STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2018AP534

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JERRY SIMONE WILSON,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE MARK A. SANDERS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Defendant-Appellant Jerry Simone Wilson argues that he has newly discovered evidence that entitles him to a new trial on his convictions for shooting three people, killing one. The evidence is testimony from Lakisha Wallace, who said that she saw one of the State's witnesses shooting a gun on the night of Wilson's crimes. Wilson claims that this evidence could lead a jury to conclude that the witness was the shooter, not Wilson.

Has Wilson demonstrated that he was not negligent in discovering Wallace's testimony and that there is a reasonable probability of a different result had the jury heard it?

The circuit court concluded that Wallace was negligent in discovering Wallace's testimony. It did not address whether it would lead to a different result.

This Court should affirm and conclude that Wilson has failed to show he was not negligent and that Wallace's testimony would lead to a different result.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither. The parties' briefs will fully address the issues presented, which can be resolved by well-established precedent.

INTRODUCTION

A jury convicted Wilson of three crimes, including reckless homicide, for shooting three people on a Milwaukee street outside of two after-hours house parties. Two witnesses identified him at trial as the shooter, and

two more identified him in statements to police. These witnesses all described the shooter as having appeared from between two houses down the block from the parties before shooting. Police found .40 caliber shell casings, a bullet, and bullet jackets fired from the same gun in the street across from where the shooter appeared.

After his conviction and unsuccessful direct appeal, Wilson filed a Wis. Stat. § 974.06 motion claiming that a statement from Wallace was newly discovered evidence. Wallace was one of the parties' hosts. She claimed that she saw one of the State's witnesses who had identified Wilson as the shooter, Antwan Smith-Currin, firing a gun on the night of the party.[1] The circuit court held a hearing on Wilson's motion, which it denied after concluding that Wilson did not discover Wallace's testimony after trial and that he had been negligent in seeking it.

This Court should affirm. The circuit court was correct that Wilson was negligent. He knew that Wallace was a potential witness to the shootings before his trial because he had been at her house earlier in the day to help her set up for the party. Wilson thus could have easily discovered her testimony before trial, and it is not newly discovered evidence.

In addition, Wallace's testimony does not establish a reasonable probability of a different result. Wallace testified that she saw Smith-Currin shooting in front of her house. The physical evidence was inconsistent with someone in front of Wallace's house being the shooter. Instead, this evidence supported the State's witnesses' testimony that the shooter emerged from between two houses down the street

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[1] There are different spellings of Smith-Currin's last name in the record. To avoid confusion, the State uses the same spelling that Wilson does. (Wilson's Br. 5, n.2.)

from Wallace's house and began shooting. This testimony all pointed to Wilson as the shooter. Even if the jury had heard Wallace testify, it would have still convicted Wilson.

STATEMENT OF THE CASE

I. The charges against Wilson, his trial, and conviction

The charges against Wilson arose from a shooting on the 2300 block of North 44th Street in Milwaukee early in the morning on May 23, 2009. (R. 2:2.) After-hours parties were taking place in both units of a duplex at 2331/2333 North 44th Street. (R. 2:3.) In addition, a large number of people were outside on the street, and several people were fighting. (R. 2:4.) The State alleged that Wilson ran into the street from between two houses, shot at some of the people fighting, and then fled. (R. 2:4.)

Three men were hit by the shots, and one, MW, died. The other two men, RD and RT, were injured. The State charged Wilson with one count of first-degree reckless homicide and two counts of recklessly endangering safety, all by use of a dangerous weapon. (R. 4.) Wilson went to trial.

A. The State's case

1. Eyewitness testimony

RT testified that he and some friends, including his cousins MW and Shatina Williams and his sister, Tiffany, had been at a bar on the south side. (R. 178:106–07.) RT lived on the 2400 block of North 44th Street, and he drove the group there after leaving the bar. (R. 178:106–08.) RT saw a "lot of people out" on the 2300 block and said that there was an after-hours party happening. (R. 178:110.)

As the group was travelling down the street, someone called Tiffany "a bitch." (R. 178:110–11.) RT parked down

the street and began to walk to a house, but he noticed Tiffany and Shatina walking back towards the 2300 block. (R. 178:111.) RT and MW followed, and when they arrived, RT saw Tiffany confronting a group of people and asking "which one of you all called me a bitch." (R. 178:112–13.) A fight started, and RT punched someone. (R. 178:113.) MW tried to break up the fight. (R. 178:114.)

RT then heard three or four gunshots. (R. 178:114–15.) RT saw the gunfire's flash from about 13 feet away, but he could not see the shooter because it was too dark. (R. 178:115.) He said everyone, including himself, started running. (R. 178:114.) RT said he "ran through a yard, jump[ed] a fence, went down the street." (R. 178:114.) He then noticed that he had been shot in the foot. (R. 178:114.)

MW was next to RT when the shots were fired. (R. 178:116.) A shot hit MW in the chest, killing him. (R. 179:5.)

RD was also with the group returning from the bar. (R. 179:103.) He said that he went with RT and MW to try to retrieve Tiffany from the argument. (R. 179:106.) RD said that he did not see "anybody fighting exactly." (R. 179:107.) He heard gunshots and then saw MW injured "on the ground." (R. 179:108.) RD said that he was in the middle of the street when he heard the shots, and MW was closer to the east side of the street. (R. 179:109.) RD's brother drove up to the scene, and he, RD, and Tiffany put MW in the car and took him to the hospital. (R. 179:108, 112.) When they arrived, RD noticed that he had a bullet fragment in his lower left abdomen, and that he had a graze wound in his right calf. (R. 179:112–13.)

Smith-Currin testified that late on May 22, 2009, he was at his house at 2333 North 44th Street. (R. 179:32–33.) He lived there with his mother. (R. 179:32–33.) The residence is the upper unit of a duplex; the address number

of the lower flat is 2331. (R. 179:33.) There were after-hours parties happening in both units, and they continued into the morning of the next day. (R. 179:33–34, 36.) Smith-Currin said he knew Wilson, whom he called "Simone," and had seen him "plenty of times" before that night. (R. 179:34–35.) He also saw the mother of Wilson's daughter at his party. (R. 179:36.)

