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STATE OF WISCONSIN

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

DISTRICT I

Case No. 2019AP1677

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LAWRENCE C. PAINE,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING A WIS. STAT. § 974.06 MOTION, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. WAGNER, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

In 2005, a jury convicted Lawrence C. Paine of two counts of first-degree intentional homicide. Paine killed two men in a duplex by shooting them multiple times. While the gun was never recovered, evidence consisting of six casings and a bullet was recovered and tested.

This Court affirmed Paine's conviction on direct appeal. In 2018, Paine hired an expert to test a firearm that was found at the crime scene (the duplex) six months after the double homicide. The expert submitted a report, which found that the firearm has "general rifling characteristics" like evidence found at the double homicide. Paine filed a Wis. Stat. § 974.06 motion, claiming that this report constitutes newly-discovered evidence, that the evidence was also admissible third-party perpetrator evidence, and that he received ineffective assistance of postconviction counsel. The postconviction court denied Paine's motion without a hearing.

1. Is Paine entitled to a new trial based on his newly-discovered evidence claim?

The circuit court held, No. This Court should affirm.

2. Is Paine entitled to an evidentiary hearing on his claim that the 2018 report constitutes third-party perpetrator evidence?

The circuit court did not address this issue. This Court should hold, No.

3. Is Paine entitled to a *Machner* hearing on his claim that postconviction counsel was ineffective for failing to argue that trial counsel was ineffective?

The circuit court held, No. This Court should affirm on the grounds that it is procedurally barred.

4. Was the real controversy in this case fully tried?

This issue was not decided by the circuit court. This Court should hold that, yes, the real controversy was fully tried. Paine is not entitled to a new trial in the interest of justice.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication, as the issue presented involves the application of well-established principles to the facts of the case.

SUPPLEMENTAL STATEMENT OF THE CASE

The charges, trials, and prior appeals

The State recites the following supplemental facts from this Court's decisions in *State v. Lawrence C. Paine*, No. 2006AP2634-CR, 2007 WL 3254464 (Wis. Ct. App. Nov. 6, 2007) (unpublished) and *State v. Lawrence C. Paine*, No. 2008AP2307-CR, 2009 WL 4042763 (Wis. Ct. App. Nov. 24, 2009) (unpublished). (R-App. 101–21.)

After his first trial ended in a hung jury, Paine was convicted on retrial in July 2005, of two counts of first-degree intentional homicide for the shooting deaths of Janari Saddler and Aaron Harrington. (R. 89; 90; R-App. 102–3.) The court imposed two sentences of life imprisonment and declared Paine ineligible for extended supervision. (R. 98; R-App. 116.)

This Court set forth the following facts in both the first and second appeals, explaining how the homicides originated from a dispute over a vehicle with a man known as "Chan":

> [T]wo men died as a result of being shot multiple times in the upstairs flat of a Milwaukee duplex. According to a witness who said he was present in the flat at the time of the shootings, one of the victims, Janari Saddler, got into a discussion about a parked car with a person the witness knew as "Chan." Apparently "Chan" had parked a car, which Saddler thought was stolen, in front of the duplex

> which was also where Saddler lived. Ultimately "Chan" became upset with Saddler for continuing to talk about the car, pointed a gun at Saddler, followed a retreating Saddler into the bedroom and, thereafter, the witness heard multiple gunshots. The witness then heard the other victim, Aaron Harrington, yell "Don't kill me!" followed by more gunshots. The witness then ran out of the building. Upon his return to the flat shortly thereafter, the witness saw the two bodies, one in the bedroom and one in the bathroom, and he left the flat again, this time calling 9-1-1 from another house. The witness subsequently identified a photograph of Paine as the person who he knew as "Chan." Another witness, who also said he was present in the flat at the time of the shootings, likewise identified Paine from a photograph as someone he knew as "Chan." Paine's middle name is Chan. The second witness described the events preceding the shootings in a substantially similar manner, although his account was not identical to the account given by the first witness. There was no physical evidence tying Paine to the murders.
>
> Paine's theory of defense, as described specifically in the postconviction motion, was that he was not at the duplex that evening, but rather was first at a strip club with another friend he knew as "Skin," and that after he dropped Skin off for the night, Paine then left for Minneapolis to visit his young son who lived there with his son's mother. To support his statements to police, Paine provided police with Skin's cell phone number.

