STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2019AP1677-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

LAWRENCE C. PAINE,
Defendant-Appellant.

ON APPEAL FROM THE ORDER DENYING PAINE'S WIS. STAT. § 974.06 POSTCONVICTION MOTION, FILED ON JUNE 10, 2019, IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. WAGNER, PRESIDING. MILWAUKEE COUNTY CASE NO. 2004CF2380

DEFENDANT-APPELLANT'S REPLY BRIEF

Respectfully submitted by:

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I. LAWRENCE PAINE'S CONVICTIONS AND SENTENCES SHOULD BE VACATED WHERE EVIDENCE NOT PRESENTED TO THE JURY SHOWS THAT: (1) A FIREARM MATCHES CHARACTERISTICS OF THE CRIME-SCENE FIREARM EVIDENCE; (2) THAT FIREARM WAS CONNECTED TO RONALD TERRY; (3) TERRY'S DNA WAS PRESENT AT THE CRIME SCENE UNLIKE PAINE; AND (4) TERRY INTIMIDATED A WITNESS.

The State argues that the evidence presented in Paine's postconviction motion is not new, but "newly appreciated." (St. Br. 10-12). But it is not a mere "new appreciation" when the State previously claimed that the Terry firearm did not match, when now it is known that the firearm did have matching characteristics. (152:25; App. 50). Instead of a random firearm, now there is a possible murder weapon. Thus, it constitutes newly discovered evidence.

The cases cited by the State do not support its position in this case. In *State v. Fosnow*, the defendant sought to withdraw his plea because he did not know that he had a mental illness that rendered him not responsible for the offense. *State v. Fosnow*, 2001 WI App 2, ¶5, 240 Wis.2d 699, 624 N.W.2d 883. But all the facts regarding his own mental illness were obviously known and available to the defendant and his counsel at the time. *Id.* at 19. The Court held that an expert taking a different view later was not new. *Id.* at 25.

The situation in *Fosnow* is unlike the situation here. The defendant in *Fosnow* had the facts and the ability to raise the issue if he chose to do so. Paine never controlled all the facts relating to his claim of new evidence. The police department got rid of the gun before Paine went to trial again. (152:18-21; App. 43-46). Plus, Paine cannot be to blame for assuming the State's expert was wrong or lying, especially where the

science challenging firearm identification certainty has evolved since that time. (151:10). Moreover, in Paine's case the State's expert purported that the gun was not match at all; a negative. (152:18; App 43). But now Paine has shown that conclusion was not correct. Paine has shown matching characteristics to the fired evidence at the crime science. (152:25; App. 50). These are opposite conclusions, not simply moving from irrelevant to relevant.

The State also argues that, "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" and has not been diligent in presenting his claim. (St. Br. 11-12). But the more precise question under the newly-discovered-evidence analysis is whether the petitioner was negligent, and Paine certainly was not. *See State v. Plude*, 2008 WI 58, ¶32, 310 Wis.2d 28, 750 N.W.2d 42. Paine has asserted that it took devoted family members for him to get to the point where he could finally challenge for himself whether the gun was not a match or not, considering it was no longer in police custody. (151:12); (152:20-25; App. 45-50). Diligence was exercised, or more precisely Paine was not negligent, and prior to hearing, nothing in the record contradicts that conclusion.

The State claims that the firearm is not material because the police report does not show that Terry ever possessed the firearm or that it was the murder weapon. (St. Br. 12-13). The critical fact that undermines the State's insistence that Terry had no connection to the firearm is that the police believed it did at the time. One of the lead detectives on this case read the same report included in this record and did not conclude, as the State has, that Terry never possessed the firearm so how is this material to the case. Terry's DNA was at the crime scene, unlike Paine. (152:6-12; App. 31-37); (192:64-65). The lead detective in this case knew the firearm was taken from the very spot Terry fled and matched the same firearm

that the State's expert told police to look for. (152:13, 16-17; App 41-42). Yet now, contrary to common sense, the State's position is as if Terry was a stranger to this case and to this firearm.

