are more likely to be inaccurate than are same-race identifications." (*Id.* (citation omitted).)

When the conditions of the identification procedure itself are added to the aforementioned "impoverished encoding conditions" (*id.*:27), Clifton's identification is unreliable under the totality of the circumstances. For one, a police detective had suggested to Clifton that one of the three suspects was the shooter. Two, Clifton was under extreme stress during the identification procedure. He was angry at the detective, very nervous, and fearful for his safety. Three, no precautions were taken to eliminate Terry's uniquely identifying features. Instead, he stood out to Clifton the moment that he saw the suspects.

The totality of the circumstances thus shows that Clifton's identification was unreliable and should have been suppressed as the result of a violation of his constitutional rights.

II. TERRY'S TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE INSOFAR AS HE FAILED TO OBTAIN AND PRESENT EXPERT TESTIMONY REGARDING PROBLEMS WITH THE WITNESSES' IDENTIFICATIONS.

The right to effective assistance of counsel is constitutionally guaranteed. U.S. Const. Amend. VI, Wis. Const. Art. I, § 7, *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984), *State v. Thiel*, 2003 WI 111, ¶ 11, 264 Wis. 2d 595, 665 N.W.2d 305. The rules governing ineffective

assistance are well settled. *See State v. McDowell*, 2004 WI 70, ¶ 30, 272 Wis. 2d 488, 681 N.W.2d 500. To prove ineffective assistance, the defendant must prove deficient performance by counsel and resulting prejudice. *Strickland*, 466 U.S. at 687. Deficiency occurs when counsel performs below "an objective standard of reasonableness." *State v. Franklin*, 2001 WI 104, ¶ 13, 245 Wis. 2d 582, 629 N.W.2d 289 (quotation and quoted authority omitted). Prejudice is shown if there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* ¶ 14 (quotation and quoted authority omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the proceeding. *Strickland*, 466 U.S. at 694.

A. Terry's counsel was deficient in failing to obtain an expert witness regarding the reliability of the eyewitnesses' identification of him as the shooter.

As a threshold matter, Terry would have been constitutionally entitled to funds to pay for an expert had his counsel asked for them.

"An indigent defendant has a constitutional right to the state's assistance in securing the raw materials integral to the building of an effective defense." *State v. Kirschbaum*, 195 Wis. 2d 11, 20, 535 N.W.2d 462, 465 (Ct. App. 1995) (citing *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985)). Pursuant to that right, an indigent defendant may obtain the "trial court's assistance in . . . put[ting] before a jury evidence that might influence the determination of guilt." *Id.* (citing *Taylor v. Illinois*, 484 U.S. 400, 408 (1988)). But, the constitution does not entitle an indigent defendant to "unlimited access to blank checks to hire all expert witnesses that he or she desires." *Id.* Instead, before the trial court's duty to assist is triggered, "the defendant must make a plausible showing that the

proposed expert witness will be both material and favorable to his or her defense, i.e., necessary." *Id.*

In the instant case, Terry's counsel could have satisfied the requisite showing had he tried. First, Terry is indigent. Second, this is an identification case. There are no photos or videos of the offense. There is no fingerprint evidence, no DNA, no gun, no ballistics, no shell casings, and no blood spatter tying Terry to the shooting. He didn't have the victim's blood on his clothes when he was arrested. He was not caught fleeing from the scene and he made inculpatory statements to police. Despite an extensive search of his residence, which he purportedly entered immediately after the shooting and remained in until police arrived, police found no gun and no shells. A jacket that they found in the residence that witnesses identified at trial as like the one the shooter was wearing was never tested for DNA, and thus was not shown to have been worn by Terry; he shared that residence with other people.