(R. 119:3; 143:2–3; R-App. 103, 115–16.)

In his postconviction motion, Paine alleged that his trial counsel was ineffective for failing to call two witnesses in his defense: Anthony Mendez Blackman ("Skin") and Zenobia Davis. (R. 112; R-App. 116.) The circuit court denied the motion, and this Court remanded for a *Machner* hearing on whether trial counsel was ineffective for failing "to investigate and to call Davis and Skin as witnesses at trial." (R. 113; 119; R-App. 113.)

On remand, the postconviction court conducted a *Machner* hearing at which Skin's mother (Ella Blackmon) and the private investigator retained by the defense prior to trial (William Garrott) both testified.[1] (R. 197; R-App. 116–17.) Paine elected not to testify. (R-App. 117.)

Defense counsel testified that Davis told him she did not want to testify so he decided not to call her as a witness because he also "did not believe that her testimony would be helpful." (R. 196; R-App. 117.) The postconviction court determined that defense counsel's decision not to call Davis was strategic, not outside the purview of ineffective assistance, and that trial counsel's performance was not deficient or prejudicial. (R. 132; R-App. 117.)

On November 24, 2009, this Court affirmed, concluding that the postconviction court's finding that trial counsel's decision not to compel Davis to testify "was strategic, thereby removing it from the realm of ineffective assistance of trial counsel." (R. 139:7, R-App. 120.)

The current postconviction motion and decision

Over nine years lapsed. On March 22, 2019, Paine filed a Wis. Stat. § 974.06 motion claiming that new evidence sets forth his actual innocence, or "at the very least," he received ineffective assistance of counsel. (R. 151:1–2.) Specifically, Paine asserted that new evidence in the form of a gun that was recovered during a drug raid six months after the homicides, belonging to Ronald Q. Terry (whose DNA was found at the murder scene), had been determined to match evidence in this case. (R. 151:6–7.) And, therefore, there is a reasonable probability of a different result at trial. (R. 151:13.) Paine claimed that further evidence points to Terry as the killer because his DNA was found at the crime scene

[1] Skin did not testify; he died prior to the *Machner* hearing. (R-App. 117.) Davis did not testify; she could not be located. (*Id.*)

and he intimidated one of the people in the house at the time of the murders, Sherika Ray. (R. 151:12.)

Alternatively, Paine claimed that "appellate counsel[2] rendered ineffective assistance by not arguing trial counsel's ineffectiveness." (R. 151:17.) Specifically, he argued that appellate counsel was ineffective for failing to argue "that a weapon found on Ronald Terry matched the characteristics of the crime scene evidence." (R. 151:19.)

The State responded that neither the evidence pertaining to the intimidation of Ray nor the evidence pertaining to Terry's DNA found at the murder scene is new because both were known at the time of Paine's trial in June of 2005. (R. 154:4.) Consequently, they do not constitute newly-discovered evidence. (*Id*.)

The State also argued that there is no evidence to show that Terry possessed the gun that was recovered during the drug raid. (R. 154:6–7.) Rather, it was merely found on the stairs by police with several other people in the residence. (*Id*.) While the State acknowledged that the gun found during the drug arrest had characteristics that are similar to items found at the scene of the homicides, "so also do numerous other types of firearms." (R. 154:11.) The State argued that Paine did not show by clear and convincing evidence that the gun recovered in the drug raid was the same gun used in the

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[2] While Burns refers to "appellate" counsel in his motion and in his appellate brief, the State will assume for purposes of responding on appeal that Burns actually means "postconviction" counsel. Claims against appellate counsel need to be brought under a *Knight* petition with this Court, which this isn't. *See State ex rel. Kyles v. Pollard*, 2014 WI 38, ¶ 38, 354 Wis. 2d 626, 847 N.W.2d 805.

homicides, or that the conclusion of Mark Simonson[3] was erroneous. (R. 154:11–12.)

