STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP001347-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN TYRONE BRATCHETT,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUES PRESENTED

1. Mr. Bratchett's trial hinged on eyewitness testimony from the victim, S.D. Mr. Bratchett challenged the admissibility of her identification in both the circuit court and the court of appeals. Both courts agreed that while the identification was derived from a suggestive procedure, it was nonetheless "reliable" and therefore admissible.

   Did the court of appeals correctly apply the reliability test for admission of an eyewitness identification as recently reaffirmed in *State v. Roberson,* 2019 WI 102, 389 Wis. 2d 190, 935 N.W.2d 813?

2. Mr. Bratchett also alleged that his lawyer was ineffective for not impeaching S.D. with a prior inconsistent statement at trial. Both courts concluded that counsel was not ineffective.

   Did the court of appeals appropriately apply the "objective standard of reasonableness" required when assessing counsel's post-hoc excuses? If trial counsel's "strategic" reason was, in fact, unreasonable and unsound, did that deficient performance prejudice Mr. Bratchett?

3. If this Court accepts review, Mr. Bratchett asks this Court to review his remaining claims:

   - Did the circuit court properly admit a photo showing Mr. Bratchett in prison garb?

- Was trial counsel ineffective for not cross-examining the victim about the obvious flaws of her identification of Mr. Bratchett?
- Was trial counsel ineffective for not objecting to improper closing argument by the prosecutor and by not asking for a mistrial?
- Was Mr. Bratchett cumulatively prejudiced by his attorney's errors?
- Was the evidence sufficient to convict Mr. Bratchett of attempted sexual assault?

Both the circuit court and the court of appeals denied Mr. Bratchett's request(s) for a new trial on these grounds.

CRITERIA FOR REVIEW

The risks of eyewitness identification evidence have been acknowledged by courts for decades. S*ee United States v. Wade*, 388 U.S. 218, 228 (1967) ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.").

In response to these well-known risks, the United States Supreme Court has articulated a standard for admissibility focusing on the "reliability" of the ensuing identification. *Manson v. Brathwaite*, 432 U.S. 98, 114, (1977). While this Court previously experimented with a broader rule effectively banning all identifications derived from so called "show-ups,"

State v. Dubose, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, this Court recently reaffirmed the primacy of the "reliability" test in assessing the admissibility of eyewitness identification evidence under both the state and federal constitutions. *State v. Roberson*, 2019 WI 102, ¶ 3 389 Wis. 2d 190, 935 N.W.2d 813.

The reliability test, if it is to actually protect the defendant's due process rights, must be a meaningful exercise. A reliability test for admissibility therefore necessarily implies that there are at least some identifications which are too unreliable to be admitted. While this seems like a superfluous truism, this case calls the proposition into question. Here, the identification evidence is transparently unreliable—yet, in the court of appeals' view, still somehow capable of satisfying this Court's test for admissibility reaffirmed in *Roberson*. Accordingly, this Court should accept review and, in labeling this evidence as too unreliable for admission, give teeth to the reliability standard in Wisconsin. Accordingly, review is warranted to address an issue of serious concern that will have an obvious impact on circuit court litigation throughout Wisconsin.

Second, Mr. Bratchett asks this Court to accept review and reverse the court of appeals' problematic assessment of trial counsel's alleged strategic choices. While it is no doubt true that such strategic justifications are entitled to deference, counsel must still base his decisions on reasonable professional judgments. *Strickland v. Washington*, 466 U.S. 668,

681 (1984). Mere invocation of an excuse is not the same as proof of "reasoned strategic judgment." *Wiggins v. Smith*, 539 U. S. 510, 534 (2003). An "objective standard of reasonableness" is not satisfied by a mere hand-wave in the form of an after-the-fact excuse for poor lawyering.

In this case, however, the court of appeals did not apply this standard, instead rubber-stamping counsel's objectively unreasonable post-hoc justifications for his deficient litigation strategy. Claims of ineffective assistance of counsel are some of the most common claims in postconviction and appellate practice; accordingly, clarification of this point will help to assist legal actors to accurately apply legal standards. This Court should therefore accept review and reverse the court of appeals.