The case against Terry was built on the identifications of Thomas, Kubik, and Clifton. And, it was because of their identifications that he was convicted. Thus, whether the witnesses' identifications of Terry were reliable is highly relevant to his defense. An expert witness regarding extant flaws with those identifications would be both "material and favorable" to Terry's proffered defense, as demonstrated by Dr. Cutler's report. *Kirschbaum*, 195 Wis. 2d at 20, 535 N.W.2d at 465; (*see* R.148:18-32). Showing the reliability problems with those identifications—as Dr. Cutler identified them in his report—would have influenced the determination of guilt in the instant case because reliability of the identifications went directly to the theories offered by both the State and Terry. *Id.*

Terry's trial counsel had recognized the importance of the witness identifications before trial when he sought to suppress them. (*See* R.17:6-8.) He

argued that the State should not be allowed to present Clifton's identification because it resulted from bad police practices. (*Id.*:3-8.) Losing that motion, trial counsel talked with Terry about an eyewitness identification expert, but did not hire one because it was unaffordable. Then, at trial, counsel unsuccessfully attempted to elicit evidence from one of the detectives about the cross-race effect, a factor that would have diminished the reliability of Clifton's identification. Even though counsel got no good evidence on point, he asked for an instruction that would expressly advise the jury about the cross-race effect and that they could consider it in the guilt analysis. But the cross-race effect is not the only problem with Clifton's identification. As Dr. Cutler explains, there were a host of other problems present that have been before identified as contributing to misidentifications. (R.148:24-27.) But, without an expert's testimony, the jury did not hear how those problems were manifested with Clifton.

As for Thomas, defense counsel did not have any way to challenge his identification other than to test his credibility generally. Unlike Clifton, the cross-race effect evidence and instruction were not applicable to Thomas—like Terry, Thomas is black. Nor were there the similar problems of impermissible police conduct that counsel argued applied to Clifton. Thus, absent attacking Thomas's general credibility, trial counsel had no specific attack on the reliability of his identification. However, as Dr. Cutler's report establishes, there are noted problems with a confirmation bias in eyewitness identifications. (*See* R.148:29.) Namely, Thomas's prior association of Terry with Carter from the gas station may have rendered him more likely to misidentify shooter as Terry because he would have expected to see Terry again associated with Carter. (*See id.*) And, there were additional problems with the conditions under which Thomas witnessed the event that call into question the reliability of his identification. (*Id.*:23-27.)

The facts underlying Terry's prosecution and his trial counsel's proffered defense satisfy the test establishing Terry's constitutional right to the court's assistance paying for an eyewitness identification expert. *Kirschbaum*, 195 Wis. 2d at 20, 535 N.W.2d at 465, *Ake*, 470 U.S. at 77, *Taylor*, 484 U.S. at 408. Insofar as the only reason that no such expert was hired was Terry's inability to afford one and his trial counsel's failure to seek court assistance in doing so, Terry's trial counsel was deficient. *See Strickland*, 466 U.S. at 690. It is objectively unreasonable for defense counsel not seek the tools necessary for the presentation of a defense, especially when a defendant has a constitutional right to be provided with those tools. *See id.* at 690-91.

Trial counsel recognized the importance of presenting an eyewitness identification expert's testimony but did not present it simply because Terry could not afford it. Objectively reasonable counsel would have sought funding for an expert given Terry's indigence. Thus, it was objectively unreasonable for trial counsel not to have obtained funding so that he could have hired an expert witness.

B. Terry was prejudiced by his counsel's deficient performance.

"The benchmark for judging any claim of ineffective assistance of counsel is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *State v. Jenkins*, 2014 WI 59, ¶ 34, 355 Wis. 2d 180, 848 N.W.2d 786. "[A] court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Strickland*, 466 U.S. at 696.

In the instant case, there is a reasonable probability of a different result if the jury had been presented with

the testimony of an eyewitness expert like Dr. Cutler. Three people in this case testified that Terry shot Elliot: Tiffany Carter, Thomas, and Clifton. Carter's testimony was impeached by the State and the defense alike, with each party pointing to times that she had made statements favorable to the party's position. At times, she said Terry was responsible; at other times, she said he was not. To its benefit, the defense adroitly pointed out that the times when Carter pointed the finger at Terry were the times when she was in custody or threatened by police with consequences for not making a statement. On the other hand, the State pointed out that Carter had reason to protect Terry: they had a relationship together. In all, Carter had countless credibility problems going both directions, and her claim that Terry was the shooter was thus not significant evidence.