Smith-Currin said that he heard two sets of gunshots that night. (R. 179:36.) The first sounded like they were coming from North Avenue. (R. 179:36.) After hearing those shots, he noticed people fighting outside, went out on the porch, and told them they had to leave. (R. 179:37.) About 30 minutes later, Smith-Currin was on the duplex's lower porch when he saw some women fighting in front of the duplex. (R. 179:37–38.) He then saw a man trying to break up the fight. (R. 179:38–39.) Another man was helping. (R. 179:39–40.) Those men got in a fight with two other men. (R. 179:39–41.) The fight started on the sidewalk outside the duplex and ended up in the street. (R. 179:41.)

Next, while still on the porch, Smith-Currin saw Wilson come out from between two houses north of the duplex. (R. 179:41–43, 49.) The houses were the second and third houses from the duplex on the same side of the street. (R. 78; 179:41–42.) Smith-Currin said that Wilson "just came out, got to shooting" at the man who had tried to break up the fight and the man who was helping him. (R. 179:43.)

Wilson moved into the street. (R. 179:44.) The man who was helping the man who tried to break up the fight moved behind a Buick. (R. 179:44–46.) Wilson went toward him and shot at him two times, hitting him in the foot. (R. 179:44–46.) Wilson was "about 7 to 8 feet" away from him when he shot. (R. 179:46.) Wilson also hit the car's left rear tire, which went flat. (R. 179:44–45.) The man "got up, limped a little bit, then ran and jumped the gate." (R. 179:45.)

Smith-Currin also testified that the man who tried to break up the fight came up from behind the Buick and tried to run, "but he never made it" because Wilson had shot him too. (R. 179:46–47.) Wilson shot at this man three times from about nine feet away. (R. 179:47.) The man fell in the street toward the front of the Buick. (R. 179:48.) Some people in a truck pulled up to the man, put him inside the truck, and drove away. (R. 179:48.) Wilson ran back between the houses. (R. 179:48–49.) Smith-Currin said that Wilson used a handgun and that all the shots sounded the same. (R. 179:48–49.) Wilson said he had not had anything to drink that night. (R. 179:72.)

Smith-Currin also testified that he identified Wilson in a photo array conducted by the police. (R. 179:50–57.) Detective Steven Caballero confirmed Smith-Currin's identification. (R. 181:68–77.)[2]

Samantha Coats testified that early on the morning of May 23, 2009, she was asleep on the upper floor of 2335 North 44th Street. (R. 180:29–30.) She woke up and heard a fight outside. (R. 180:29–30.) Coats looked out the window and saw a crowd of people fighting. (R. 180:30–31.) She recognized "Kawana, Shantell, Aaron, and Daryl" among the people fighting. (R. 180:31.) She knew Shantell as Wilson's girlfriend and had known Wilson for about six months before this time. (R. 180:28–29, 31.)

Less than one minute later, Coats saw someone shooting. (R. 180:30–32.) She acknowledged that she later told Detectives Scott Gastrow and Charles Mueller that the person was Wilson. (R. 180:35.) She told them that Wilson came out between the houses at 2335 and 2341 North 44th

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[2] There are different spellings of Caballero's last name in the record. (R. 181:2; 184:2.) The State uses "Caballero."

Street and stood in the street. (R. 180:32–33, 41.) She recognized him by his height. (R. 180:33.) Wilson was wearing a black hoodie, and she described him as a black man, five feet, three inches tall, with braids and light skin. (R. 180:34–35.) Coats said that after the shooting, the person she thought was Wilson turned around and ran west. (R. 180:41–42.)

Coats remembered telling the detectives that she saw one of the victims try to run but then fall between two cars. (R. 180:38–39.) Coats also admitted that she told police that people had run up to this person to help him. (R. 180:39.)

In addition, Coats acknowledged that she identified Wilson as the shooter in a photo array. (R. 180:42–47.) She also admitted that she told someone's probation officer that Wilson "came out of nowhere and started shooting." (R. 180:53–54.)

Mueller testified that he and Gastrow interviewed Coats. (R. 183:88.) She identified Wilson as the shooter in a photo array they conducted. (R. 183:91–106.) Mueller also testified that Coats said that she knew Wilson was the shooter and "was scared of that." (R. 183:111.)

Shakira King testified that early on the morning of May 23, 2009, she went down the street after learning that her cousin Tiffany had got "into it." (R. 180:88–89.) She saw a fight, and she said that MW was trying to break it up. (R. 180:91.) The fight was near some cars on the street in front of the after-party, though it moved down the street toward another car. (R. 180:92–93.)

King then saw Wilson emerge between two houses about three or four houses down from the party house on the same side of the street. He started shooting. (R. 180:94–95;

181:4–5, 17, 31.)[3] King had seen Wilson 20 or more times before the shooting. (R. 180:94; 181:4.) She said that Wilson ran into the street and fired a handgun eight or nine times toward the fight. (R. 181:6.) King was about 15 feet away from Wilson when he was shooting. (R. 181:6–7.) She described Wilson as black and about five feet, five inches tall with a thin build. (R. 181:9.) He was wearing blue jeans and a blue jacket. (R. 181:9.) She did not see anyone else shooting that night. (R. 181:10.)

King also testified that she identified Wilson as the shooter in a photo array. (R. 181:11–16.) Detective Matthew Goldberg confirmed this testimony. (R. 183:43–48.) When King identified Wilson in court, she said there was no doubt in her mind that he was the shooter. (R. 181:10.)

Sanntanna Ross testified that she, her sister Shantell Johnson, and her friend Kawana Robinson went to the upstairs party on North 44th Street. (R. 183:6–7.) Before they went inside, while the women were leaning on Robinson's car, "a truck rolled past," and a woman inside said to them, "[B]itches get off the street." (R. 183:10.) The three women "[t]old them to shut the fuck up." (R. 183:12.)