The State argues that there is nothing to show that the Terry firearm was the murder weapon. But again, what did the firearm expert say when the murder evidence was collected? It was essentially, look for a 9mm Luger firearm with six lands and grooves and a right-hand twist. (152:2; App. 27). During Terry's arrest police found a 9mm Luger firearm with six lands and grooves and a right-hand twist. (152:2, 4, 16; App. 27, 29, 41); (152:25; App. 50). What says that this is not a match? The State's expert declared, "none of the evidence [taken from the double-homicide crime scene] was fired [from the recovered firearm]." But on what basis? That is not known[1]. It is also unknown why the State's expert would later tell the jury that he never tested a firearm relating to the homicides, when he had. (192:35). What are the facts; a firearm taken from the steps where Ronald Terry had fled shares the known characteristics of the crime scene evidence. It is clearly material.

Finally, the State argues this would not have made any difference to the jury. (St. Br. 13). The State supports this claim with the evidence that two people claimed that Paine was the shooter. (St. Br. 13). But this Court has previously found that the same evidence was not enough to deny a hearing on a previous postconviction motion. *State v. Paine*, No. 2006AP2634-CR, slip op. at ¶¶16-18 (Ct. App. Nov. 6, 2007); (119:9-10; App. 10-11). This Court noted there was no physical evidence tying Paine to the crime and the case had already resulted in a hung jury. (119:10; App. 11). When considering what this Court had

[1] Before litigating the motion, Paine asked the District Attorney's office to release the underlying basis for the report that indicated the Hanson/Terry firearm was not used in the homicides. (168:1). The State refused. (168:1).

previously determined was sufficient to require an evidentiary hearing, combined with the concerns now raised by Paine about the validity of his conviction, clearly there is a reasonable probability that a jury would not agree to convict Paine (as a jury had done at the first trial).

In summary, the State's position in this appeal is that if its own lab purports that a potentially critical piece of evidence, like the murder weapon, is not connected to the offense, but later testing shows it does have connections to the offense, it would never constitute newly discovered evidence. This is not consistent with the principles of allowing a new trial based on newly discovered evidence. This Court should accordingly reverse the dismissal of Paine's petition and remand for an evidentiary hearing.

II. ALTERNATIVELY, TO THE EXTENT DEFENSE COUNSEL HAD THE OBLIGATION TO INVESTIGATE AND PRESENT THE FACTS RAISED IN THIS PETITION THAT WERE UNKNOWN TO THE JURY, APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY NOT ARGUING TRIAL COUNSEL'S INEFFECTIVENESS.

At the outset, the State is incorrect to claim that Paine had to raise his claim of ineffective assistance in the court of appeals, not the circuit court. The State claims "Burns" needed to do this. (St. Br. 5, 17). There is no one named Burns associated with this case. Perhaps the State simply cut and pasted this point from another of its briefs. Regardless, the real problem is that it is wrong on the law. Paine's claim against appellate counsel was not for his actions in the court of appeals, but in the circuit court, so it is the circuit court where his challenge should be filed. *See State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682-83, 556 N.W.2d 136 (Ct. App. 1996) (appellate counsel's

failure to litigate postconviction motion properly filed in circuit court); *and State ex rel. Kyles v. Pollard*, 2014 WI 38, ¶3, 354 Wis.2d 626, 847 N.W.2d 805 ("the court where the alleged ineffective assistance of counsel occurred is the proper forum in which to seek relief.").

As for the merits, the State is between a rock and hard place. For all its effort to claim above that Paine could have located the gun from who knows where before the second trial and asked to have it tested even though the State had asserted it was not a match, if that is the case, then appellate counsel should have argued that trial counsel should have raised the issue. (Opening Br. 26-29).

Below and in his opening brief, Paine argued that the evidence about Terry could have been presented as third-party perpetrator evidence. (Opening Br. 21); (151:6-17); (167:6-8). On this point, the State chooses not to make an argument that Terry did not have the opportunity to commit the crime, given his DNA was at the crime scene. Instead, the State choses to argue that there was no motive for Terry to commit the shooting and there was no direct connection between Terry and the shooting. (St. Br. 15-17). But these two similar points are clearly shown in this case.