Finally, if this Court grants review, Mr. Bratchett asks this Court to review the remaining issues in the brief. While these issues do not independently merit review and are instead presented as an opportunity for error correction, acceptance of the remaining issues is consistent with this Court's usual practice.

STATEMENT OF RELEVANT FACTS

Background

On November 15, 2015, Marquette University Police observed two men follow female students into off-campus housing at 911 N. 17th Street in the City of

Milwaukee. (1:2). While investigating this suspicious activity, police ultimately learned that S.D., a resident of the N. 17th Street apartment building, had been robbed inside her apartment by two men. (1:2). According to the criminal complaint, S.D. identified Mr. Bratchett as one of the perpetrators in a photo lineup. (1:2). Based on her identification and statement to police, Mr. Bratchett was ultimately charged with: (1) burglary as a party to the crime and as a habitual criminal; (2) armed robbery as a party to the crime and as a habitual criminal; (3) attempted third-degree sexual assault as a party to the crime and with use of a dangerous weapon. (15:1-2).

Motion to Suppress Identification

Prior to trial, counsel moved to suppress S.D.'s identification of Mr. Bratchett. (151:22). The court, the Honorable T. Christopher Dee presiding, held a hearing on counsel's motion to suppress. (151). According to the testimony at the hearing, S.D. was in "shock" during the robbery and claimed that she could not "completely see" the robber's face. (151:7; 151:9). She could not recall any specific facial features, like the robber's eyes or nose. (151:7). When asked by police after the robbery, the only physical descriptor she gave was a rough estimate of the robber's height. (151:7). She believed that the robber may have had a gun during the robbery, as well. (151:8).

She told the court that she picked Mr. Bratchett's photograph because:

> I was -- it was not a clear decision at all. I -- I knew he was younger. He wasn't older, but I -- I don't know. He just fit the description best, I guess, from my memory of what it looked like.

(151:9).

S.D. testified she was actually "between a few" of the photographs, having eliminated those she did not think were the robber. (151:10). "[T]here were two, maybe three, that [S.D.] asked to see back." (151:10). After "[a] couple minutes" she "chose the one picture that [S.D.] thought it was." (151:10). S.D. was "maybe" sixty or seventy percent confident in her identification. (151:10). She claimed to have "compared" the photographs and told the court it was Mr. Bratchett's "boxy" face that led her to select him as the robber. (151:14).

Further testimony revealed that S.D. was actually instructed "to study the picture and to pick which one best fits the description of what happened that night." (151:12). Police called S.D. after the fact to confirm that she had made the "correct" choice. (151:13). Moreover, Assistant District Attorney Daniel Gabler, immediately prior to S.D.'s testimony at the suppression hearing, allowed her to participate in a refresher identification procedure using Mr. Bratchett's photograph. (151:16).

Although the court concluded that the procedure was suggestive because Mr. Bratchett stood out in the photo array (unlike the fillers, he had a conspicuous facial mole *and* a neck tattoo), the witness did not use

those distinguishing characteristics to identify Mr. Bratchett. (151:26); (App. 57). Accordingly, the identification was sufficiently reliable to be admitted. (151:26); (App. 57).

Jury Trial, Verdict, and Sentence

Following the denial of the suppression motion, the court conducted an approximately two-day jury trial. At the close of the evidence, the jury convicted Mr. Bratchett on all three counts. (47:1-3). The court sentenced Mr. Bratchett to 222 months of initial confinement followed by 192 months of extended supervision. (52:1); (App. 44).

Postconviction Proceedings

Mr. Bratchett ultimately filed a Rule 809.30 postconviction motion. (114). Relevant to this petition, Mr. Bratchett argued: (1) trial counsel was ineffective for failing to impeach S.D. with a prior inconsistent statement; (2) trial counsel was ineffective for not adequately cross-examining S.D. about the validity of her identification; and (3) trial counsel was ineffective for not objecting to improper closing argument and for not asking for a mistrial. (114).

After multiple postconviction hearings, the court, the Honorable T. Christopher Dee presiding, denied the motion for a new trial in a written order. (134); (App. 50-54). The court denied all of Mr. Bratchett's claims for relief. (134); (App. 50-54).