Almost immediately after the three went inside the party, Ross heard gunshots from an unknown direction. (R. 183:8–11.) The women decided to leave. (R. 183:8–9.) On the street, some women approached them; one said, "[Y]ou all called my mama a bitch?" (R. 183:13.) Ross got in an argument and then a fight with one of the women, whom she

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[3] King testified that she thought the number of the party house was 2335, though she also correctly identified a photo of the duplex at 2331/2333 as the party house. (R. 181:17, 31–32, 80.)

said was named Sharika. (R. 183:13–14.)[4] Ross explained that MW attempted to pull Sharika back, trying to break up the fight. (R. 183:14.) She also said that someone named Aaron was trying to pull her back. (R. 183:14–16.) The men eventually started fighting. (R. 183:16.) Ross said the fight between the women took place outside the after-party, but she did not see exactly where the men fought because she was still fighting the other women. (R. 183:17.)

Ross said that she then heard gunshots. (R. 183:17.) She claimed not to have seen the shooter and denied telling the police that it was Wilson. (R. 183:17, 20–21.) She also said that she did not know where the shots came from. (R. 183:35–37.) Ross said that she had known Wilson for five or six years, and she knew him because he had two children with her sister Shantell Johnson. (R. 183:18.)

Goldberg testified that he and Caballero interviewed Ross about the shooting. (R. 183:48.) Goldberg said that Ross identified Wilson in a photo and said that she had known him for five or six years because her sister has two children with him. (R. 183:50.) Goldberg said that Ross told him that while she was outside the party, she heard gunshots slightly to the southeast, turned, and then saw Wilson firing into the crowd of people fighting. (R. 183:52.) She said Wilson was wearing a dark jacket and dark pants. (R. 183:53.) Caballero confirmed Goldberg's testimony about the interview with Ross. (R. 183:74–81.)

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[4] While Ross referred to King as "Sharika" rather than "Shakira," she said that the person's last name was "King." (R. 183:13, 27.) The State believes that Ross was referring to Shakira King. (*See also* R. 183:84–85; 184:51.)

2. Physical evidence

Caballero also testified about evidence he found at the crime scene. (R. 181:77.) He explained that there were three cars parked on the right side of North 44th Street across from the party house. (R. 78; 181:80–81.)[5] From south to north, there was a Buick Park Avenue, a Chevrolet Beretta, and an Acura. (R. 181:79–81.) The Buick had a flat left rear tire; another detective later recovered a bullet from it. (R. 181:61–62, 79.) Caballero found blood behind the Beretta. (R. 181:81–82.)

Caballero described bullet casings he found at the scene. A "crushed" .380 casing that Caballero thought had been "stepped on, run over" was behind the Beretta. (R. 46; 181:82–83.) He found another .380 casing between the Beretta and the Acura that was "crushed in the same manner." (R. 46; 181:91.) A third .380 casing was in the middle of the street to the west of the Acura. (R. 57; 181:91–92.) It "also had numerous folds in it." (R. 181:91–92.) Caballero found a fourth .380 casing "just east" of the Beretta "amongst the leaves . . . in the gutter." (R. 64; 181:92–93.)

In addition, Caballero found five .40 caliber Smith and Wesson bullet casings at the scene. He found one behind the Beretta "near the corner of the car." (R. 47; 181:83, 85.) It was not damaged. (R. 181:83.) The second casing was in the middle of North 44th Street in front of address number 2341 and behind the Beretta. (R. 49; 181:86–87.) It was "not

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[5] Record entry number 78 is trial Exhibit 63, a computer-generated diagram of the crime scene. (R. 181:81.) It shows the locations of the buildings on North 44th Street where the three cars were parked and where Caballero found the various pieces of evidence. Caballero relied on it during his testimony to explain where he found the evidence. (R. 181:81–103; 182:4–18.)

stepped on or driven on, it is basically round." (R. 181:87.) Caballero found the third .40 caliber casing, which was "just a little bit out of round," "more or less in front" of the Buick on the passenger side. (R. 50; 78; 181:87–88.) The fourth .40 caliber casing was also in front of the Buick on the passenger side, closer to the car than the third one. (R. 51; 78; 181:88–89.) It was not damaged. (R. 51.) Caballero located the fifth .40 caliber casing behind the Buick's passenger side, next to the curb. (R. 58; 78; 181:92.) It was also undamaged. (R. 181:92.)

Caballero testified that he found no other casings at the scene, including by the party house. (R. 182:40–41.) He also said that in his experience, when a person fires a handgun that ejects casings, the casing will land within "about maybe 5 to 7 feet." (R. 182:32–33.) Caballero further testified that the location of the .40 caliber casings was consistent with a person coming out between the duplexes at 2343/2345 and 2341/2341A North 44th Street and starting to shoot. (R. 182:42.)

In addition to the casings, Caballero found a copper jacketed bullet behind the Beretta. (R. 48; 181:86.) He also found three copper bullet jackets, which he explained cover the bullet and sometimes separate from it when it is fired. (R. 181:86.) The first jacket was in the middle of the street just west of the Buick and in front of 2341 North 44th Street. (R. 52; 78; 181:89.) The second jacket was near the first. (R. 53; 78; 181:89–90.) He found the third near the others, but closer to the curb in front of 2341 North 44th Street. (R. 60; 78; 181:93.)

Mark Simonson, a tool mark examiner from the State Crime Laboratory, examined the ballistics evidence that Caballero found. (R. 182:45, 55–65.) He concluded that the .40 caliber casings, the bullet, and the bullet jacket fragments were fired in the same .40 caliber gun. (R. 182:66–67.) They could not have been fired in a .380 caliber gun.

(R. 182:67.) Simonson also concluded that the .380 caliber casings were all fired from the same gun. (R. 182:68.) Comparing the two different sets of casings, Simonson described the .380 casings as "beat up," damaged, and dirty. (R. 182:69.) The .40 caliber casings were, in contrast, in much better condition—closer to what a recently fired casing would look like. (R. 182:70.)

Simonson also concluded that the bullet fragment retrieved from the Buick's tire was too heavy to be from a .380 caliber bullet. (R. 181:62–63; 182:72.) It was consistent with being from a .40 caliber bullet. (R. 182:82.)