As for motive, one needs only to look at what was going on in the apartment were the shootings occurred. There was drug activity. (193:187, 193, 203). As the State knows perfectly well, violence goes hand in hand with drug activity. *See e.g. State v. Richardson*, 156 Wis.2d 128, 144, 456 N.W.2d 830 (1990). Violence arising out of drug trafficking is a far more believable motive than the one posited by the State at Paine's trial. The State attempted to downplay that any drug activity was going on in the apartment, and instead argued that Paine shot two based on a spat about whether Paine parked an

allegedly stolen car too close to the apartment.[2] (193:167-68). The circumstances where Terry was arrested after an officer heard a gun drop to the ground where Terry fled are not all that different than the apartment where the shootings occurred. There was drug activity. (152:3-4; App. 28-29). Thus, with consistent involvement in drug activity, a motive for gun violence is present.

The State also argues there was no direct connection between Terry and the offense. (St. Br. 16-17). But Terry's connection is plentiful. Aside from the gun similarities (*supra* at 3) there is the fact that Terry intimidated Sherika Ray. He intimidated and threatened Ray along with George Donald who was one of the two witnesses the State holds up as the reason for maintaining Paine's conviction.

The State's takes the curious position that the report never actually stated that Terry threatened her. (St. Br. 16-17). This is a completely misleading view of the reality of the situation. The police wrote in their report that Ray said she was not threatened. (152:13-14; App. 38-39). But when one reads what happened this simply refers to the fact that no overt threats were made. The behavior of Terry, Donald, and others was clearly threatening. Terry located her at her mother's house and Terry drove her to another residence. (152:13; App. 38). Inside she recognized George Donald, who would testify against Paine later. (152:13-14; App. 39). She observed weapons, she was questioned her about what she had observed and what she had told police, and she was asked if she wanted to see the basement. (152:14; App. 39). Ray was terrified about the encounter and asked the police for protection. (152:15; App. 40). Terry's behavior was

[2] While some State's witnesses claimed that Paine's car was parked in the back ((189:22); (191:140)), another State's witness testified that the only car in the back belong to him. (191:127-28).

clearly threatening and intimidating, and provides a compelling connection to this case.

Finally, the State also claims that this claim is not "clearly stronger" than what Paine's appellate counsel argued. (St. Br. 19-20). Firstly, the "clearly stronger" question is not part of the federal constitutional claim of ineffective assistance. *See Smith v. Robbins*, 528 U.S. 259, 285-86, 120 S.Ct. 746 (2000). It is was grafted on in by our Wisconsin Supreme Court without any tether to any clearly established law. *See State v. Starks*, 2013 WI 69, ¶¶77-80, 349 Wis.2d 274, 833 N.W.2d 146 (J. Bradley, dissenting). And for good reason, as this case shows. Would appellate counsel's argument have been clearly stronger if in addition to arguing points about Paine's alibi he had also raised an issue regarding trial counsel's failure to present this evidence? It is clearly stronger to do so. At most, the clearly stronger test might have some heft if it were a situation where counsel had to take one path to the exclusion of another. But here, there was no reason for appellate counsel to reject this claim in order to pursue this claim. Of course, this begs the additional question that only an evidentiary hearing can answer, which is why appellate counsel did not pursue the claim. For all these reasons, the State's assertion of the clearly stronger test does nothing to defeat Paine's claim.

Moreover, the fact that prior counsel obtained an evidentiary hearing and the court below denied one, does not mean direct appeal counsel's claims were clearly stronger. The State conveniently steps over the fact that appellate counsel's motion was initially denied a hearing and this Court ordered another one, which if anything, supports this Court to grant a hearing in this case.

Paine maintains that these facts and points argued in Issue I, his opening brief and motion below, much of which were not heard by the jury, show his

innocence and require vacating his convictions. (Opening Br. 12-26); (151:6-17); (167:1-10). But to the extent that this failure may fall on Paine's trial counsel to present it and direct appeal counsel's failure to argue trial counsel's failure during Paine's direct appeal, Paine was denied his right to effective counsel.

III. AT THE VERY LEAST, PAINE'S MOTION REQUIRED AN EVIDENTIARY HEARING.

The State argues that no evidentiary hearing is required because prior counsel's claim was clearly stronger. (St. Br. 19-20). The State also argues that the instant claim is not clearly stronger because: (1) Terry was not the only person around when the weapon found on the staircase; (2) no one threatened Sherika Ray; and (3) the expert concluded that the weapon was not a match. (St. Br. 19-20). For the reasons argued above, the State's factual points arguments fail. *See supra* at 1-7.