Proceedings in the court of appeals

Mr. Bratchett appealed. (135). In addition to renewing his claims from the postconviction motion, Mr. Bratchett asked the court of appeals to review two pretrial rulings from the circuit court regarding the admissibility of the eyewitness identification and the admissibility of a photograph showing Mr. Bratchett in prison garb. Mr. Bratchett also challenged the sufficiency of the evidence with respect to the attempted sexual assault charge.

The court of appeals, in a divided opinion, affirmed. *State v. Bratchett*, ¶ 1, Appeal No. 2020AP1347-CR, unpublished slip op., (Wis. Ct. App. November 9, 2021). (App. 3-4). Judge Maxine Aldridge White, joined by Judge M. Joseph Donald, issued the majority opinion. Judge Timothy G. Dugan filed a dissent.

With respect to the eyewitness identification, the majority agreed that the procedure was suggestive. *Id.*, ¶ 19. (App. 11). Under a totality of the circumstances analysis, however, the majority concluded that the identification was otherwise reliable. *Id.*, ¶ 25. (App. 13).

As to the photo identification card of Mr. Bratchett, the majority concluded that the circuit court's decision to admit the photograph of Mr. Bratchett was not erroneous under the deferential standard of review applicable to such trial court orders. *Id.*, ¶ 30. (App. 15).

Moving to the ineffectiveness claims, the majority concluded that counsel's decision not to impeach S.D. with a prior inconsistent statement was not deficient performance because it was "part of a reasonable trial strategy." *Id.*, ¶ 37. (App. 19). It did not reach the question of prejudice. *Id.* (App. 19).

The majority likewise concluded that further cross-examination of S.D. with respect to the flaws of her identification was not deficient and that counsel's strategic decision was "not irrational or capricious." *Id.*, ¶ 41. (App. 22). Considering the other evidence in the record, the majority concluded that "Bratchett's claim of ineffective assistance of counsel based on the procedures surrounding S.D.'s identification of Bratchett in the police photo array fails by not demonstrating that counsel's performance was deficient or prejudicial." *Id.*, ¶ 43. (App. 22-23).

Likewise, the majority concluded that failure to object to allegedly improper closing argument (the majority did not expressly decide this question) was not deficient or prejudicial. *Id.*, ¶ 47. (App. 24-25).

The majority rejected an argument that counsel's errors cumulatively prejudiced Mr. Bratchett. *Id.*, ¶ 50. (App. 26-27). The majority also concluded there was sufficient evidence to convict Mr. Bratchett of the attempted sexual assault charge. *Id.*, ¶ 55. (App. 30).

The dissent is narrower, having concluded that Mr. Bratchett was entitled to a new trial on two of his claims and, thus, that it was not necessary to address

the other legal issues. *Id*., ¶ 58 (Dugan, J., *dissenting).* (App. 32).

First, the dissent concludes that Mr. Bratchett was entitled to a new trial as a result of the eyewitness identification evidence. *Id*. (Dugan, J., *dissenting).* (App. 32). Here, not only was the procedure highly suggestive "such that there was a very substantial likelihood of misidentification," *id.*, ¶ 66 (App. 35), the identification also failed to satisfy four of the five reliability factors set forth by this Court in *Roberson*. *Id*., ¶ 72 (Dugan, J., *dissenting).* (App. 37).

Second, the dissent also concludes that counsel's decision not to impeach S.D. with her prior inconsistent statement was objectively unreasonable given the significance of her statement in the overall prosecution for attempted sexual assault. *Id.*, ¶ 80 (Dugan, J., *dissenting).* (App. 40). Trial counsel's deficient performance prejudiced Mr. Bratchett. *Id.*, ¶ 83 (Dugan, J., *dissenting).* (App. 42).

This petition follows.

ARGUMENT

I. This Court should accept review and hold that the identification in this case was insufficiently reliable, thereby reaffirming that the due process clause's prohibition against unreliable eyewitness evidence is a meaningful constitutional protection.