The postconviction court adopted the State's response brief "*in toto*," and it denied Paine's motion without a hearing. (R. 169:3.) It opined that Paine's motion was "completely speculative and without the requisite showing of support for the conclusions it sets forth." (*Id.*) It concluded that trial counsel was not ineffective "for failing to present evidence to the jury that the firearm recovered in a drug raid six months after the homicides occurred was the gun used to kill the victims or that Ronald Q, Terry was the killer." (R. 169:2–3.) As a result, "postconviction/appellate counsel cannot be deemed ineffective for failing to allege trial counsel's ineffectiveness on these points." (R. 169:3.)

Paine appeals.

ARGUMENT

I. Paine is not entitled to a new trial based on newly-discovered evidence.

Paine claims the circuit court erroneously denied his newly-discovered evidence claim. This Court should affirm the circuit court's decision that denied Paine's request.

[3] Simonson, of the State Crime Lab, examined the firearm recovered during the drug raid and concluded that the bullets/casings recovered in Paine's homicide case were not fired from the tested firearm. (R. 152:18.)

A. To be entitled to a new trial based on newly-discovered evidence, a defendant must demonstrate that the evidence was discovered after conviction and that it is not merely newly-appreciated evidence.

In order to set aside a judgment of conviction based on newly discovered evidence, the evidence must be sufficient to establish that a defendant's conviction was a "manifest injustice." *State v. Krieger*, 163 Wis. 2d 241, 255, 471 N.W.2d 599 (Ct. App. 1991). A defendant must prove: "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking [the] evidence; (3) the evidence is material to an issue in the case; *and* (4) the evidence is not merely cumulative." *State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997) (emphasis added). Only if the defendant is able to prove all four of these criteria, then it must be determined whether a reasonable probability exists that had the jury heard the newly discovered evidence, it would have had a reasonable doubt as to the defendant's guilt. *Id.* "A reasonable probability of a different outcome 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 (alteration in original) (citation omitted).

Finally, "[n]ewly discovered evidence . . . does not include 'the new appreciation of the importance of evidence previously known but not used,'" *State v. Fosnow*, 2001 WI App 2, ¶ 9, 240 Wis. 2d 699, 624 N.W.2d 883. "The determination of whether something proffered postconviction should be categorically excepted from being declared 'newly discovered evidence' . . . presents a question of law, requiring an assessment only of the nature of the proffered item. . . ." *Id.* ¶ 12.

The decision to grant or deny a motion for a new trial based on newly discovered evidence is committed to the circuit court's discretion. *State v. Boyce*, 75 Wis. 2d 452, 457, 249 N.W.2d 758 (1977). A circuit court erroneously exercises its discretion when it applies an incorrect legal standard to newly discovered evidence. *McCallum*, 208 Wis. 2d at 474.

B. Paine has not shown by clear and convincing evidence that the evidence meets the requirements for newly-discovered evidence.

Paine offers three pieces of newly-discovered evidence. As will be demonstrated below, the first two fail *McCallum's* first element that the evidence must be discovered *after* conviction. The final piece of evidence fails because it is not newly-discovered evidence; it is merely newly-*appreciated* evidence.

1. Terry's intimidation of a witness

Paine claims he has evidence that Terry intimidated a witness and that this is newly discovered. (Paine's Br. 13.) The basis for this claim is a police report concerning an interview of Sherika Ray by Milwaukee Detectives Gilbert Hernandez and Katherine Hein. (*Id.*) This report, dated February 6, 2005, documents an interview the detectives conducted on February 1, 2005. (R. 152:13–14.) In that interview, Ray informed police that while she was "intimidated" by Terry, Terry never threaten her. (R. 152:13–14.)

Paine was convicted after a jury trial that began on June 27, 2005, and ended on June 30, 2005. (R. 193.) By definition, this is not newly-discovered evidence because it

was known before his convictions.[4] *McCallum*, 208 Wis. 2d at 473. The postconviction court so held (R. 169:2), and this Court should affirm.

2. Terry's DNA at the crime scene

Paine next claims he has evidence that Terry's DNA was found on a soda can, a beer can, and a cigarette butt recovered from inside the residence where the homicides were committed. (Paine's Br. 13, 20.) This information was contained in a Wisconsin Crime Lab report dated June 30, 2004. (R. 152:6–12; 191:28–29.) This information was also known to Paine before his convictions and even discussed during trial. (R. 192:57–61, 64–65.) By definition, this is not newly-discovered evidence. *McCallum*, 208 Wis. 2d at 473. The postconviction court so held (R. 169:2), and this Court should affirm.