B. The defense's case and the State's rebuttal

Wilson first called Kawana Robinson. (R. 183:125.) She said that she and Ross got in a fight outside the after-party with King. (R. 183:131–33.) She said the fight was between 2333 and 2335 North 44th Street. (R. 183:134.) Robinson said she heard gunshots during the fight. (R. 183:134–35.) They sounded like they came from the after-party house. (R. 183:135.) She ran home to 2341 North 44th Street and did not look back outside after. (R. 183:135–37.) Robinson admitted that she was friends with Shantell Johnson, the mother of Wilson's children. (R. 183:139.)

On rebuttal, Detective Shannon Jones said that Robinson had said that she did not know or hear anything about the shooting when interviewed. (R. 184:78–80.) Caballero said the same thing. (R. 184:88–90.) And Mueller testified that that Robinson told him that she did not know Ross. (R. 185:16.)

Johnson testified that she was on the second floor of the party house with Ross and Robinson when she heard gunshots from outside. (R. 184:29–31.) They had not been in the house for more than one minute. (R. 184:29.) The women left the house. (R. 184:31.) A group of people confronted

them, and a fight started. (R. 184:33–34.) Johnson heard more gunshots during the fight and dropped to the ground. (R. 184:34–35.) She said that she thought the shots came from the upper porch of the party house. (R. 184:35–36.) Johnson acknowledged that Wilson was the father of her children. (R. 184:23.) She said, though, that she did not see him that night. (R. 184:36.)

Aaron Lee testified that he lived at 2335 North 44th Street at the time of the shooting. (R. 184:44.) He was sitting on his porch because he could not sleep. (R. 184:48.) Lee said that he saw some women standing on the street, and that some other women drove by saying "you hoes get off the street." (R. 184:48.) The women on the street went into the after party. (R. 184:49.) The same women came out a few minutes later and got in a fight with some other women. (R. 184:51–52.) Lee said that Taylor, King, Robinson, Ross, and Johnson were all in the fight. (R. 184:51–52.) Lee then got involved in the fight. (R. 184:52–53.)

Lee heard gunshots as the fight was ending and ran back to his house. (R.184:54–55.) He could not tell where the shots came from. (R. 184:54.)

Officer Joseph McLin testified that Lee denied knowing anything about what happened when interviewed. (R. 184:83.) Detective Mueller similarly testified that Lee initially denied knowing anything, though Lee later admitted that he saw someone firing four or five shots toward the crowd from the middle of the street. (R. 185:11–12.) Lee told Mueller that the shooter was a five foot, eleven inch black male wearing dark clothing. (R. 185:12.)

The jury convicted Wilson. (R. 96; 97; 98; 186:6–9.) The circuit court gave him consecutive sentences totaling 28 years of initial confinement and 12 years of extended supervision. (R. 106.)

II. Wilson's Wis. Stat. § 974.06 motion

A. Wilson's motion, the circuit court's decision, Wilson's appeal, and the supreme court's remand for a hearing

After this Court affirmed Wilson's conviction on direct appeal (R. 117), he filed a Wis. Stat. § 974.06 motion in the circuit court raising several claims. (R. 120.) As relevant here, Wilson argued that he had newly discovered evidence in the form of a statement from Lakisha Wallace. (R. 120:1–5, 19–20.) Wilson argued that Wallace's statement showed that Smith-Currin was the shooter. (R. 120:3.)

In the statement, Wallace asserted that she was the host of one of the after-parties along with Smith-Currin's mother. (R. 120:19.) Wallace's party was in the downstairs unit. (R. 120:19.) She claimed that Smith-Currin was "smoking weed, taking x-pills, and drinking liquor" before the party. (R. 120:19.)

Wallace asserted that, during the party, she heard arguing outside that "sounded like someone fighting or yelling." (R. 120:19.) She said that she opened the back door and saw Smith-Currin running up the back stairs and yelling to his brother, "Man give me yo gun." (R. 120:19.) Smith-Currin then ran back down the stairs. (R. 120:19.)

Wallace alleged that she then went to the front door to see what was going on outside. (R. 120:19.) She saw Smith-Currin on the front porch waving a black handgun and saying, "Move the fuck from in front of my momma's house with all this bullshit." (R. 120:19.) Wallace said there were "fights breaking out all over the place." (R. 120:19.) She saw Smith-Currin "run into the crowd shooting the gun that he had." (R. 120:19.) She said somebody else was shooting as well, and that she hears shots from both ends of the block. (R. 120:19.)

Wallace said that Smith-Currin then came back on the porch. (R. 120:19.) She refused to let him in her house. (R. 120:19.) She later saw Smith-Currin run up the back stairs and yell, "I just popped that nigga, I just offed that nigga." (R. 120:19.) Wallace then heard Smith-Currin's brother say, "[M]an calm the fuck down stop talking so much, I told yo ass to leave them motherfucking pills alone, now see what you done got yourself into." (R. 120:19.)

Wallace said that Smith-Currin had braided hair and was wearing a black hoodie and dark jeans. (R. 120:19.)

In addition, Wallace asserted that, before the party, Smith-Currin had learned that his girlfriend, who was also Wallace's cousin, "was seen with [Wilson] the day before all this stuff happened." (R. 120:19.) She said that Smith-Currin was mad at Wilson and "looking for revenge" because Wilson was "messing with his girl." (R. 120:19.)

The circuit court denied the motion without a hearing. (R. 121.) This Court affirmed, concluding that Wallace's statement was inadmissible hearsay or uncorroborated impeachment evidence, and thus, Wilson could not show that it created a reasonable probability of a different result. (R. 130:5.)

Wilson petitioned the supreme court for review. In its court-ordered response to the petition, the State conceded that Wilson's motion was sufficient to warrant an evidentiary hearing because Wallace had alleged that she saw Wilson fire a gun as he ran into the crowd. (R. 134:2; R-App. 106–107.) The supreme court remanded to the circuit court for a hearing. (R. 134:2.)