At this point in our history, the serious problems attached to shoddy eyewitness identification evidence are well-known and amply discussed in both the legal and scientific literature. The Wisconsin Department of Justice has acknowledged those concerns in its Model Policy and Procedure for Eyewitness Identification[1] and this Court has affirmed its awareness of the problem on at least two notable occasions. *Dubose*, 2005 WI 126, ¶ 30, *State v. Hibl*, 2006 WI 52,¶¶ 37-38, 290 Wis. 2d 595, 714 N.W.2d 194. As noted above, an acknowledgment of the risks attendant to eyewitness testimony is relatively uncontroversial and was first made by the United States Supreme Court a half-century ago. *Wade*, 388 U.S. at 228.

In our legal tradition, it is usually up to juries to determine the reliability and credibility of the State's evidence. *Stovall v. Denno*, 388 U.S. 293, 299-300 (1967). The Sixth Amendment's manifold protections are deemed sufficient to combat questionable trial evidence and, should the legislature believe that extra

[1] Available online at https://www.doj.state.wi.us/sites/default/files/2009-news/eyewitness-public-20091105.pdf.

protections against certain kinds of evidence are required, it has the right to regulate the use of such evidence via the evidence code. *Perry v. New Hampshire*, 565 U.S. 228, 245 (2012).

Eyewitness identification evidence is unique, however, because both the state and federal constitutions recognize a due process protection against "unreliable" identifications derived from "suggestive" procedures. *Roberson*, 2019 WI 102, ¶ 3. Under that test, the reviewing court first analyzes whether the procedure used to derive the identification was "'an unnecessarily suggestive identification procedure,'" such that there was a very substantial likelihood of misidentification." *Id.*, ¶ 27 (quoting *Perry*, 565 U.S. at 232 n.1). The evidence may be excluded unless "the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances." *Perry*, 565 U.S. at 232.

This test represents the only textual limit either the state or federal constitution places on the admission of such evidence. *Roberson*, 2019 WI 102,¶ 44. Thus, while many commentators—including social scientists and other non-lawyers—have urged courts (including this Court) to adopt more broad-ranging "prophylactic" rules outright banning certain forms of evidence,[2] this Court has made very clear that neither

[2] In addition to discussion in popular culture—which is usually occasioned by yet another exoneration based on faulty eyewitness evidence—there is a torrent of critical scholarship, Continued.

the state nor federal constitution countenance such judicially-mandated restrictions. *Id.*

To many commentators, this is an unacceptable outcome, especially in light of social science which calls into question the dated scientific assumptions undergirding the original formulation of the reliability test as set forth in *Manson*.[3] Yet, that is our law. Although there may indeed be sound policy reasons to endorse broader reform, that reform cannot be "discovered" within texts whose plain language does not readily permit such policy-centric remedial action. *See Roberson*, 2019 WI 102, ¶ 91 (Hagedorn, J., *concurring*) (Explaining that while the policy judgments of *Dubose* "may" have been sound, they were not based in the written constitution).

However, an acknowledgment of textual limitations need not be an invitation to abdication in

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much of which was already brought to this Court's attention in the brief of amicus curiae in *Roberson* filed jointly by the Innocence Project Inc., and the Wisconsin Innocence Project. The amicus brief is available online at https://acefiling.wicourts.gov/document/eFiled/2017AP001894/244315. A good overview and thorough defense of the so-called "prophylactic" position is found in Timothy P. O'Toole & Giovanna Shay, *Manson v. Brathwaite Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 VAL. U.L. REV. 109 (2006).

[3] *See for example* Gary L. Wells, *Eyewitness Identification, in* REFORMING CRIMINAL JUSTICE: VOLUME 2, POLICING, 259 (Erik Luna, ed. 2018). Available online at https://lib.dr.iastate.edu/cgi/viewcontent.cgi?article=1066&context=psychology_pubs.

the face of patently unreliable evidence. Circuit court judges, acting as original gatekeepers, and appellate courts exercising independent review can and should use the reliability test's "totality of the circumstances" analysis to weed out especially problematic identifications. The test can work and achieve the goals sought by reformers and skeptics; courts just need to apply the test as it is written and in good faith.

As this case shows, however, that is clearly not happening. Instead, consistent with the concerns of critical skeptics, the *Manson* factors have been weaponized into a mere "checklist" that can be used to justify admissibility under even the most questionable circumstances. This case, with its convoluted attempts to justify an identification which is contrary to commonsense itself, proves it.