3. A June 25, 2018 firearm report concerning a gun that was found at the crime scene before Paine's convictions

Paine's final newly-discovered-evidence claim is the following: Six months after the homicides, Terry was arrested at the same residence where the homicides occurred. While inside the residence, police found a firearm.[5] (Paine's Br. 13.)

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[4] Paine does not claim that this police report was never provided to defense counsel during discovery or that he never received it before trial.

[5] The record indicates that the firearm was not found on Terry's person when he was arrested. (R. 152:3.) It was not found in the possession of anyone. Rather, the firearm was found on the staircase in the residence. (*Id.*) And, in addition to Terry, three other people were located inside the residence, and another individual had fled the scene. (*Id.*)

The State had the firearm tested before Paine was convicted, on November 12, 2004. (R. 152:16.) The results were that none of the evidence collected regarding the homicides was fired from the firearm that was found when Terry was arrested six months later.[6] (R. 152:18.) However, in June of 2018, Paine's postconviction counsel *also* had the firearm tested (the firearm found when Terry was arrested). And, according to this new testing, that firearm has "general rifling characteristics" of the evidence found at the homicides. (R. 152:25.) Therefore, this "newly-discovered evidence" supports Paine's innocence and entitles him to a new trial. (Paine's Br. 12.)

Paine is wrong. The new report about the gun that was tested in 2004 is not newly-discovered evidence. It is newly-appreciated evidence.

In *State v. Fosnow*, this Court held that newly-discovered evidence does not include a "new appreciation of the importance of evidence previously known but not used." 240 Wis. 2d 699, ¶ 9 (citation omitted). In that case, a psychiatrist diagnosed the defendant with dissociative identity disorder after his conviction on several felonies. When he received the diagnosis, the defendant filed a motion to withdraw his pleas of no contest because the *new* diagnosis would show he was not criminally responsible for his acts. *Id.* ¶ 5. He argued that the new diagnosis constituted newly-discovered evidence that entitled him to withdraw his no contest plea. *Id.* However, this Court noted that, extensive psychiatric information about the defendant was available at the time of the plea. Accordingly, this Court held that the new diagnosis was merely the new appreciation of the importance of existing evidence. *Id.* ¶ 12. And, because "[n]ewly discovered evidence . . . does not include 'the new appreciation

[6] A gun was never recovered at the scene of the homicides, only six casings and a bullet. (R. 152:2.)

of the importance of evidence previously known but not used,'" *id.* ¶ 9 (quoting *State v. Bembenek,* 140 Wis. 2d 248, 256, 409 N.W.2d 432 (Ct. App. 1987)), this Court denied the defendant's motion to withdraw his plea.[7] *Id.* ¶ 27. *See also State v. Vara*, 56 Wis. 2d 390, 394, 202 N.W.2d 10 (1972) (providing that newly-discovered evidence does not include a new appreciation of the importance of evidence previously known but not used).

Following *Fosnow* and *Vara*, this Court should conclude that the new report is nothing more than the newly discovered importance of *existing* evidence—not newly discovered evidence. Such a holding would also be consistent with *State v. Slagoski,* 2001 WI App 112, ¶ 11, 244 Wis. 2d 49, 629 N.W.2d 50, where this Court held that the existence of a post-sentencing contradictory psychiatric report, based on old information, does not constitute a new factor for purposes of sentence modification. As this Court stated in that case, a contradictory report merely confirms that mental health professionals will sometimes disagree on matters of diagnosis. *Id.*

In this case, as Paine acknowledged in his brief, "[t]he firearm was returned to its rightful owner before the second

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[7] In *Fosnow,* this Court cited a Washington Court of Appeals decision that stated:

> [W]e must ask whether all of those defendants who could now unearth a new expert, who finds "new facts"-which if believed by the same jury might cause them to acquit-were denied a fair trial, i.e. failed to receive substantial justice. Surely we have to answer in the negative, or finality goes by the boards and the system fails.