B. The circuit court's evidentiary hearing

1. Witness testimony

a. Lakisha Wallace

Wallace testified that on May 22–23, 2009, she lived at 2331 North 44th Street in Milwaukee in a lower unit of a duplex. (R. 191:14.) She thought that the upper unit address number was 2333. (R. 191:14–15.) Wallace said that Barbara Smith lived in the upper unit and her son was Smith-Currin. (R. 191:15.) She said she had known Smith-Currin for years, and her cousin was dating him at the time. (R. 191:15–16.)

Wallace said that on May 22, 2009, Smith-Currin and her cousin Tamika were on the front porch drinking liquor, smoking weed, and taking ecstasy. (R. 191:16–19.) She could tell that Smith-Currin was high. (R. 191:20–21.) Wallace could see them through her front window. (R. 191:19.) She said that she did not allow Smith-Currin in her house because of an altercation he had with her cousin. (R. 191:19–20.)

Later that night, Wallace hosted a party in her unit. (R. 191:21–22.) There was also a party in the upstairs unit. (R. 191:22.) Wallace said there was traffic outside and "people everywhere . . . it was packed out there." (R. 191:22.) She described the scene as "crazy" with "a lot of fights." (R. 191:25.)

Wallace saw Smith-Currin that night. She explained:

> During the party like it was some commotion outside — goin' on outside. There was people out there yellin' and stuff like that, and I was like, well, I was tryin' to see what was goin' on, and I seen him asking his brother for a gun, and he came downstairs, and then I shut the door back and went to the front.

> When I came to the front of the door, I opened the door and I just seen people fightin' everywhere. There was a whole bunch of fights breaking out, people screaming, and then that's when he was just yellin' like, "Move the fuck away from in front of my motherfuckin' mama" — excuse my language — "my motherfuckin' mama house with this bullshit," and he was yellin' that a couple times, an like there was so many people out there, how the stairs was it was like you couldn't see the stairs 'cause — I mean, it was packed out there.

(R. 191:23–24.)

Wallace testified that after shouting at the crowd from the front porch, Smith-Currin "ran down like a couple stairs and he was shooting. He started shooting a gun." (R. 191:24.) She explained that she had seen Smith-Currin get the gun from his brother before he yelled at the crowd. (R. 191:25–26.) Wallace also said she heard other people shooting, too. (R. 191:25.) "It wasn't like it was just one gun. Like you could hear different guns going off. It wasn't just like one person shooting outside." (R. 191:25.)

Smith-Currin tried to go into Wallace's house, but she would not let him in. (R. 191:24.) Wallace left through her back door, and she heard Smith-Currin talking to his brother. (R. 191:24.) Smith-Currin said, "Yeah, I popped that nigga." (R. 191:24.) His brother responded, "Shut the fuck up. I told you to stop taking these pills and shit. Look what you got yourself into." (R. 191:24.)

Wallace said she knew Wilson from the neighborhood. (R. 191:33.) "He was like a person I'd say hi to, I spoke to, you know, and that's far as how I knew him from, right, basically that." (R. 191:33.) When asked why Smith-Currin might "have a dislike or bias against Mr. Wilson," Wallace responded:

> Because my cousin Meeka used to — Well, like I told you earlier, he beat her up, so I told her if

> she gonna be living with me she could be — he couldn't be in my house, so I guess she was still mad or whatever and weren't talking to him, and so like one day he must have seen her on the porch with [Wilson] or somethin' and figured that they was talkin' or somethin' like that or she liked-ed him or somethin', but he went far as to like say things like she —
>
> > Well, he told her like, yeah, Ima put this all on [Wilson] and stuff like this. They was in the back of the hallway having a conversation and I overheard them talkin' and then that's when she came in and told me like, well, he say he gonna put all this stuff on [Wilson]. I'm like, "Why he gonna say that and [Wilson] wasn't even there."

(R. 191:33–34.)

Wallace testified that she did not see Wilson that night, though he had "brought the music to [her] house" earlier that day. (R. 191:60–61.)

Wallace said she never told the police about what she had seen because they did not interview her. (R. 191:35.) She admitted that she did not take the initiative to tell the police what she knew. (R. 191:62–64.) Wallace explained that a couple of years after the shooting, Wilson's mother reached out to her. (R. 191:35–36.) Wilson's mother came to her, saying that she heard Wallace had information. (R. 191:49.) Wallace did not know why Wilson's mother knew to contact her, and she did not talk to anyone else about the case before this happened. (R. 191:52–53.)

Eventually, on July 1, 2013—a year or two after the initial contact—Wilson's mother met with Wallace and obtained the statement. (R. 191:35–36, 47.) Wallace testified that she did not write the statement herself because she "can't read or write." (R. 191:42.) Instead, she said that she "told the story" and Wilson's mother typed it. (R. 191:42.) An "old friend" of hers named Bobby read the statement back to her. (R. 191:42–43.)

b. Jerry Wilson

Wilson testified that he knew Wallace "in the community on 44th," and that he "put the music in for" her the night of the shooting. (R. 191:90.) He said that Wallace wrote him a letter between May and March 2011, while he was in prison, saying that "she had information about what happened that night." (R. 191:91–92.) The letter did not specify what the information was. (R. 191:91.) His case was on direct appeal at this time, and he had counsel. (R. 191:91–92.) Wilson did not have a copy of this letter. (R. 191:108.)

Wilson said he wrote back to Wallace to ask her if she would testify. (R. 191:104–05.) She wrote back that she would and gave him her contact information. (R. 191:106–07.) Wilson did not have a copy of this letter either. (R. 191:108.)

According to Wilson, his mother "supposedly" contacted his appellate lawyer with the information about Wallace. (R. 191:92.) He also claimed that he told his lawyer about the information and said that he wanted it raised in his first appeal. (R. 191:92.)

After this Court affirmed his conviction on direct appeal in 2012, Wilson decided to pursue the issue pro se. (R. 191:94–95.) He had his mother get the statement from Wallace in 2013. (R. 191:95.) He could not explain why it took so long to get the statement. (R. 191:95.)