Here, the Marquette University Police Department administered a photo lineup so intrinsically bad it could be used as a law school examination prompt. Officers blatantly violated the DOJ's Model Policy by giving S.D. a "best fit" instruction, thereby implying "that S.D. was expected to pick a photo, even if it was not the photo of the person she believed to have entered her apartment." *Bratchett*, 2020AP1347-CR, ¶ 62 (Dugan, J., *dissenting*). (App. 34). This contravenes the fundamental principles motivating our State's scientific approach to the collection of eyewitness evidence as set forth in the Department of Justice's Model Policy, which is partially designed to avoid the biasing effects of a "relative judgment process" in

which an eyewitness is pressured to "identify the person who looks the most like the real perpetrator relative to the [fillers]." Model Policy at 2. That relative judgment process, our law enforcement community now understands, "can lead to misidentification." *Id.*

S.D. followed the flawed instructions of police which explicitly directed her to use a relative judgment process and unambiguously testified that she chose the person who "just fit the description best." (151:9). The decision was not "clear" and, in order to help her reach it, police allowed her to pick and choose between up to three possible photographs, further contaminating the "trace" memory evidence the photo array procedure is designed to extract and preserve. (151:10). Notably, Mr. Bratchett stood out in that photo lineup by virtue of a neck tattoo, a distinctive facial mole, *and* a boxy face shape. *Id.*, ¶ 65 (Dugan, J., *dissenting*). (App. 34-35). Police then called S.D. after the fact to confirm that she picked out the suspect. (151:13). Finally, the State allowed S.D. to review the same photo array immediately prior to her testimony in court, encouraging even more confirmation bias and introducing additional suggestiveness into the equation. (151:16).

Of course, the majority decision of the court of appeals is correct that all of these police missteps relate to the first prong of the of the admissibility analysis, pertaining to the overall suggestiveness of the procedure. *Bratchett,* Appeal No. 2020AP1347-CR, ¶ 25 n.5. (App. 13). Yet, as the dissent also

acknowledges, such galling suggestiveness cannot be so easily set to the side. *Id*., ¶ 61 (Dugan, J., *dissenting*). (App. 33). In fact, as the majority fails to acknowledge, the egregiously suggestive nature of this identification procedure is directly relevant to its disputed reliability—it was the State's burden to produce sufficient indicia of reliability capable of "outweighing" that suggestiveness. *Perry*, 565 U.S. at 232.

Examining the evidence impartially, it is difficult to see how S.D.'s testimony would allow the State to discharge its constitutionally-mandated obligation to prove this identification reliable. As the dissent points out, there are serious concerns under four of the five reliability factors laid out by this Court in *Roberson*:

- "Under the first factor, S.D. admitted that she 'couldn't see much of his face" because the suspect had the hood of his sweatshirt covering his head and kept putting his hand over his mouth when he talked." *Bratchett,* 2020AP1347-CR, ¶ 67 (Dugan, J., *dissenting*). (App. 35).

- As to the second factor, S.D. "testified that she was in shock during the robbery, and she 'wasn't focused on memorizing anything about [the robber's] face.'" *Id*., ¶ 69 (Dugan, J., *dissenting).* (App. 36).

- "As it applies to the third factor, S.D. provided an unremarkable description of the

> subject who entered her apartment when the police asked her for details. In fact, she was only able to provide an estimated age and height, and did not provide 'any facial descriptions.'" *Id.*, ¶ 70 (Dugan, J., *dissenting).* (App. 36-37).
>
> - "The fourth factor likewise points to the identification being unreliable. S.D. admitted that her identification was "'not a clear decision at all,'" and she was in shock and not concentrating on the facial features of the intruders in her apartment. In fact, during the photo array, she was struggling to choose between two or three pictures. Ultimately, she stated that she was only 60% to 70% sure that the photo she chose was the photo of the person who entered her apartment. *Id.*, ¶ 71 (Dugan, J., *dissenting).* (App. 37).

These are not mere quibbles. They are troubling indicia suggesting a patently unreliable identification—no concrete description, no clear view of the face, and a concession that, not only was S.D. *not* focused on the robber's face, she was perhaps only sixty-percent confident in her ensuing pick, meaning that she had up to a forty-percent chance of picking out the wrong man. If the reliability standard means anything, clearly it counsels against the admission of an identification in the face of testimony such as this.