In addition, whether a claim is "clearly stronger" is not the standard for obtaining a hearing. The burden to obtain an evidentiary hearing is simply whether if the facts alleged in the petition were true, would Paine be entitled to relief. *See State v. Bentley*, 201 Wis.2d 303, 309-10, 548 N.W.2d 50 (1996). As Paine has argued before, whether a claim is clearly stronger has no basis in the federal constitutional claim of whether Paine received ineffective assistance of counsel. *See supra* at 7. But beyond having no place in the context of ineffective assistance, it has no place in whether the circuit court should have ordered an evidentiary hearing. For the reasons mentioned in the opening brief, this Court should order one. (Opening Br. 29-30).

IV. IN LIGHT OF ALL THE CIRCUMSTANCES THE JURY DID NOT HEAR, THE REAL CONTROVERSY OVER WHO COMMITTED THIS SHOOTING WAS NOT FULLY TRIED, WHICH PROVIDES THIS COURT WITH ANOTHER BASIS TO REVERSE PAINE'S CONVICTION.

The jury did not hear the following in Paine's case: (1) the witness who accused Paine of being the shooter and who failed to appear at Paine's trial was with Ronald Terry when they intimidated witness Sherika Ray; and (2) Terry, whose DNA was the at the crime scene, was arrested in a house where officers found a gun that matched the characteristics of the crime scene evidence. The State argues that the absence of these facts from the jury does not make the case an exceptional one. (St. Br. 21).

The logic of the State's argument cannot maintain itself. The State's argues it is not exceptional that the jury never heard that Paine's accuser was involved with intimidating a witness or that a weapon matching the crime scene evidence was obtained while Terry (whose DNA was all over the crime scene) was arrested in a drug house. These are critical facts about what happened. This is not simply some impeachment on a collateral point. It is facts about who perpetrated this offense. The possession of a possible murder weapon is highly relevant, as is intimidating a witness. Paine was tried twice after the jury at the first trial was unable to arrive at a verdict, yet that was without hearing this evidence.

It is also relevant that the jury never heard evidence about Paine's alibi, which his prior appellate counsel raised during Paine's direct appeal. (112:9-11). It was implied to the jurors that Paine's alibi was flawed and that the person who was with Paine never existed. (119:9-10; App. 9-10). But those facts, and other facts raised in Paine's instant postconviction petition (151: 6-17), were never heard by the jury who

convicted Paine after the State failed to do so with the first jury. All of this should be considered by this Court to find that this case is exceptional because the real controversy was not fully tried. Accordingly, this Court should reverse under Wis. Stat. § 752.35 (2019) as well.

CONCLUSION

For the aforementioned reasons, Paine asks this Court to reverse his conviction, or at the very least, remand for further proceedings.

Dated this 1st day of May, 2020.

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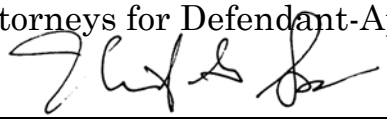

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CERTIFICATION

I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2989 words, as counted by the commercially available word processor Microsoft Word.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Section 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 1st day of May, 2020.

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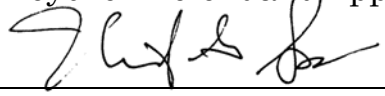

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CERTIFICATION OF FILING BY THIRD-PARTY COMMERCIAL CARRIER

I hereby certify, pursuant to Rule 809.80(4)(a), Rules of Appellate Procedure, that this this Appellant's Reply Brief will be delivered to a FedEx, a third-party commercial carrier, on May 1, 2020, for delivery to the Clerk of the Court of Appeals, 110 East Main Street, Suite 215, Madison, Wisconsin 53703, within three calendar days. I further certify that the brief will be correctly addressed and delivery charges prepaid. Copies will be served on the parties by the same method.

Dated this 1st day of May, 2020.

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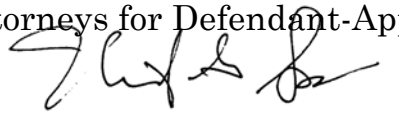

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