Wilson admitted that he did not tell his attorney during trial about setting up the music for Wallace before the party. (R. 191:99–100.) He also claimed that someone in prison told him about Wallace. (R. 191:102–03.)

2. The circuit court's decision

The circuit court denied Wilson's motion, concluding that he had failed to prove that he discovered Wallace's

testimony after trial and was not negligent in discovering it. (R. 192:24–32.)

The court first found Wallace's testimony to be generally credible, though it concluded that some parts of it undermined her credibility. (R. 192:12–17.) The court determined that Wilson's testimony was not credible and "not worthy of belief." (R. 192:17.) Specifically, the court rejected Wilson's testimony that the illiterate Wallace had written him letters in prison that said that she had information about the shooting. (R. 192:17–22.) It concluded that Wilson was crafting his testimony about the letters to bolster the credibility of Wallace's statement. (R. 192:22–23.)

The court next determined that Wilson had not proven that he discovered Wallace's testimony after trial. (R. 192:24–29.) It concluded that Wilson knew Wallace was a potential witness because he had been at her house before the shooting to help her set up the music for the party. (R. 192:27.) It explained that Wilson

> had knowledge that Miss Wallace was available, that he had been with Miss Wallace, that she lived at that address, and that the shooting occurred in front of her house.
>
> He did not know what her testimony would be; but, of course, he wouldn't know what her testimony would be until someone went to interview her.

(R. 192:27–28.)

It added, "The substance of her testimony was not known until after her conviction. The potential of her testimony that there was evidence there was known by the defendant before his conviction." (R. 192:29.)

The court also concluded, based on the same reasoning, that Wilson was negligent in not obtaining Wallace's testimony. (R. 192:29–31.) It said, "When the defendant knows that there may be a potential witness and

does not ask anybody to go interview that witness and essentially sits on his hands relative to that potential witness, that's negligence." (R. 192:29.) The court further determined that the delay between Wilson's mother's contacting Wallace in 2011 or 2012 and obtaining the statement in 2013 also showed negligence. (R. 192:30.)

The circuit court declined to address the remaining factors of the newly discovered evidence test. (R. 192:31.)

Wilson appeals. (R. 157.)

ARGUMENT

Wilson failed to prove his newly discovered evidence claim because he was negligent in discovering Wallace's testimony, and the testimony does not create a reasonable probability of a different result.

A. Applicable law and standard of review

"Motions for a new trial based on newly discovered evidence are entertained with great caution." *State v. Morse*, 2005 WI App 223, ¶ 14, 287 Wis. 2d 369, 706 N.W.2d 152 (citation omitted). In seeking a trial based on newly discovered evidence, a defendant must establish by clear and convincing evidence that: (1) the evidence was discovered after trial; (2) the defendant was not negligent in seeking it; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. *See State v. Armstrong*, 2005 WI 119, ¶ 161, 283 Wis. 2d 639, 700 N.W.2d 98; *State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997).

If a defendant makes these showings, the circuit court then "determine[s] whether a reasonable probability exists that a different result would be reached in a trial." *Armstrong*, 283 Wis. 2d 639, ¶ 161 (citation omitted). Such a likelihood exists if "there is a reasonable probability that a

jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt." *State v. Love*, 2005 WI 116, ¶ 44, 284 Wis. 2d 111, 700 N.W.2d 62. In short, "to set aside a judgment of conviction based on newly-discovered evidence, the newly-discovered evidence must be sufficient to establish that a defendant's conviction was a 'manifest injustice.'" *State v. Plude*, 2008 WI 58, ¶ 32, 310 Wis. 2d 28, 750 N.W.2d 42.

The decision to grant a new trial based on newly discovered evidence is a matter of the circuit court's discretion. *Plude*, 310 Wis. 2d 28, ¶ 31. A circuit court erroneously exercises its discretion when it misapplies the legal standard in resolving a claim of newly discovered evidence. *See id*. Whether a jury would have concluded that newly discovered evidence would have sufficiently affected the other evidence at trial and found reasonable doubt of the defendant's guilt is a question of law. *Id*. ¶ 33. This Court reviews questions of law independently. *State v. Kashney*, 2008 WI App 164, ¶ 7, 314 Wis. 2d 623, 761 N.W.2d 672.

B. The circuit court correctly determined that Wilson was negligent in seeking Wallace's testimony.[6]

This Court should first conclude that the circuit court properly exercised its discretion when it found that Wilson was negligent in seeking Wallace's testimony. Wilson had sufficient information before his trial that Wallace was a potential witness to the shootings. The blame thus falls squarely on him for not obtaining her testimony sooner.

---

[6] The State does not assert that Wilson did not discover Wallace's testimony until after trial, that it was not material, or that it was cumulative.

Wilson and Wallace knew each other from the neighborhood before the shooting. Wilson knew that Wallace had a party at her house the night of the shooting because he helped her set up the music for it. For the same reason, he knew her address. And once the State charged Wilson with the crimes, Wilson knew that the party at Wallace's address was a central event in the allegations against him. The complaint specifically references the party at the duplex at 2331/2333 North 44th Street. (R. 2:3.) Thus, Wilson should have known that Wallace was a potential witness to the shootings—and could have sought to learn what she knew—long before his trial in 2010. His failure to obtain her statement until 2013 was negligent.

Wilson's arguments that he was not negligent do not persuade.

He first takes issue with the overlap in the court's decision on the discovered-after-trial and negligence prongs of the newly discovered evidence test. (Wilson's Br. 17–19.) He complains that the circuit court erroneously relied on *State v. Boyce*, 75 Wis. 2d 452, 249 N.W.2d 758 (1977), and *Sheehan v. State*, 65 Wis. 2d 757, 223 N.W.2d 600 (1974), because both of those cases involved people who were identified as witnesses before trial. (Wilson's Br. 17–18.) Wilson contends that no one contemplated that Wallace would be a witness at trial, and she deliberately withheld her information about the shooting. (Wilson's Br. 18.) He also complains that the court made no findings about Wallace's availability before trial. (Wilson's Br. 19.) And Wilson argues that, by concluding that he could have found Wallace before trial, the circuit court imposed "an onerous burden of pretrial discovery" on him. (Wilson's Br. 19.)