Yet, the court of appeals was unbothered, finding that S.D.'s identification satisfied *all five* of the

reliability factors set forth in *Neil v. Biggers,* 409 U.S. 188 (1972). The mismatch between the dissent and the majority is glaring; clearly, application of this purportedly objective test has broken down along the way. There is perhaps no better proof than the court of appeals' treatment of the factor focusing on the witness' degree of confidence: Despite undeniable testimony establishing a low confidence level, that confidence level, in the majority's view, renders the identification reliable—because the victim was candid that her confidence is low. *Id.*, ¶ 23. (App. 12). Respectfully this is absurd. If one buys a plane ticket, and is then told, by the agent, that there is a forty percent chance the plane's engines will fail and it will crash from the sky midflight, no rational human being would label the means of conveyance "reliable" simply because they received a "candid" acknowledgement of a contrary fact.

As this case demonstrates, the reliability test, if wrongly applied, functions not as a meaningful due process protection, but as a leaking sieve for facially questionable evidence. This Court must accept review and reverse, thereby demonstrating that this standard matters and that there is at least a hypothetical "floor" for the admissibility of eyewitness identification evidence in Wisconsin courts.

II. This Court should accept review and hold that Mr. Bratchett is entitled to a new trial with respect to the attempted sexual assault charge due to ineffectiveness of counsel.

A. S.D.'s prior statement radically contradicts her trial testimony with respect to an essential element that the State needed to prove beyond a reasonable doubt.

In this case, Mr. Bratchett was charged with attempted third-degree sexual assault of S.D. (15). In order to convict him, the State needed to convince the jury that Mr. Bratchett "formed [the] intent" to have sexual intercourse with S.D. and that he "did acts towards the commission of the crime...which demonstrate[d] unequivocally, under all of the circumstances, that [he] intended to and would have committed the crime…except for the intervention of another person[.]" (155:19-21).

At trial, the State presented the testimony of S.D., who described the following chain of events. First, she was robbed inside her apartment by two men. (151:82-86). After taking her personal property and demanding the PIN number for her debit card, the first robber—whom she identified as Mr. Bratchett—became increasingly agitated as he repeatedly demanded assurances that she was not lying to him about the PIN number. (151:86). Next, the first robber verified that he and his accomplice were in possession of S.D.'s phone. (151:88). The first robber then told S.D. that he was going to leave to withdraw the money from S.D.'s account and the second robber would stay behind to watch over S.D. (151:88).

At this point, the second robber objected to this plan, telling the first robber that it would take too long for him to get the money and come back. (151:88). The first robber became agitated, pacing S.D.'s apartment while he formulated a new plan. (151:89). He then asked S.D. to go into her bedroom and instructed her to sit on the bed. (151:89-90). The first robber became increasingly paranoid that S.D. was concealing a second phone which she could use to call for help:

> He told me, "Are you lying? Is there another land line? Do you guys have a land line? Do you have another phone?" And then he kept saying, "Is there anyone else in here?" And I kept telling him, "No, we don't have a land land [sic] line. I don't have another phone. There's no one else in here. My roommates aren't here." And then he said — or he thought I was looking for something under the bed or looking at something, because I had my hands up because I didn't know what he was going to do. And he said, "What are you trying to look for? What are you looking for?" And I said, "No, nothing, just sitting here."

(151:91). The first robber then demanded that S.D. disrobe and tugged at her shorts. (151:93-95). She refused, and held onto her shorts, preventing them from moving. (151:95).

At this point, S.D. told the jury that Mr. Bratchett stated, "I will fuck you. You better not be lying to me." (151:96). She told the jury that he made a similar threat as he was leaving the apartment. (151:97). These threats were important to the State's case as the prosecutor argued in closing that they

helped to "unequivocally" prove Mr. Bratchett's intent to commit sexual assault. (155:29).