State v. Fosnow, 2001 WI App 2, ¶ 26, 240 Wis. 2d 699, 624 N.W.2d 883 (quoting *State v. Harper,* 64 Wash. App. 283, 823 P.2d 1137, 1143 (Wash. App. 1992)).

trial began and [the] State had asserted it was not a match." (Paine's Br. 16.) Had Paine wanted to hire an expert to contest the Crime Lab's conclusion or test the gun, he could have done so back in 2004. But he didn't, and so several years after his conviction he is offering a new report on the same gun.

This is not newly-discovered, it is newly-appreciated evidence. Paine fails to differentiate the evidence that was available for inspection in 2004 from his new 2018 report; it is a test of the *same* firearm. The 2018 report is nothing more than the newly-opined importance of existing evidence. It is not newly discovered.

But even if this Court were to stretch the definition of newly-discovered evidence to include this new report on old information, Paine's failure to discover this "new" information clearly arose from a lack of diligence.[8] *See In re Commitment of Williams*, 2001 WI App 155, ¶ 18, 246 Wis. 2d 722, 631 N.W.2d 623. As the owner of the gun provided in his affidavit (attached to Paine's postconviction motion), while the gun was stolen from the owner 15 years ago, it was returned to him "10 or 11 years ago."[9] (R. 152:20.) It can hardly be said that Paine was "diligent" in seeking a report on the gun when it took him more than a decade to obtain it. Accordingly, the evidence does not meet the second element of newly-discovered evidence. *See McCallum*, 208 Wis. 2d at 473.

The 2018 report is also not material to an issue in Paine's case because the report does not provide (1) Terry *ever* possessed the gun found on the staircase six months after the

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[8] *See* Wis. Stat. § 805.15(3)(b), providing that evidence is not newly discovered if, among other factors, "[t]he moving party's failure to discover the evidence earlier did not arise from lack of diligence in seeking to discover it."

[9] (*See also* Paine's Br. 16 (providing "[t]he firearm was returned to its rightful owner before the second trial began and [the] State had asserted it was not a match.").)

homicides, or (2) the gun found on the staircase was the same gun that was used to kill Saddler and Harrington, or (3) that the Crime Lab's determination that the gun found on the staircase six months after the double homicides was not the gun used to kill Saddler and Harrington was erroneous. Finally, the report lists 138 other "9mm Luger caliber firearms" that had the same "general rifling characterizes." (R. 152:25–26.) The new report is not material as to who killed Saddler and Harrington, and therefore it does not meet *McCallum's* third prong. *McCallum*, 208 Wis. 2d at 473.

Finally, a reasonable probability does not exist that had the jury heard the results of the 2018 firearm report, that it would have had a reasonable doubt as to Paine's guilt. *See McCallum*, 208 Wis. 2d at 473. The results of the report do nothing to change the fact that two witnesses identified Paine being in the duplex at the time of the shooting, that Paine was upset with Saddler before the shooting, and that Harrington, who was at the duplex with Paine and Saddler at the time of the shootings, yelled, "Don't kill me!" right before he was shot. (R-App. 103, 115–16.)

Paine has not met all of *McCalllum's* factors that the evidence is newly-discovered. The circuit court properly exercised its discretion in denying him a new trial without an evidentiary hearing. Should this Court disagree, this Court's remedy would be to remand for an evidentiary hearing on this claim, where the circuit court can determine if Paine can prove the allegations in the matter and then issue findings of fact and conclusions of law as to whether Paine's evidence constitutes newly-discovered evidence.

II. The 2018 report is not admissible as third-party perpetrator evidence.[10]

Paine next argues that "Terry's connection" to the firearm constitutes third-party perpetrator evidence under *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984) and that he is entitled to an evidentiary hearing to show a legitimate tendency that Terry committed the homicides. (Paine's Br. 21, 25–26.) Paine is wrong. *Nothing* in the 2018 firearm report "connects" Terry to the double homicide that Paine committed in 2004.

A. General legal principles related to the admissibility of evidence that a third party committed the offense.

The *Denny* "legitimate tendency" test "is the correct and constitutionally proper test for circuit courts to apply when determining the admissibility of [known] third-party perpetrator evidence." *State v. Wilson*, 2015 WI 48, ¶ 52, 362 Wis. 2d 193, 864 N.W.2d 52. A legitimate tendency is shown where the defendant can establish (1) the motive and (2) the opportunity to commit the charged crime, and (3) can provide "some evidence to directly connect a third person to the crime charged which is not remote in time, place or circumstance." *Denny*, 120 Wis. 2d at 623–24.