This Court should reject these arguments. The reason that Wallace was not a witness at trial is because Wilson did nothing to ensure that someone—presumably his attorney—talked to her. A court cannot grant a new trial based on new

evidence when the defendant knew about the evidence before trial but did not tell his lawyer. *See State v. Albright*, 98 Wis. 2d 663, 674, 298 N.W.2d 196 (1980). Further, Wallace did not withhold her information. As she explained at the hearing, no one interviewed her. There is nothing to suggest that she would not have testified if someone had interviewed her before trial. And the circuit court hardly imposed an onerous pretrial discovery burden on Wilson—defense attorneys have witnesses interviewed all the time, if they know about them.

Next, Wilson argues that the circuit court improperly imposed a diligence requirement on him in violation of *State v. Vollbrecht*, 2012 WI App 90, ¶ 22, 344 Wis. 2d 69, 820 N.W. 2d 443. (Wilson's Br. 20–21.) It did not. By noting that Wilson was "sit[ting] on his hands relative to that potential witness," the court was emphasizing that Wilson was negligent because he was aware before trial that Wallace was a potential witness and could have discovered what she knew then. (R. 192:29–30.) The court was not saying that he did not act diligently once he learned about her.

Finally, Wilson argues that Wallace's testimony could not be "reasonably foreseen," and that she could be expected to come forward given that the "State's zealous investigation" failed to uncover her. (Wilson's Br. 21–22.) He also contends that it would be inappropriate to conclude that he or his attorney should have been able to discover Wallace as a witness among the large number of people at the party or out on the street. (Wilson's Br. 21–22.)

These arguments should fail. The issue is not whether it is reasonable to think that Wallace could have come forward on her own or that the State could have found her before trial. Rather, the question is what *Wilson* could have done. *See Armstrong*, 283 Wis. 2d 639, ¶ 161. And here, he knew that Wallace hosted a party that was a major part of the events surrounding the shooting. Wallace was not

merely one of a hundred potential witnesses as Wilson suggests. (Wilson's Br. 22.) She was a specific, identifiable person with an obvious connection to the events. Wilson knew her personally, and he could reasonably assume that she might know something about the shooting. Wilson was negligent by not trying to get her testimony before trial.

C. Wallace's testimony does not create a reasonable probability of a different result.

This Court should also conclude that Wilson cannot show a reasonable probability that the result of his trial would have been different had Wallace testified. Wallace's testimony would not have undercut the State's eyewitness testimony or the physical evidence in any meaningful way.

Wilson contends that Wallace's testimony would have led to a different result because it pointed to an alternate suspect who also happened to be the State's key witness. (Wilson's Br. 26–27.) This Court, though, must examine the old evidence and the new evidence when determining whether there is a reasonable probability of a different result. *Love*, 284 Wis. 2d 111, ¶ 44. Wallace's new testimony barely supports an inference that Smith-Currin was the shooter, and that inference is soundly refuted by the old trial evidence.

Wallace testified at the hearing that Smith-Currin went on the duplex's front porch, "ran down like a couple stairs and he was shooting. He started shooting a gun." (R. 191:23–24.) This does not create a reasonable probability of a different result. Wallace did not say what direction Smith-Currin fired the gun. She did not say that he aimed at the victims. Wallace's non-specific testimony about how Smith-Currin fired the gun would not have changed the outcome at trial. This is particularly true given that several witnesses testified that they heard other gunshots that night.

In addition, the idea that Smith-Currin could have shot the victims from the porch is inconsistent with the physical evidence. Caballero found the ballistics evidence in an area between two to four houses north of the party house, either in the middle of the street or around three parked cars that were on the other side of the street. He found all of the .380 and .40 caliber casings in this area. Since the .380 caliber casings had significant damage and the .40 caliber casings were in good shape, it is likely that a .40 caliber gun was used in the shooting. This is bolstered by Caballero's discovery of several copper bullet jackets and a bullet in the area of the cars that were all .40 caliber and all fired from the same gun as the .40 caliber casings. And a bullet recovered from the tire of one of the cars was also consistent with being .40 caliber.

This evidence, specifically the location of the casings, effectively disproves that Smith-Currin could have shot the victims while standing on the porch. Caballero testified that normally, a gun ejects a casing no more than five to seven feet. But Caballero found no casings near the porch. Instead, he found them all at least two houses away from the party house and either in the middle of the street or toward the other side of it. While the record does not establish exactly how far away these locations were from the porch, common sense dictates they were more than five or seven feet.

Instead, the physical evidence was consistent with the State's theory that the shooter came from between two houses north of the party house, went into the street, and began shooting. The area where Caballero discovered the physical evidence was, essentially, directly across from where the State asserted the shooter appeared. (R. 78.)

Moreover, the State's eyewitness testimony strongly established that Wilson was the shooter. At trial, Smith-Currin and King both identified Wilson as the shooter and

said that he came out from between two houses north of the party house. Coats, while less forthcoming at trial, nonetheless admitted that she told police that Wilson came out from between two houses and started shooting. And Ross, though she denied it at trial, also told police that Wilson shot into the crowd of people fighting. There is no reasonable probability that, had the jury heard Wallace testify, it would have ignored the eyewitness testimony and the physical evidence and found Wilson not guilty.

This Court should also reject Wilson's arguments that he has met his burden of showing a reasonable probability of a different result.

Wilson first mentions the State's concession in its response to his petition for review that the allegation in Wallace's statement, if believed, would establish a reasonable probability of a different result. (Wilson's Br. 26.) The State does not understand Wilson to be arguing that the State has conceded the issue or is somehow estopped from asserting now that he is not entitled to a new trial.

But if Wilson is making those arguments, this Court should reject them. The State's concession in response to the petition for review was that Wallace's allegation in her petition that she saw Smith-Currin run into the crowd and shoot was sufficient to get Wilson a hearing, not a new trial. (R-App. 106–107.) Wilson had to prove Wallace's allegations at the hearing before that could happen. He failed to do so. Wallace's testimony at the hearing changed critically from her statement. She testified that Smith-Currin fired from the porch, not that he ran into the crowd and shot. As explained, that testimony does not establish a reasonable probability of a different result.