However, these threats were not included in S.D.'s original statement to police. A comparison of a more contemporaneous report with her trial testimony shows stark differences. According to that report:

> At this time, Bratchett instructed [S.D.] to get up and told her, "Now go in your bedroom." As she was walking towards her bedroom, she felt his hand on her left shoulder guiding her into the room. Once into the room, Bratchett told her to sit down on the bed. Bratchett then stated, "Are you lying to me, you better not be lying to me. Don't fuck with me." [He] then stated, "You have another phone, don't fuck with me. You have another phone or a house phone?" [S.D.] stated that Bratchett seemed like he was in an agitated state so she put her hands up in a defensive position in front of her face. Bratchett then stated, "What are you reaching for?" and Robinson [the alleged accomplice] stated "C'mon we gotta go." At this time, Bratchett told [S.D.], "Take off your clothes" and [S.D.] replied, "no your [sic] not going to do that." Bratchett stated, "I don't believe you, and your [sic] going to do it before I leave. Now move back on the bed. [S.D.] stated that she backed up on the bed with her back against the wall. It was now that Bratchett grabbed onto the bottom of her gym shorts and began tugging on them. [S.D.] then yelled at Bratchett, "I don't have any money or another phone."

(114:31).

Clearly, the statements are night and day in their differences. In one, the robber makes a vulgar and explicit threat of rape. In the other, he makes a statement, in context, that has no sexual connotations whatsoever and is instead connected to the ongoing robbery. These differences matter because Mr. Bratchett's intent to commit sexual assault was a required element that needed to be proven beyond a reasonable doubt. The words attributed to the suspect in this context are therefore vitally important. However, the words that S.D. originally attributed to the robber—"don't fuck with me"—have a radically different connotation in context and do not support a finding of the requisite intent.

B. Under these facts and circumstances, it was "objectively unreasonable" not to impeach and the court of appeals erred by applying an overly deferential deficient performance analysis.

Simply put, there is no rational reason why trial counsel should not have impeached S.D. with a statement which radically contradicted her trial testimony with respect to an essential element. In one statement, Mr. Bratchett is indisputably guilty; in the other, a window of reasonable doubt is opened wide. Confronted with this error, counsel attempted to give excuses at the postconviction hearing—excuses which were easily picked apart in the opening brief. (Bratchett's Brief at 41-42).

However, despite the transparently unreasonable nature of counsel's decision, the court of appeals refused to grant relief, instead hewing to what it viewed as an apparently inflexible obligation to "defer" to counsel's choice of strategy. *Id.*, ¶ 37. (App. 19). The dissent, meanwhile, is not content to take counsel's excuses at face value; instead, it examines the chain of reasoning undergirding that decision in determining whether or not the ultimate choice is "reasonable." *Id.*, ¶ 80-81 (Dugan, J., *dissenting).* (App. 40-41). When critically examined, the excuses simply do not make sense; they do not rescue counsel's failure to adequately defend his client. *Id.*

This is the proper application of *Strickland's* deficient performance test, which, as this Court has recognized, involves the application of an "objective reasonableness" standard. *State v. Jenkins*, 2014 WI 59, ¶ 36, 355 Wis. 2d 180, 848 N.W.2d 786. While the reviewing court is instructed to defer to counsel's informed strategic judgments, the mere giving of an excuse should not insulate the errors of counsel from scrutiny. If that were the case, the "objective standard of reasonableness" is swallowed whole by counsel's post-hoc rationalizations. Instead, the reviewing court, before deferring to counsel's strategic judgment needs to assure itself that counsel is making a *reasonable* judgment supported by an adequate investigation and resting on a logical chain of reasoning. *Strickland* is not easily satisfied just because a lawyer can dream up an excuse during postconviction proceedings; reviewing courts, tasked with enforcing standards of "objective reasonableness"

must critically examine such excuses. While an appellate court may not act as an "armchair quarterback," and it is obviously still incumbent on the defendant to prove that his attorney's actions were unreasonable, the appellate court cannot allow the mere giving of an excuse to stand in for a meaningful analysis as to whether the Sixth Amendment's requirements were satisfied.

Accordingly, this Court should accept review to reaffirm fundamental principles applicable to ineffectiveness claims, resolving the inherent dispute in this case as to the proper amount of deference owed to counsel's strategic judgments.