This Court reviews a circuit court's decision to admit evidence under an erroneous exercise of discretion standard. *Wilson*, 362 Wis. 2d 193, ¶ 47.

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[10] Paine did not raise this issue until he filed his postconviction *reply* brief. (R. 167:6.) The State therefore did not get an opportunity to respond below, and the circuit court did not rule on this issue. (R. 169.)

B. Whether third-party perpetrator evidence should have been admitted is not properly before this Court.

In this case, Paine never asked the trial court to admit third-party perpetrator evidence—the 2018 firearm report—as it was not in existence during his trial. This Court therefore has no discretionary decision for it to review on appeal. The *proper* legal procedure for Paine's claim is to attempt to seek a new trial under newly-discovered evidence. It is not for this Court to remand to the postconviction court so it can conduct an evidentiary hearing to review a *Denny* issue that was never in front of the trial court.

C. The 2018 report does not show a legitimate tendency that Terry committed the homicides.

Should this Court disagree, it still should not remand for an evidentiary hearing. The 2018 report does not show Terry's motive, nor does it in any way "directly connect" Terry to the 2004 homicides that Paine was convicted of. *See Denny*, 120 Wis. 2d at 623–24.

1. The new report does not show Terry's motive to commit the homicides.

First, while Paine argues that in addition to the report there is also evidence that Terry's DNA was found at the crime scene and that Terry intimidated a witness (Paine's Br. 22), it is undisputed that this evidence was available before trial. (R. 152:13–14.) And, the fact that Terry's DNA evidence was found at the crime scene *was admitted* during trial. (R. 192:57–61, 64–65.) The State therefore focuses its analysis on the new report.

The *Wilson* court determined that under the motive prong, this Court must ask: "[D]id the alleged third-party

perpetrator have a plausible reason to commit the crime?" 362 Wis. 2d 193, ¶ 57. A defendant is never required to prove motive with "substantial certainty"; instead, "relevant evidence of motive is generally admissible." *Id.* ¶ 63. In this case, the new report says nothing about Terry and nothing about a plausible motive of Terry's. (R. 152:25–29.) The report lacks *any* information about Terry having a specific, personal motive to target Saddler and Harrington. (*Id.*) Paine cannot establish Terry's motive.

2. The new report does not show a direct connection of Terry to the homicides.

The third prong of the *Denny* test[11] asks whether there is "evidence that the alleged third-party perpetrator actually committed the crime, directly or indirectly?" *Wilson,* 362 Wis. 2d 193, ¶ 59. "The 'legitimate tendency' test asks whether the proffered evidence is so remote in time, place or circumstances that a direct connection cannot be made between the third person and the crime." *Denny*, 120 Wis. 2d at 624. "[C]ircuit courts must assess the proffered evidence in conjunction with all other evidence to determine whether, under the totality of the circumstances, the evidence suggests that a third-party perpetrator *actually committed* the crime." *Wilson*, 362 Wis. 2d 193, ¶ 71. "[D]irect connection evidence should firm up the defendant's theory of the crime and take it

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[11] The State does not concede that Paine established the opportunity prong of *Denny*. But given the many other grounds upon which this Court should affirm, for briefing purposes the State proceeds on the assumption that because he was at the crime scene (R. 190:101), Terry had the opportunity to kill Saddler and Harrington. *See State v. Wilson*, 2015 WI 48, ¶ 65, 362 Wis. 2d 193, 864 N.W.2d 52 (providing that evidence of opportunity will "often, but not always, amount[ ] to a showing that the defendant was at the crime scene or known to be in the vicinity when the crime was committed.").

beyond mere speculation." *Id.* ¶ 59. Courts must "look for some direct connection between the third party and the perpetration of the crime." *Id.* ¶ 71.

Paine argues that "[t]he report shows compelling evidence that Terry possessed [the gun], or the very least, had a connection to it." (Paine's Br. 24.) Paine is wrong. The report shows *no* evidence that Terry either possessed or had a connection to the gun. (R. 152:25–29.) The report is silent as to *anyone* having possession of *or connection* to the gun. (*Id.*) Terry's name is not mentioned anywhere in the report. (*Id.*) Nor does the report conclude that the firearm was the firearm used during the homicides of Saddler and Harrington. (*Id.*) The report offers *no* direct connection between Terry and the homicides. (*Id.*)

Paine fails to show that the 2018 report constitutes third-party perpetrator evidence. He is not entitled to an evidentiary hearing on this issue.