Wilson next argues that, apart from Smith-Currin, King was the only witness who consistently identified him as the shooter, and he notes problems with her testimony.

(Wilson's Br. 26–27.) King, though, knew Wilson before the shooting, having seen him around the neighborhood 20 or more times. (R. 180:94.) It is unlikely that she misidentified him, and Wilson has given no reason why she would falsely accuse him of shooting three people.

Next, Wilson contends that Wallace's testimony is consistent with Ross's, Robinson's, and Johnson's testimony that they thought shots came from the party house. (Wilson's Br. 27.) Ross, though, did not say that the shots that hit the victims came from the house, only that she heard shots coming from the upstairs—not the downstairs—porch. (R. 183:35.) And Robinson did not see the shots; she said that they sounded like they came from the house. (R. 183:135.) Johnson also could say only that she thought the shots sounded like they came from the party house, and she thought they came from the upstairs porch. (R. 184:35.) This hardly bolsters Wallace's testimony.

In addition, Wilson points out that Smith-Currin admitted at the preliminary hearing that people thought he was the shooter. (Wilson's Br. 27; R. 162:23.) The jury never heard this, though, so it is irrelevant to whether Wilson can show a different result at trial is probable.

Wilson also contends that Wallace's testimony that Smith-Currin shouted at the crowd is corroborated by Smith-Currin's own trial testimony. (Wilson's Br. 27.) But Smith-Currin said that he yelled at the crowd 30 minutes before the shootings, not immediately before, as Wallace described. In addition, none of the other witnesses said that they saw a person shouting from the porch and firing a gun.

Wilson also notes that Wallace described Smith-Currin's clothes similarly to how two other witnesses had described what the shooter was wearing. (Wilson's Br. 27.) But he ignores that these two witnesses—Coats and Smith-Currin himself—identified Wilson as the shooter.

Finally, Wilson compares his case to *State v. Jenkins*, 2014 WI 59, 355 Wis. 2d 180, 848 N.W.2d 786. (Wilson's Br. 27–28.) There, the supreme court reversed for a new trial on homicide charges after concluding that trial counsel was ineffective for failing to call an eyewitness (1) that he knew about before trial, and (2) whose statements to police would have contradicted or impeached the State's only evidence tying Jenkins to the crime. *Id.* ¶¶ 42–66. Wilson contends that the evidence in his case was similarly lacking and that Wallace's testimony would have undermined it. (Wilson's Br. 27–28.)

The evidence presented here was far stronger than that in *Jenkins*. Several witnesses identified Wilson as the shooter, either at trial, to the police, or both. The physical evidence—there was none in *Jenkins*—bolstered the witnesses' testimony. And finally, Wallace's testimony barely, if at all, challenged the State's proof of Wilson's guilt. Wilson has not proven his newly discovered evidence claim.

***

For the sake of completeness, the State addresses two matters that Wilson does not clearly discuss in his brief.

First, in his argument that Wallace's testimony is material, Wilson contends that, in addition to showing that Smith-Currin was the shooter, it was relevant to show that he was biased against Wilson and would falsely accuse him of a crime. (Wilson's Br. 23–24.) Wilson also argues that the testimony would show that Smith-Currin was intoxicated, impeaching his testimony that he was sober. (Wilson's Br. 23–24.) Wilson, though, does not address bias or impeachment in his argument that Wallace's testimony establishes a reasonable probability of a different result. (Wilson's Br. 25–28.)

Wallace's testimony regarding Smith-Currin's motive for falsely accusing Wilson or intoxication should not factor

into this Court's analysis of whether there is a reasonable probability of a different result. This Court has already concluded that the statement's allegations on these matters were impeachment evidence, which lacked the required corroboration to justify a new trial. (R. 152:5.)

Nothing that has happened in this case since this Court's opinion should change that conclusion. The State's concession that Wilson was entitled to a hearing was based solely on this Court's overlooking Wallace's assertion that she saw Smith-Currin shooting, not anything else that she said. (R-App. 106–107.) The State did not concede then that there were any other errors in the Court's opinion, and it does not do so now. Nor does the State see anything in Wallace's hearing testimony about Smith-Currin's motive to falsely accuse Wilson or his intoxication that should change this Court's earlier analysis about a lack of corroboration. Wallace's testimony on these matters, like her statement about them, still lacks corroboration. And, as noted, Wilson has not developed an argument that Wallace's testimony on these matters demonstrates that there is a reasonable probability of a different result.

Second, Wilson does not clearly argue that Wallace's testimony about what Smith-Currin told his brother after he allegedly fired the shots contributes to the analysis of whether there is a reasonable probability of a different result. (Wilson's Br. 25–28.) This testimony also should not factor in this Court's resolution of this issue.

In this Court's earlier opinion, it concluded that most of the "proof" in Wallace's statement that Smith-Currin was the shooter was hearsay and was not a basis for a new trial. (R. 130:5.) The same is true of Wallace's testimony about the statements Smith-Currin made to his brother that he had shot someone. Wilson has not argued that these statements are not hearsay or shown how they would otherwise be admissible. And again, the State's earlier concession was

only that Wallace's seeing Smith-Currin firing the gun was sufficient to justify a hearing. The State did not admit that her hearsay statements could be considered. This Court should thus adhere to its earlier conclusion that these inadmissible statements cannot create a reasonable probability of a different result.

CONCLUSION

This Court should affirm the circuit court's order denying Wilson's Wis. Stat. § 974.06 motion.

Dated September 21, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,028 words.

_____
AARON R. O'NEIL
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

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

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.

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Dated this 21st day of September, 2018.

_____
AARON R. O'NEIL
Assistant Attorney General

Supplemental Appendix
State of Wisconsin v. Jerry Simone Wilson
Case No. 2018AP534

SUPPLEMENTAL APPENDIX CERTIFICATION

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

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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_____

AARON R. O'NEIL
Assistant Attorney General

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This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

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AARON R. O'NEIL
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