C. If this Court accepts review, it should also assess whether counsel's deficient performance prejudiced Mr. Bratchett.

In its decision, the court of appeals did not reach the issue of prejudice, having determined that Mr. Bratchett did not prove deficient performance. *Id.*, ¶ 37. (App. 19). If this Court accepts review, Mr. Bratchett is asking the Court to reach that question and hold that counsel's deficient performance undermined confidence in the jury verdict with respect to the sexual assault charge.

As set forth above, the State needed to prove an "unequivocal" intent to commit sexual assault. (155:21). Here, both S.D. and the robber remained clothed for the duration of the robbery. While the attempt to tug at her shorts is relevant evidence of intent, that action is ambiguous in light of the other

testimony showing that this occurred in context of a dispute as to whether S.D. was concealing a second phone which she could use to call police. The explicit threats of rape therefore do much of the heavy lifting in the State's case. Successful cross-examination would reveal that those statements may not have ever been made or that context radically changes their meaning. Accordingly, failure to present this contradiction to the jury undermines confidence in the verdict for the sexual assault charge and this Court should remand for a new trial on that count.

III. If this Court grants review, it should address Mr. Bratchett's remaining legal claims.

Finally, if this Court grants review, Mr. Bratchett is also asking the Court to review his remaining legal issues.

First, Mr. Bratchett asks this Court to review the trial court's decision to admit a photograph of an identification card, which in turn contained a photograph of Mr. Bratchett in prison garb. (151:36). While the court covered up the address—which suggested that Mr. Bratchett was incarcerated at Waupun Correctional Institution—it nonetheless allowed the jury to view the photo. (151:37). Admission of evidence that the defendant had been previously incarcerated contravenes long-standing precedent. *See United States v. Silvers*, 374 F.2d 828, 830 (7th Cir. 1967). Given the egregiousness of the error, Mr.

Bratchett asks this Court to find an erroneous exercise of discretion and reverse.

Second, Mr. Bratchett is asking this Court to review the claim of ineffective assistance of counsel focusing on counsel's examination of S.D. Although S.D.'s testimony at the pretrial motion hearing gave counsel productive fodder with which to impeach her identification in front of the jury, he did not visit those topics during cross. Because counsel had already decided to attack the reliability of the identification during his cross-examination, Mr. Bratchett is asking this Court to find that it was plainly unreasonable to omit additional lines of attack. And, because these criticisms could have tipped the scale in favor of the jury disbelieving the identification, he also asks this Court to find that this deficient performance prejudiced him.

Third, Mr. Bratchett asks this Court to assess counsel's failure to object to improper closing statement or to ask for a mistrial when Assistant District Attorney Gabler insinuated that Mr. Bratchett had confessed to the crime (he did not). (155:51) Such arguments are plainly improper and, in this case, the circuit court signaled its agreement when it granted counsel's initial objection. (155:51). Yet, ADA Gabler continued—and trial counsel sat by silently. Because that omission is plainly unreasonable and resulted in a highly prejudicial and inaccurate inference of guilt being communicated to the jury, this Court should accept review and reverse.

Fourth, Mr. Bratchett asks this Court to assess whether these errors cumulatively prejudiced him, pursuant to this Court's decision in *State v. Thiel*, 2003 WI 111, 264 Wis. 2d 571, 665 N.W.2d 305.

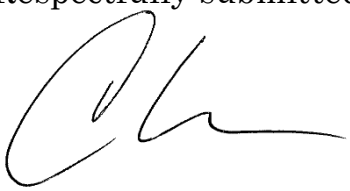
Finally, he asks the Court to review whether the evidence was sufficient to convict him of attempted sexual assault.

CONCLUSION

For the reasons set forth herein, Mr. Bratchett asks this Court to grant review, to reverse and remand for a new trial, and to vacate the conviction for attempted third-degree sexual assault.

Dated this 7th day of December, 2021

Respectfully submitted,



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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 5,847 words.

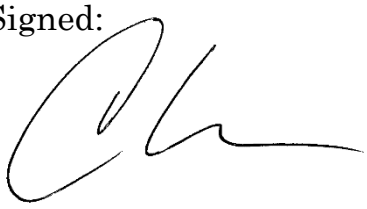
CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, including the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 7th day of December, 2021

Signed:



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