III. Alternatively, Paine fails to show that postconviction counsel provided ineffective assistance of counsel. He is therefore not entitled to an evidentiary hearing.[12]

Paine next makes an alternative argument that "appellate counsel[13] rendered ineffective assistance by not arguing trial counsel's ineffectiveness." (Paine's Br. 26.) But

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[12] While Paine's appellate brief discusses whether he is entitled to an evidentiary hearing on his claim of ineffective assistance of counsel in two separate sections (Sections II and III, pg. 26–30) the State responds to both arguments in this Section.

[13] As indicated in n.2 *supra*, while Burns refers to "appellate" counsel in his brief, the State assumes for purposes of responding that Burns means "postconviction" counsel. If Burns has a claim against his appellate counsel, Burns needs to file a *Knight* petition with this Court. *Kyles*, 354 Wis. 2d 626, ¶ 38.

Paine does not show that a claim of ineffective assistance of trial counsel was "clearly stronger" than the issues that his postconviction counsel raised. His claim is therefore procedurally barred.

A. Standard of review

Wisconsin Stat. § 974.06 promotes finality and efficiency by requiring defendants to bring all available claims in a single proceeding unless there exists a sufficient reason for not raising some claims in that initial proceeding. *See State v. Escalona–Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Whether a Wis. Stat. § 974.06 motion alleges a sufficient reason for failing to bring available claims earlier is a question of law that is subject to de novo review. *State v. Kletzien*, 2011 WI App 22, ¶ 16, 331 Wis. 2d 640, 794 N.W.2d 920. Similarly, whether a Wis. Stat. § 974.06 motion alleges sufficient facts to require a hearing is a question of law that is reviewed de novo. *State v. Balliette*, 2011 WI 79, ¶ 18, 336 Wis. 2d 358, 805 N.W.2d 334.

B. A defendant has a high burden in proving ineffective assistance of counsel.

As previously indicated, a criminal defendant must raise all available claims in the direct appeal or postconviction motion. *Escalona-Naranjo*, 185 Wis. 2d at 181. While constitutional claims may be brought pursuant to Wis. Stat. § 974.06(1) after the time for an appeal has passed, a defendant may not pursue subsequent claims that could have been raised in the direct appeal or in an earlier motion absent a "sufficient reason" for not raising it earlier. Wis. Stat. § 974.06(4); *see also State v. Lo*, 2003 WI 107, ¶ 31, 264 Wis. 2d 1, 665 N.W.2d 756; *Escalona-Naranjo*, 185 Wis. 2d at 181–82. Ineffective assistance of postconviction counsel *may* constitute a sufficient reason as to why an issue that could

have been raised on direct appeal was not. *Balliette*, 336 Wis. 2d 358, ¶¶ 37, 62.

To prevail on an ineffectiveness claim, a defendant must show deficient performance that prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). That is, he must show both that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment," and the errors "deprive[d] the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. The defendant bears the burden of overcoming a strong presumption that counsel acted reasonably within professional norms. *Id.* A postconviction attorney is "strongly presumed to have rendered" adequate assistance. *Balliette*, 336 Wis. 2d 358, ¶ 25.

C. Paine's claim of ineffective assistance of postconviction counsel is procedurally barred.

To prevail on his ineffectiveness claim as to postconviction counsel, Paine must demonstrate that his ineffective-assistance-of-trial-counsel claim was "clearly stronger" than the claim his postconviction counsel *did* advance. *See State v. Romero-Georgana,* 2014 WI 83, ¶ 4, 360 Wis. 2d 522, 849 N.W.2d 668. Paine fails to satisfy the "clearly stronger" pleading standard.