On the other hand, Thomas and Clifton were more believable. But, as defense counsel pointed out, Thomas had general credibility problems. Not only had he been convicted five times, but he had also testified selectively regarding the Elliot-Carter drug transaction. His attempt to hide his own criminal behavior with drugs gave a motive for him to fabricate aspects of the story he told police and later testified to. Furthermore, his testimony did not square with that of other disinterested witnesses. So, Thomas's testimony was subject to a general challenge, but it was never effectively challenged on the reliability of his identification specifically.

Dr. Cutler's testimony would address a bevy of problems with Thomas's identification, including one highly relevant one. Namely, there is a known phenomenon that when a witness expects to see an individual, they are more likely to mistakenly identify a person as the person that they had expected to see. (*See* R.148:29.) In addition to other factors—stress, divided attention, presence of a gun—the fact that Thomas may have expected to see Terry, given his prior encounter at the gas station and subsequent encounter with Carter on

the street, lends credence to the possibility that he misidentified Terry. (*Id.*:25-27, 29.)

The one witness in the case that identified Terry, was unimpeached, and had no interest in the outcome was Clifton. Clifton was the only person—aside from Carter and Thomas—whose testimony put the gun in Terry's hand and had him shooting it. Sure, Clifton's story had problems—he said he saw Terry shooting at someone running at the end of the alley, not a car—but he had not given multiple inconsistent statements or ever been convicted of a crime. Thus, in terms of believability, Clifton was hard to doubt on the evidence presented. He provided the link needed to overcome the problems with Carter and Thomas and establish that they were correct in saying Terry did the shooting: Clifton—a disinterested witness—said he saw Terry shoot a gun in the alley.

Adding Dr. Cutler's testimony into the trial, however, would have provided significant reasons to doubt Clifton. Dr. Cutler explains that Clifton's twenty-second observation of the shooter is a problem, insofar as "[b]rief exposure times are associated with increase rate of error in eyewitness identification." (R.148:25.) So too was Clifton's stress a problem in his ability to correctly identify the shooter; "[e]xtreme stress is known in the eyewitness research to impair encoding and subsequent eyewitness identification." (*Id.*) Additionally, Clifton's focus on the gun, his related divided attention, the fact that he saw the shooter wearing large sunglasses, and his different race from Terry are all known bases for false identifications. (*Id.*:25-27.)

If the jury had been presented with expert testimony detailing the impact of the "impoverished witnessing conditions and suggestive showup procedure" on the reliability of Clifton and Thomas's identifications (*id.*:31), his defense would have been significantly advanced. Remember, it was the defense's assertion that Thomas and Clifton had mistaken Terry

for some other black man in the alley with a gun. Dr. Cutler's testimony would have offered the jury with a professional, scientific explanation based in fact and empirical research as to how those two men could have independently been wrong in their identification of Terry. Such evidence would have been powerful evidence before the jury suggesting to it that Terry was not responsible for Elliot's murder. The inclusion of Dr. Cutler's testimony at trial would thus have resulted in a reasonable likelihood of a different result. Terry can therefore prove prejudice, and he is entitled to a new trial on the basis of his counsel's ineffective assistance.

The State's postconviction response brief thoroughly explained the testimony of the various witnesses so that it could argue that the evidence conclusively demonstrated Terry's guilt, and thus the failure to call an eyewitness expert was not prejudicial. But, Terry sees the evidence much differently.

His defense at trial was that somebody else shot Elliot; that the witness testimony shows that there were two men in and around 424 N. 34th street before the shooting; and that he was confused with the shooter. (*See* R.193:134.)

But, let's assume the State is correct that Terry is the person seen by Kubik, Leighton, the Funches sisters, Thomas, and Clifton. Here's the problem. On that assumption, Kubik and Leighton saw *Terry follow Elliot's car* into the alley after which a gunshot rang out. Thomas, on the other hand, *followed Terry* into the alley *in Elliot's car* and found Terry already in the alley. Clifton saw Terry *waiting in the alley*, not running into it behind Elliot's car.

It is not possible for all those people to be correctly remembering what occurred and identifying the same person; Terry would have to be in two places at once:

both *ahead of* Thomas and Elliot waiting in the alley and simultaneously *chasing behind* them as they drove into it.

That was Terry's point at trial. He was the guy with the blue underwear that Kubik and Leighton saw chasing Elliot's car; he was not the guy that shot Elliot after Thomas followed him into the alley. Terry even introduced evidence at trial establishing that, when he was arrested, he was wearing blue underwear, which squares with both women's testimony that the guy chasing the car had on blue underwear. (R.193:35.)

Postconviction, Terry argued, *inter alia*, that the result of his trial would have been different if he had been able to challenge the reliability of Clifton's identification because Clifton is the only disinterested witness to have put the gun in Terry's hands. It was his identification that linked the testimony of the other witnesses and allowed the jury to disregard problems with other inculpatory evidence in favor of the State's theory. (R.148:15-16.) Thus, reasoned Terry, he can show the prejudice.

The State's response brief made a key admission for Terry when it agreed that Clifton's testimony "conclusively linked the testimony of the Funches with Ms. Kubrik [*sic.*] and Ms. Leighton. His testimony . . . links the dreadlocked man that chased the red Cadillac to the dreadlocked man with a silver gun in the alley." (R.156:7.) In other words, the State agreed that Clifton allowed the jury to accept its version of events that Terry was both the man out front chasing Elliot's car and the man that Thomas followed into the alley. Presenting the jury with testimony that Clifton's identification was unreliable would create a reasonable probability of a different result by severing the link that allowed the jury disregard other problems with the evidence against Terry.

Terry also argued that Dr. Cutler would have been able to meaningfully challenge Thomas's identification based on a confirmation-bias theory. (R.148:13.) That theory of unreliability fits perfectly with Terry's defense. Namely, research has noted that persons who expect to see an individual under certain circumstances are more likely to make a mistaken identification. Thomas said that he saw Terry poking his head out of the alley shortly after Elliot's assault on Carter. Thomas had before seen Terry with Carter at the gas station, and thus he may have mistakenly identified Terry as the person in the alley because he was expecting to see him. If Thomas was wrong about that identification, the added factors of stress, the gun, and the limited time that he saw the shooter once he drove into the alley would have contributed to his continued misidentification of Terry. (*Id.* at 13, Ex. A at 12.)

The State's assertion that the other evidence adds up to prove that Terry was the shooter is not compelling. (*See* R.156:16.) For example, the State touts the fact that Carter's DNA was found in the alley as proof of Terry's guilt. (*Id.*) But no one denies that Carter was brutally assaulted by the victim or that she ran away bloodied. Her DNA being on the scene is thus unsurprising and does not meaningfully contribute to the ultimate question whether was Terry the shooter. Furthermore, the State's argument hinges on the continued belief that there is only one person seen by all of the witnesses. While it is true that the witnesses' descriptions "match[ed]" in many ways (R.156:16), they differed in one very important way that contributes to Terry's theory of defense. The Funches sisters and Clifton all described the person in the alley as wearing a jean jacket. Kubik and Leighton never saw a jean jacket on the guy who ran after the Cadillac. However, Kubik did vaguely recall seeing a black man *other than the man she saw chase the car* enter 424 N. 34th after the shooting *and he was wearing a jean jacket*. If Terry was the person that Kubik and Leighton saw—as his underwear and their

testimony suggests—then he was not the person with the jean jacket in the alley who shot Elliot.

Relevantly, the matching descriptions aside from the jean jacket lend support the idea that the witnesses could have mistakenly identified Terry. After all, if Terry looked so much like the shooter and was even similarly dressed, it would have been easy for the witnesses to confuse the two men.