In this case, postconviction counsel argued that trial counsel was ineffective for failing to call two witnesses in Paine's defense. (R. 112.) He was ultimately successful at obtaining a *Machner* hearing on this issue. (R. 119.) But Paine argues that a "clearly stronger" claim would have been ineffective assistance of trial counsel for failing to investigate whether the Crime Lab's conclusion that the firearm was not a match was wrong. (Paine's Br. 27–28.) According to Paine, the absence of "evidence that Ronald Terry was arrested along with a weapon that matched the characteristics of the crime

scene evidence" clearly affected the outcome of the trial. (Paine's Br. 28.) And, therefore, "this Court should find that if [trial] counsel was obligated to investigate Terry and the firearm closer, [trial counsel] rendered ineffective assistance and postconviction counsel rendered ineffective assistance by not raising the issue." (*Id.*)

Paine is not entitled to an evidentiary hearing on this issue. The ineffective assistance of trial counsel issue that postconviction counsel *actually* raised was successful in obtaining a *Machner* hearing. His claim that he *now* offers—trial counsel was ineffective for failing to investigate Terry and examine and contest the crime lab's conclusions—are not clearly stronger. Contrary to Paine's argument neither the police or firearm report show that Terry "had the weapon" that killed Saddler and Harrington. (Paine's Br. 28.) The weapon was found on a *staircase* with other individuals nearby (not just Terry) in the duplex, and the firearm report does *not* conclude that the firearm tested was the one that was used to kill Saddler and Harrington. Also contrary to Paine's argument, neither trial counsel nor postconviction counsel had evidence that Terry "threatened a witness." (Paine's Br. 28.) The record shows exactly the opposite: Ray specifically told police that Terry did *not* threaten her. (R. 152:13.)

Paine cannot show that a claim of ineffective assistance of trial counsel was "clearly stronger" than the issues that his postconviction counsel raised. *See Romero-Georgana*, 360 Wis. 2d 522, ¶ 4. Accordingly, Paine cannot overcome the *Escalona-Naranjo* procedural bar. *See Balliette*, 336 Wis. 2d 358, ¶¶ 62–64. The circuit court properly exercised its discretion in denying Paine's postconviction motion without an evidentiary hearing.

IV. Paine is not entitled to a new trial in the interest of justice because the real controversy was fully tried.

Paine's final request is that this Court exercise its authority to grant a new trial because the real controversy was not fully tried. (Paine's Br. 31–32.)

This Court may grant a new trial in the interest of justice when it appears from the record that the real controversy has not been fully tried. *State v. Peters*, 2002 WI App 243, ¶ 18, 258 Wis. 2d 148, 653 N.W.2d 300. It need not determine that a new trial would likely result in a different outcome. *State v. Watkins*, 2002 WI 101, ¶ 97, 255 Wis. 2d 265, 647 N.W.2d 244. This Court's "discretionary reversal power is formidable, and should be exercised sparingly and with great caution." *State v. Williams*, 2006 WI App 212, ¶ 36, 296 Wis. 2d 834, 723 N.W.2d 719.

With respect to evidentiary matters, the real controversy has not been fully tried "(1) when the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case; and (2) when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried." *State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996) (citation omitted).

Paine argues that his case is "an exceptional case" that deserves reversal because the jury never heard that Terry intimidated Ray or saw the conclusions offered in the 2018 report. (Paine's Br. 32.) He's wrong.

Again, while the February 2005 police report indicated that Ray was intimidated by Terry, Ray also told police that Terry never threatened her. (R. 152:13–14.) With respect to the 2018 firearm report, that report shows *no* evidence that Terry either possessed or had a connection to the gun. (R. 152:25–29.) Terry's name is not mentioned anywhere in the

report. (*Id.*) Finally, the report does not conclude that the firearm tested was the *same* firearm that was used to kill Saddler and Harrington. (*Id.*)

The real controversy was fully tried back in 2005. Paine is not entitled to a new trial in the interest of justice.

CONCLUSION

This Court should affirm Paine's judgment of conviction and order denying his Wis. Stat. § 974.06 motion.

Dated this 19th day of February 2020.

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 5,824 words.

Dated this 19th day of February 2020.

_____
SARA LYNN SHAEFFER
Assistant Attorney General

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I hereby certify that:

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_____
SARA LYNN SHAEFFER
Assistant Attorney General

Supplemental Appendix
State of Wisconsin v. Lawrence C. Paine
Case No. 2019AP1677

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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SARA LYNN SHAEFFER
Assistant Attorney General

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