The jury should have had an opportunity to hear the testimony of an eyewitness expert who could have provided empirically verified reasons to doubt the reliability of Clifton and Thomas's identifications. If that evidence had been presented, there is a reasonable probability of a different result, given the defendant's theory of defense and the supportive evidence in the record of more than one person with whom Terry could have been confused.

C. Terry should have an evidentiary hearing.

"[I]t is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel. [A reviewing court] cannot otherwise determine whether trial counsel's actions were the result of incompetence or deliberate trial strategies." *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979). In the instant case, the circuit court did not hold a hearing on Terry's ineffective assistance claim specifically because it concluded that he could not prove prejudice. (R.163:11; A-Ap 26); *see also State v. Roberson*, 2006 WI 80, ¶ 44, 292 Wis. 2d 280, 717 N.W.2d 111 (no hearing necessary if prejudice not established). If this Court reaches the contrary conclusion, Terry should have a hearing on the matter of his counsel's deficiency. *See Machner*, 92 Wis. 2d at 804. His postconviction motion "allege[d] sufficient material facts that, if true, would entitle [him] to relief," and thereby triggered his right to

a hearing. *State v. Love*, 2005 WI 116, ¶ 26, 284 Wis. 2d 111, 700 N.W.2d 62.

The circuit court based its decision to deny Terry's postconviction motion in part on its opinion that Dr. Cutler was not credible. (R.163:8; A-Ap 23; *see also* R.156:16 ("[T]his conclusion by Dr. Cutler contains numerous factual and legal errors and misstatements that are not supported by the evidence adduced at trial."). However, when deciding whether a defendant is entitled to a postconviction hearing, the reviewing court is not to decide the credibility of a defendant's allegations. *See State v. Allen*, 2004 WI 106, ¶ 12, 274 Wis. 2d 568, 628 N.W.2d 433. In fact, if a court finds reasons to doubt the believability of a defendant's claims, it should hold an evidentiary hearing so that it may assess credibility by the testimony of witnesses. *Id.* Any dispute regarding Dr. Cutler's credibility should have been done during testimony in open court rather than on a cold record. *State v. Leitner*, 2001 WI App 172, ¶ 34, 247 Wis. 2d 195, 633 N.W.2d 207 (when credibility is an issue, it is best resolved by live testimony). The circuit court's concerns regarding Dr. Cutler's credibility are thus further demonstrative of Terry's entitlement to a hearing.

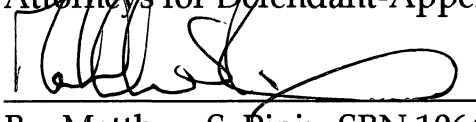
He therefore asks the Court to remand his case to the circuit court for a *Machner* hearing, should it decide the prejudice prong in his favor.

CONCLUSION

For the aforementioned reasons, Terry asks this Court, first, to hold that he is entitled to a new trial given that his original trial included identificatory eyewitness testimony that should have been suppressed. In the alternative, he asks this Court to hold that he can prove *Strickland* prejudice derivative from the absence of an eyewitness identification expert and to remand his case to the circuit court for a *Machner* hearing.

Dated this 13th day of March, 2018.

PINIX & SOUKUP, LLC
Attorneys for Defendant-Appellant



By: Matthew S. Pinix, SBN 1064368

CERTIFICATION

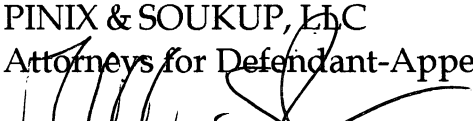
I certify that this replacement brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this replacement brief is 9,122 words, as counted by the commercially available word processor Microsoft Word.

I further certify that I have submitted a replacement 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 replacement electronic brief is identical in content and format to the printed form of the replacement 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 13th day of March, 2018.

PINIX & SOUKUP, LLC
Attorneys for Defendant-Appellant



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CERTIFICATION OF APPENDIX CONTENT

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

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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

Dated this 13th 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 (Replacement Copy) will be delivered to a FedEx, a third-party commercial carrier, on March 13, 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 13th day of March, 2018.

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